THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

SECOND APEPAL No.1062 OF 2013

JUDGMENT:

The defendant in O.S.No.1576 of 2003 on the file the Court of Principal Junior Civil Judge, Rajahmundry, who is the respondent in A.S. No.82 of 2010 on the file of the Court of Special Judge for Trial of cases under SCs & STs (POA) Act-cum- X Additional District Judge, Rajahmundry, East Godavari District, filed this appeal under Section 100 of the Code of the Civil Procedure, 1908 (for short, 'the Code') challenging the Decree and Judgment dated 08.07.2013 in A.S. No.82 of 2010 passed by the first appellate court, reversing the Decree and Judgment dated 30.03.2010 in O.S. No.1576 of 2003 passed by the trial court, whereby directed the respondent, who is the appellant herein, to vacate the schedule premises within three months from the date of Decree and Judgment besides granting other reliefs.

02. For convenience of reference, the ranks given to the parties before the trial court will be adopted through out the Judgment.

03. The plaintiff filed a suit for ejectment of the defendant on the ground that he committed default in payment of rent, and terminated the tenancy by issuing notice (Ex.A.1) under Section 106 of the Transfer of Property Act, 1882, since the tenancy is oral. The rent payable for the premises was Rs.1300/-, which is inclusive of rent of Rs.500/- for the occupation of the premises and Rs.800/- for the amenities provided to the defendant. The rent was payable on or before 5th of every succeeding month, as agreed in the oral tenancy. Therefore, the plaintiff claimed ejectment of the defendant as well as for recovery of arrears of rent Rs.46,800/- together with interest 24%, and with subsequent interest at 6% from the date of Decree till realization and also damages at Rs.5,000/- from December 2003,

and to deliver the vacant possession.

04. The defendant filed counter contended that the rent was only Rs.500/-, and deposited the same to the credit of RCC No.102 of 2000 filed under Section 8 of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960 (for short, 'the Act, 1960'), and that there was no agreement for payment of rent at Rs.500/- towards occupation of the premises and Rs.800/- towards amenities, and thereby the Civil Court has no jurisdiction and the Rent Control Court is competent to order eviction of the defendant, subject to proof of any of the grounds enunciated under Section 10 of the Act, 1960. He also contended that the notice to vacate the premises under Section 106 of the Transfer of Property Act, 1882 is not accordance with law. Thereby the suit is liable to be dismissed.

05. The trial court framed as many as four issues and held that the plaintiff failed to establish the rent payable for the premises was Rs.1300/-, which is inclusive of rent Rs.500/- towards occupation of the premises and Rs.800/- towards the amenities provided to the defendant and dismissed the suit.

06. Aggrieved by the Decree and Judgment passed by the trial court, the plaintiff preferred an appeal in A.S.No.82 of 2010 before the District Court, whereby the learned X Additional District Judge allowed the appeal by Decree and Judgment dated 08.07.2013, setting aside the Decree and Judgment passed by the trial court, ordering eviction of the defendant from the schedule premises and passed a Decree for Rs.46,800/- together with interest at 24% per annum from the date when the amount become due till the date of decree, and from the date of Decree with interest at 6% per annum, besides granting damages Rs.4,500/- per month from December, 2003 till delivery of vacant possession.

07. Aggrieved thereby, the defendant preferred the present appeal raising several contentions and most of the grounds are with regard to appreciation of evidence by the first appellate court while

supporting the Judgment of the trial court, raised several substantial questions of law and most of them are not substantial questions of law, are only questions of fact. However, during hearing, Sri Ch.Dhanamjay, learned counsel for the appellant/defendant, contended that the Decree and Judgment of the first appellate court is not in compliance of Section 96 read with Rule 31 of Order XLI of the Code and placed reliance on the Judgment of the Apex Court in a case between **VINOD KUMAR V. GANGADHAR**[1]**.** On the strength of the said Judgment, it is contended that the first appellate court did not appreciate the evidence being the final court of fact and the Judgment is not in accordance with law. Similarly the first appellate court also failed to consider the rent payable for the premises and it has no jurisdiction to entertain the appeal.

08. Therefore, on the basis of the contentions of the learned counsel for the appellant/defendant, the following two substantial questions of law are formulated for consideration,

1) Whether the first appellate court discharged its obligation under Section 96 read with Rule 31 of Order XLI of the Code?

2) Whether the rent agreed to be payable for the schedule premises is Rs.1300/- per month? If not, whether the civil court is vested with the jurisdiction to order eviction of tenant from the schedule premises and to pass a Decree for recovery of arrears of rent of Rs.46,800/- together with interest and to award the damages?

09. During hearing, learned counsel for the appellant/defendant did not raise any other contention, except the above two.

10. Sri T.S. Anand, learned counsel for the respondent/plaintiff, has argued totally in support of the finding recorded by the first appellate court and drawn attention of this Court to paragraph 21 of the Judgment of the Apex Court in **VINOD**

KUMAR referred to supra and distinguished the facts of the said case from the facts of the present case, and thereby the principle laid down in the above Judgment cannot be applied. Apart from the above contentions, it is contended that though the rent payable for the premises is purely a question of fact, the jurisdiction of the civil court to order eviction of the appellant/defendant depends upon the fact finding recorded by the first appellate court reversing the finding recorded by the trial court.

IN Re. QUESTION 1:

11. The major contention of the learned counsel for the appellant/defendant before this Court is that the Judgment of the first appellate court is not in compliance of Section 96 read with Rule 31 of Order XLI of the Code. Since the first appellate court being a final court to decide the question of fact, did not re-appreciate the evidence on record. He also drawn the attention of this Court to the findings recorded by the trial court and the first appellate court with regard to quantum of rent payable for the premises.

12. The second appeal is limited only to the extent of substantial question of law raised under Section 100 of the Code, and generally, the second appeal does not lie on question of fact or of law. Then what is substantial question of law? A question is of no general importance, but it refers to impact or effect of the question of law on the decision in the *lis* between the parties.

13. In **STATE BANK OF INDIA AND OTHERS V. S.N. GOYAL**[2] the Apex Court explained the term "substantial question of law" and observed as under:

> "The word 'substantial' prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or ***effect of the question of law on the decision in the lis between the parties***. 'Substantial questions of law' means not only substantial questions of

> law of general importance, but also substantial question of law arising in a case as between the parties. ……..... any ***question of law which affects the final decision in a case is a substantial question of law as between the parties.*** A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law. There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case.”

(Emphasis added)

14. Similarly, in **SIR CHUNILAL V. MEHTA & SONS LTD. V. CENTURY SPINNING AND MANUFACTURING CO. LTD.,**[3] the Apex Court for the purpose of determining the issue held as follows:

> “The proper test for determining whether a question of law raises in the case is substantial, would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties…..”

(Emphasis added)

15. In **VIJAY KUMAR TALWAR V. COMMISSIONER OF INCOME TAX, NEW DELHI**[4]**,** the Apex Court held as follows:

> “a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law 'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. It will, therefore, depend on the facts and circumstance of each case, whether a question of law is a substantial one or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.”

16. The Court, for the reasons to be recorded, may also

entertain a second appeal even on any other substantial question of law, not formulated by it, if the Court is satisfied that the case involves such a question. Therefore, the existence of a substantial question of law is a sine-qua-non for the exercise of jurisdiction under the provisions of Section 100 CPC. The second appeal does not lie on the ground of erroneous findings of facts based on appreciation of the relevant evidence. There may be a question, which may be a "question of fact", "question of law", "mixed question of fact and law" and "substantial question of law." Question means anything inquired; an issue to be decided. The "question of fact" is whether a particular factual situation exists or not. A question of fact, in the Realm of Jurisprudence, has been explained as under:-

> "A question of fact is one capable of being answered by way of demonstration. A question of opinion is one that cannot be so answered. An answer to it is a matter of speculation which cannot be proved by any available evidence to be right or wrong." (Vide: Salmond, on Jurisprudence, 12th Edn. page 69, cited in Gadakh Yashwantrao Kankarrao v. E.V. alias Balasaheb Vikhe Patil & ors., AIR 1994 SC 678).

17. In **SMT. BIBHABATI DEVI V. RAMENDRA NARAYAN ROY & ORS**[5]**.,** the Privy Council has provided the guidelines as in what cases the second appeal can be entertained, explaining the provisions existing prior to the amendment of 1976, observing as under:-

> "..... that miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happen not in the proper sense of the word 'judicial procedure' at all. That the violation of some principles of law or procedure must be such erroneous proposition of law that if that proposition to be corrected, the finding cannot stand, or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the Courts could arrive at their finding, is such a question of law. That the question of admissibility of

> evidence is a proposition of law but it must be such as to affect materially the finding. The question of the value of evidence is not sufficient reason for departure from the practice

18. In **SUWALAL CHHOGALAL V. COMMISSIONER OF INCOME TAX**[6]**,** the Apex Court held as under:-

> "A fact is a fact irrespective of evidence, by which it is proved. The only time a question of law can arise in such a case is when it is alleged that there is no material on which the conclusion can be based or no sufficient evidence."

19. Following the principles referred above, in **UNION OF INDIA V. IBRAHIM UDDIN AND ANR.,**[7] the Apex Court held that the decision of this Court under Section 100 of the Code is limited to substantial question of law and not on the question of fact or of law.

20. In the present facts, the first contention of the counsel for the appellant/defendant is that the first appellate court did not re-appreciate the evidence, since the first appeal is continuation of original suit and final court of fact in terms of Section 96 read with Rule 31 of Order XLI of the Code.

21. In the facts of the Judgment in **VINOD KUMAR**'s case relied on by the counsel for the appellant/defendant, the first appellate court passed a cryptic Judgment of five lines, which is as follows:

> "After hearing learned counsel for the parties and going through the evidence, I do not find any justification to throw over board findings recorded by the trial court. After due appreciation of evidence, I do not find any merit and substance in this appeal. Same stands dismissed with costs. Counsel fee Rs.1000/-, if certified. Ordered accordingly."

22. It is specifically extracted at paragraph 21 of the Judgment of the Apex Court and held that the said Judgment is without any consideration either oral or documentary evidence by the first

appellate court being a final court of fact.

23. In the present case, the first appellate court discussed each and every document with reference to oral evidence, but defined a reason to come to conclusion within the reason assigned by the trial court. Therefore, the first appellate court did not left any stone unturned and decided the issue with same reasons, which deserves.

24. On close reading of the Judgment of the first appellate court, it is clear that the first appellate court assigned reason for every question and for not accepting the conclusion arrived by the trial court. Therefore, the principle laid down in **VINOD KUMAR'**s case referred to supra that the Judgment of the first appellate court is not in compliance of Section 96 read with Rule 31 of Order XLI of the Code, merits no consideration. Though there is no quarrel about the law laid down in **VINOD KUMAR'**s case and various Judgments of the Apex Court referred therein, I am of the considered view that the first appellate court rightly appreciated being the final court of fact after exercising the power conferred under Section 96 read with Rule 31 of Order XLI of the Code, re-appreciated each and every question in dispute with reference to documentary and oral evidence.

25. Hence, the substantial question is answered against the appellant in favour of the respondent.

IN Re. QUESTION 2:

26. The second substantial question of law is with regard to the jurisdictional aspect. According to the appellant/defendant, the rent payable for the schedule premises was Rs.500/-, it is being deposited to the credit of R.C. No.102 of 2000 pending in the Court of Principal Junior Civil Judge-cum-Rent Controller, Rangareddy. But whereas the contention of the respondent/plaintiff is that the rent payable for the premises was Rs.1300/-, which was inclusive of rent

Rs.500/- towards occupation of the premises and Rs.800/- towards the amenities provided by the respondent. The dispute regarding quantum of rent is purely a question of fact and the first appellate court after re-appraisal of evidence on record, reversed the finding recorded by the trial court, however, the respondent/plaintiff produced voluminous documentary evidence marked as Exs.A.1 to A.55, inclusive of accounts maintained by him in the regular course of business, which are relevant under Section 34 of the Indian Evidence Act, 1872, though they do not form basis for claim that they were assessed the income tax and sale tax, much credence cannot be given to those documents.

27. Learned counsel for the appellant/defendant drawn attention of this Court to Ex.A.26-cancelled rent receipt dated 06.10.2000 issued by Y. Rama Krishna. The said Ramakrishna is the clerk of the respondent/plaintiff, according to the contention of the appellant/defendant. But whereas the learned counsel for the respondent/plaintiff contended that the said Rama Krishna is working under the appellant/defendant besides the other two helpers viz., Koteswara Rao and Baskar Rao, who are receiving remuneration as per the entries maintained by the appellant/defendant. They were not examined as witness before the trial court.

28. In the Judgment of the first appellate court, there is a typographical mistake at paragraph 23 that instead of typing D.W.1 typed as P.W.1. But in the next sentence of the same line explained the reason clearly that the said Rama Krishna is the clerk under the respondent to the first appeal i.e. appellant herein. Therefore non-examination of the said Y. Rama Krishna to prove the cancelled rent receipt, covered by Ex.A.26, is fatal to the appellant herein.

29. To substantiate the contention of the appellant/defendant, he produced voluminous evidence marked as Exs.B.1 to B.42. Most of them are relevant entry regarding payment of rent for

different years in day books and ledgers.

30. Undisputedly, the appellant/defendant is carrying cloth business in Tadithoda, Rajamundry. He is a registered dealer under AP VAT Act. The books and ledgers produced by the appellant/defendant were not audited by the authorities for VAT assessment. In such case, no credence can be given to those documents being an assessee under VAT Act, however, the accounts maintained in regular course of business are only relevant under Section 34 of the Indian Evidence Act, 1872 and they cannot form the basis for the claim.

31. Here, both the parties relied on the accounts maintained in regular course of business. The respondent/plaintiff besides producing the accounts maintained in the regular course of business, produced counter foils evidencing payment of rent by the appellant/defendant to him, which were marked as Exs.A.35 to 55 and also produced the cancelled receipt marked as Ex.A.26.

32. All the accounts maintained by the respondent/plaintiff were in regular course of business and those books were audited and levied tax based on entries therein. The entries are supported by Exs.A.35 to 55 and those documents corroborates the entries in the books maintained in the regular course of business. Apart from that the appellant/defendant himself admitted as D.W.1 that there was no practice of signing on the counter foils. Therefore, the evidence on record established that the rent payable was Rs.500/- towards the occupation of the premises and Rs.800/- towards the amenities provided to him, the total rent was Rs.1300/-.

33. In fact, it is a question of fact and this Court need not look into. However, in view of the contentions raised by the counsel for the appellant/defendant, this Court is forced to look into the fact finding recorded by the trial court and the first appellate court, to decide perversity in the findings recorded by the first appellate court.

34. The learned counsel for the appellant/defendant

contended that even if the rent payable for the premises is Rs.500/-, the Civil Court has no jurisdiction in view of Section 10 of the Act, 1960 and the jurisdiction to evict the tenant in the premises, for which rent payable is less than Rs.1,000/-, is vested with the Rent Controller.

35. Whereas the learned counsel for the respondent/plaintiff contended that the rent payable for the premises was Rs.1300/- and therefore, the civil court is competent to pass a Decree for eviction of the tenant by issuing notice-Ex.A.1 under Section 106 of the Transfer of property Act, 1882.

36. As per the fact finding recorded by the first appellate court, the rent payable was Rs.500/- for occupation of the building and Rs.800/- for amenities provided to the appellant/ defendant. Now the question is, rent also includes the amount payable for the amenities or not. The first appellate court placing reliance on the Judgment of this Court in **M/S.HEERACHAND POONAMCHAND, HUF REPRESENTED BY KARTHA CHAINCHAND CHALLANI V. M/S.KANCHAN CYCLE TRADING COMPANY, PARTNERSHIP FIRM BY SHANKERLAL AGARWAL**[8] held that rent payable includes the amount payable for the amenities. The trial court made an attempt to distinguish the facts of the Judgment in **M/S.HEERACHAND** referred to supra, with the facts on hand. But the first appellate court did not agree with the distinction drawn between the facts of the present case and the facts of the above referred Judgment.

37. However, in **PUSPA SEN GUPTA V. SUSMA GHOSE**[9], the Apex Court held that Rent includes payment in respect of amenities or services provided by the landlord, such as payment in lieu of consumption of electricity under the terms of the tenancy, referring to the earlier Judgment reported in **RADHA KISHAN SAO**

V. GOPAL MODI[10] . Thus the definition of rent is wide enough and it includes both rent payable for occupation of the premises and the rent payable for enjoyment of the amenities. Even otherwise, as per the definition provided under Section 2 (b) (iii) of the Act, 1960, 'building' means any house or hut or part of a house or hut, let or to be let separately for residential or non-residential purposes and includes: (a) the gardens, grounds, garages and out-houses if any, appurtenant to such house, hut or part of such house or hut and let or to be let along with such house or hut or part of such house or hut; (b) any furniture supplied or any fittings affixed by the landlord for use in such house or hut or part of a house or hut, but does not include a room in a hotel or boarding house.

38. In view of sub-clause (b) to clause (iii) of Section 2 of the Act, 1960, the furniture supplied or any fittings affixed by the landlord for use in such house or hut or part of a house or hut, would form part of the house and the amount payable for use of those fittings etc., would form part of the rent.

39. Therefore, the finding recorded by the first appellate court that the rent payable for the premises was Rs.1300/- do not suffer from any illegality. When the appellate court recorded a fact finding that the rent payable for the premises was Rs.1300/-, the Rent Controller under the Act, 1960 has no jurisdiction, but the jurisdiction is vested with the civil court to order eviction of the tenant in occupation since the premises is not governed by the provisions of the Act, 1960 as the rent payable for the premises was exceeding Rs.1,000/- as on the date of filing the suit.

40. Hence, I find no merit in the contention of the counsel for the appellant, and thereby, I find no error in the fact finding recorded by the first appellate court regarding rent, to come to any different conclusion than the conclusion arrived by the first appellate court to reverse the Decree and Judgment.

41. In view of my foregoing discussion, I find that the rent payable for the premises was only Rs.1300/- which is inclusive of Rs.500/- for the occupation of the premises and Rs.800/- for the amenities provided to the appellant/defendant and the civil court is vested with jurisdiction to order eviction of tenant i.e. appellant herein on termination of tenancy. Accordingly, the point is answered in favour of the respondent/plaintiff and against the appellant/defendant.

42. Though the appellate court passed a Decree awarding damages, arrears of rent no question was raised before this Court about those findings, since they are consequential to the main issue of eviction. Therefore, I need not examine the illegality in the finding recorded by the first appellate court regarding damages and arrears of rent as they are not disputed before me.

43. In view of my findings on substantial questions 1 and 2, the appeal is devoid of merits and it deserves to be dismissed.

44. In the result, the appeal is dismissed confirming the Decree in A.S. No.82 of 2010 passed by the X Additional District Judge, Rajahmundry, while directing the appellant/defendant to vacate the premises within three months from today and deliver the vacant possession. No costs.

45. Miscellaneous petitions, if any, pending in this appeal shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 27.07.2016
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[1] Civil Appeal No.9681 of 2014 (decided on 13.10.2014)

[2] AIR 2008 SC 2594

[3] AIR 1962 SC 1314

[4] (2011) 1 SCC 673

[5] AIR 1947 PC 19

[6] (1949) 17 ITR 269

[7] (2012) 8 SCC 148

[8] 1990 (1) ALT 315

[9] (1990) 2 SCC 651

[10] (1977) 2 SCC 656