

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

**RSA No.3080 of 2011 (O&M)
Date of Decision: 08.05.2015**

Ashok Kumar Sachdeva

..... Appellant

Versus

Harish Malik

..... Respondent

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Ajay Jain, Advocate,
for the appellant.

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

RAJIV NARAIN RAINA, J.

This appeal has been pending since September 19, 2011 when on the first date, no one appeared for the appellant and a written request was circulated which led to an adjournment to December 06, 2011. Since then the appeal has remained at the preliminary hearing stage with no effective orders passed.

The plaintiff is in Second Appeal. He instituted a simple suit for permanent injunction before the Civil Judge (Junior Division), Rewari, Civil Suit No.21 of 2002 praying for an order that defendant be restrained from dispossessing the plaintiff from the disputed shop without due process of law and in case, the defendant succeeds pendente lite to dispossess the plaintiff then a decree for mandatory injunction be issued in favour of the plaintiff and against the defendant. The shop in dispute bears No.47 and is situated in Punjabi Market, Rewari, Haryana. The plaintiff's suit succeeded and a permanent injunction was issued against unlawful dispossession.

The learned Lower Appellate Court has upheld the judgment and decree passed by the trial Judge on August 11, 2009 but while doing so he has modified the judgment and decree holding that the plaintiff's possession is permissive but it is not true that there is a relationship of landlord and tenant between the parties. It is against this finding that the present appeal has been presented.

It is pleaded by Mr. Ajay Jain appearing for the appellant that the adverse finding should be expunged or it be held that the relationship of landlord and tenant subsists between the parties. As a matter of fact, Mr. Jain's submission is primarily for a declaration of tenancy. Admittedly, there are no documents in support of tenancy by way of a rent note etc. and the plaintiff relied alone on PW-2 Dalip Mata who stated that the appellant had been a tenant in the shop in dispute since 1999 @Rs.400/- per month and that he has seen rent being paid several times. Similarly, PW-3 Sushant Chug has deposed much to the same effect. The case set up was that the possession was permissive and with the consent of the respondent. The compromise deed Ex.PW6/F was produced on record which reads as follows:-

"Ashok Kumar will close the Shop for one month and if Harish Chand could not give the money within one month, than, he can open the Shop. And if he could not repay the money within six months than, he will write a rent note in respect of the Shop @Rs.400/- per month."

Mr. Jain says that the tenancy was oral which law permits. He is right in saying that a tenancy can be oral but defendant denied relationship and claimed that plaintiff is a trespasser and no injunction could be granted against the true owner. There was a report of the Local Commissioner

Ex.PW7/B which supported possession of plaintiff over the disputed shop. The compromise deed dated September 17, 1999 was produced by way of leading secondary evidence but the application was rejected by the trial Court. That order was set aside by the High Court on the revisional side and plaintiff was permitted to lead evidence for which he examined four witnesses including himself as PW-6. The written compromise dated September 17, 1999 was found by the Court to be in existence between the parties. However, the existence of the document was not enough to prove the document as probative evidence as per Section 65 of the Evidence Act.

The trial Court had accepted the version of the plaintiff that the original of the compromise deed could not be found or traced and, is therefore, lost. The compromise was held to be proved. The defendant pleaded that the plaintiff entered possession of shop by force on the intervening night of 10/11.12.2002 but led no evidence to prove the assertion. The trial Court held that the defendant was unable to prove that plaintiff had broken open the locks to enter the disputed premises. The trial Judge held that the plaintiff had entered shop with the consent of the landlord and to that extent, the possession was permissive.

We are not concerned with what the trial Judge did thus far. What is pressed by Mr. Jain is the findings on issue No.3. Issue No.3 was rather clumsily framed and read "Whether there exists good relation of landlord and tenant between the parties? OPP"

The trial Judge held that the relationship between the parties was an oral tenancy and there existed relationship of landlord and tenant. On these premises, the suit for permanent injunction was decreed restraining the

defendant from dispossessing the plaintiff from the disputed shop.

The defendant appealed against the judgment before the learned District Judge, Rewari. The learned Lower Appellate Court found from evidence that the compromise deed was written by ASI Ram Avtar from Police Station City Rewari. It was signed by both the parties and was witnessed by four persons. The scribe of the document had meanwhile died. The learned District Judge, Rewari went in detail in examining threadbare the compromise deed and read the entire evidence and came to the conclusion that there was no doubt with respect to the existence and execution of the compromise deed of which Ex.PW6/F is the xerox copy and proved by way of secondary evidence of the plaintiff. However, the moment the defendant took the stand that his signatures were obtained on the compromise deed under pressure, the existence of the document was admitted. Thus, there was nothing wrong in the plaintiff leading the document by way of secondary evidence.

On the moot issue of whether the status of the plaintiff qua possession of the shop involved a relationship of landlord and tenant as claimed by the plaintiff is concerned, the learned District Judge found that the entry of the plaintiff in the disputed shop was by virtue of the compromise deed but the defendant had levelled a specific allegation that the plaintiff had trespassed into the shop by illegally breaking open the locks and, therefore, it was on him to prove the allegation. The appeal Court found no evidence produced by the defendant to prove the allegation. The break-in-theory propounded by the defendant was not believed by the learned District Judge but he found instead his stand in the cross-

examination fluctuating from when he first said that he had given no application to the police complaining of forcible possession by breaking open locks and then during the cross-examination modifying the version by volunteering that he had submitted an application that plaintiff was harassing and threatening him. He admitted that in the application given on September 17, 1999 he had not mentioned that he was under threat or that plaintiff had broken open the locks. If locks were open then defendant did not act prudently by not raising a hue and cry in the market place. This was not done. The Court concluded that entry of plaintiff was not by force in the disputed shop.

The further and more important question involving relationship or the capacity under which the plaintiff held the disputed shop was examined by the learned District Judge in para.18 onwards of the judgment and it would be best to reproduce the words of the learned District Judge and her view of the contents of the compromise Ex.PW6/F. They read:-

In the said document, it is mentioned that 'earlier also on an application given by Harish Malik defendant against plaintiff Ashok Kumar, a settlement had taken place and now also, as per the previous settlement, it has been agreed that Harish (defendant) will pay Rs.1,85,000/- against the House and Rs.3,00,000/- against the Shop, i.e. total Rs.4,85,000/- within six months to Shri Ashok Kumar (plaintiff). In case the amount is paid within the specified time, he will be able to get possession of the House and the Shop but if he is able to pay only Rs.1,85,000/- first he will get back his House and in the same manner if he is able to pay the money of the Shop first, he will get back the Shop and both the parties will have no objection over the same.'

It had further been agreed that 'Ashok Kumar will keep the Shop closed for one month and in case in that one month Harish Chander is unable to pay the money he will be entitled

to open the Shop. In case, Harish Chander is unable to pay the money of the Shop and House within six months, he will execute a rent deed in respect of the Shop and the rent will be paid @Rs.400/- per month. It was further mentioned that the settlement has been arrived at between the parties in the presence of brotherhood by their free will and consent and without any pressure from any quarter.'

The story which is revealed is that the shop and house of the defendant was mortgaged with the plaintiff and Rs.3 lacs had to be repaid by the defendant to the plaintiff against the shop. Since defendant failed to pay the amount of mortgage, possession of the shop was given to the plaintiff but it was agreed that no sooner the payment is made, he will be entitled to recover possession of the disputed shop. Parties decided to keep the shop closed for one month and in case, defendant will unable to repay the mortgage money, plaintiff would be entitled to open the shop. If the money is still not paid in six months time, the defendant would execute a rent deed in respect of the shop in favour of the plaintiff. The learned District Judge concluded that the shop was not let out on rent and no relationship of landlord and tenant was created between the parties by virtue of the document. The right to create tenancy was postponed to six months. If at the inception tenancy was not created and the plaintiff had not taken possession of the shop as a tenant then his possession would remain permissive after opening the shop but not as tenant and only as a mortgagee in possession awaiting redemption. The appellate court found no facts proved on record with respect to the date, month and year when the permissive possession got converted into possession as a tenant. If tenancy was intended to be created by virtue of the terms of the compromise then it

was for the plaintiff to prove his case as to when tenancy was created, as to how it is created and of the terms of the tenancy.

The learned District Judge reached a very good conclusion that the date from which tenancy started was the most important date to wrestle with. In absence of pleadings and evidence to that effect, it cannot be assumed or concluded as a point of fact that the plaintiff is in possession of the shop as a tenant. The learned Superior Judge at Rewari rejected the contention that the plaintiff had been paying rent without obtaining receipt from the defendant. There were no rent receipts on record. The basis dispute was with respect to a money transaction between the parties of which there was no doubt. In such a situation, the Court did not believe that the rent could be paid without receipt. On this analysis, the first appeal court found the statements of PW-2 Dalip Mata and PW-3 Sushant Chug unreliable testimonies or evidence sufficient to prove payment of rent and creation of a tenancy between the parties. The plaintiff's case considerably weakened when his own witness PW-2 admitted that the shop had not been taken on rent in his presence. The case set up was not that the defendant refused to acknowledge payment of rent or denied issuing rent receipts. He only stated that he never signed as a witness on any receipt. Dalip Mata could not depose of any date, month or year on which the rents had been paid in his presence. PW-3 Sushant Chug was equally vague and non specific. No other evidence with respect to the payment of rent was produced by the plaintiff. The money order receipts produced on record did not bear acknowledgements by signatures of the defendant and, therefore, could not be read in evidence as sufficient proof of payment of rent paid by the

plaintiff. The Court closely examined the exhibits in this respect and found no document of any evidentiary value which could show the defendant had received the money order/s. In absence of a rent note, nothing could be spelled out clearly of the relationship. The theory of automatic tenancy was not accepted. There was absence of pleadings as to date, month and year of payment of rent. Worse still the plaintiff did not know from when he was in possession of the shop as tenant. All that he said was that he was paying rent from September 17, 1999 by virtue of a compromise deed but the compromise deed did not create the tenancy. The appellate court agreed with the learned trial Judge in issuing injunction on the basis of permissive possession but did well in partially reversing the judgment and decree of the trial Court and returned a finding that no relationship of landlord and tenant had come into existence between the parties and, therefore, issue No.3 was answered against the plaintiff. Resultantly, the appeal was dismissed with the modification which part is impugned in this appeal.

The judgment of the learned District Judge, Rewari was announced on April 26, 2011 and the second appeal against the same is dismissed today *in limine* as not giving rise to a question of law, much less substantial one, warranting admission of the matter.

I find no error whatsoever in the finding on issue No.3. What the plaintiff appears to be looking for is a civil court decree creating a right of tenancy to use in collateral proceedings, say of seeking ejectment of the defendant under the rent laws etc. That was the undercurrent and drift of the argument of Mr. Jain, for setting aside the impugned modification under Issue 3 of the judgment and decree of the trial Court. Such a declaration of

relationship of landlord and tenant between the parties in the present suit was not possible to be given and the learned District Judge, Rewari did well in denying this prayer even though it came in a simple suit for permanent injunction but such an issue was struck and aptly answered for lack of evidence of tenancy.

Appeal dismissed.

(RAJIV NARAIN RAINA)
JUDGE

08.05.2015
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