

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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Second Appeal No.23 of 2016
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JUDGMENT:

This second appeal under Section 100 of the Code of Civil Procedure, 1908 by the unsuccessful plaintiff is directed against the judgment and decree dated 12.11.2015 of the learned VII Additional District Judge, Khammam passed in AS.no.90 of 2013.

1.1 The appellant/plaintiff filed the suit OS.No.41 of 2012 on the file of the Court of the learned Principal Junior Civil Judge, Khammam for a perpetual injunction restraining the defendants 1 to 3 from interfering with his possession over the mulgi bearing H.no.9-2-141/7 situated at Bus stand road of Khammam more fully described in the schedule annexed to the plaint. The first defendant filed a written statement-cum-counter claim seeking the relief of recovery of possession of the said property after evicting the plaintiff/tenant from the said property, besides the reliefs of recovery of arrears of rent and mesne profits. On merits, the trial Court had dismissed the suit of the plaintiff for perpetual injunction and had decreed the counter claim of the 1st defendant and directed the plaintiff to vacate and handover the plaint schedule property to the defendants within 3 months from the date of the judgment and had given liberty to the defendants to obtain possession through process of Court on the failure of the plaintiff to so vacate and deliver possession to the defendants. The trial Court had also granted a decree directing the plaintiff to deposit arrears of rent at Rs.1,795/- per month from February 2012 till he delivers vacant possession of the plaint schedule property to the defendants. The learned Additional District Judge while dismissing the above said first appeal suit of the plaintiff had confirmed the judgment and decree dated 30.08.2013 of the trial Court. Hence, the unsuccessful plaintiff/tenant has preferred this second appeal.

2. I have heard the submissions of the learned counsel for the

appellant/plaintiff ('the plaintiff', for brevity) and the learned counsel for the respondents/defendants 1 & 3 ('the defendants', for brevity). I have perused the material record.

3. The plaint averments, in brief, are as follows:

The father of the defendants by name Zainul Abedin is the owner of the plaint schedule mulgi. The said Abedin died three years prior to the institution of the instant suit. The suit schedule property was let out to the plaintiff in the year 1994 on a nominal rent of Rs.200/- per month by the said Abedin. Thereafter the rent was enhanced from time to time. The monthly rent, as on the date of the institution of the suit, is Rs.1,000/-. The rent was enhanced to Rs.1,000/- per month about one year prior to the suit. The plaintiff has been running his medical practice in the schedule premises under the name and style of 'Anil Kumar Clinic'. He used to pay the rents to the said landlord till his death. Thereafter he is paying the rents to the 3rd defendant at the instance of all the defendants. There are no defaults in payments of rents. He is in peaceful possession and enjoyment of the plaint schedule property without any interference or interruption from any quarter. On the death of Zainul Abedin, the defendants, with an ulterior motive and to cause hardship to the plaintiff, had started causing impediments to his peaceful possession and enjoyment of the property and had failed to receive the rent of Rs.1,000/- payable for the month of January 2012, which is to be paid in the 1st week of January 2012. The demand draft offered towards the said rent was refused by the defendants and hence, the plaintiff had sent the same by registered post to the 3rd defendant. In furtherance of their nefarious intention, the defendants, along with their henchmen, came to the plaint schedule property on 18.01.2012 and tried to forcefully dispossess the plaintiff and had damaged the premises. The plaintiff, with the intervention of the neighbours, could resist, with great difficulty, the illegal actions of the defendants and their men. While leaving the property, the defendants had openly proclaimed that they would dispossess the plaintiff at any moment. The defendants are influential people and are having muscle power. In the

circumstances, the plaintiff, having been left with no option, is obliged to file the suit for perpetual injunction.

4. The 1st defendant filed a written statement and counter claim. In the said pleadings, the defendants while admitting that the plaintiff is a tenant in the plaint schedule property had *inter alia* contended as follows:

The mother of the 1st defendant by name Mohammadee Begum was the original owner and possessor of the plaint schedule property. She died on 15.05.2002. The plaintiff was a tenant of the plaint schedule property under the mother of the 1st defendant. In a family partition, affected *vide* registered partition deed dated 18.09.2009 bearing document no.5017/2009, the plaint schedule mulgi fell to the share of the 1st defendant. On a number of oral requests and demands made in the month of January 2009 to vacate the mulgi, the plaintiff did not vacate the mulgi. Such request was made with a view to make changes to the structure of the commercial complex in which the plaint schedule mulgi is a part. The plaintiff started creating troubles to the family members of late Mohammadee Begum and Zunail Abedin without vacating the premises. He had intentionally stopped payment of monthly rents from 1st March 2009. The monthly rent was Rs.2,100/-, at the time the plaintiff had committed default. The monthly rent is payable on the 1st of every succeeding calendar month. The rent is to be enhanced by 10% on the existing rent in the month of January every year. The rent payable from 1st January 2010 till the end of December 2010 is Rs.2,310/-. The rent payable from 1st January 2011 is Rs.2,541/- till the end of December 2011. From 01.01.2012 to 01.03.2012 the rent payable is Rs.2,795/- per month. The details of the rents due are as follows: - 'The rent due from 1st March, 2009 to the end of December 2009 @ Rs.2,100/- per month is Rs.21,000/-; rent due from 1st January 2010 to the end of December 2010 @ Rs.2,310/- per month is Rs.27,720/-; rent due from 1st January 2011 to the end of December 2011 @ Rs.2,541/- per month is Rs.30,491/-; and the rent due from 1st January 2012 to the end of May 2012 @ Rs.2,795 per month is Rs.16,770/-; the total

rent due upto the end of May 2012 (payable by 1st June, 2012) is Rs.96,002/- .” The plaintiff being a defaulter had filed the suit for perpetual injunction with false averments. In the circumstances, a notice was got issued terminating the tenancy and demanding him to vacate the plaint schedule property by 31.03.2012. Despite receiving the said notice, the plaintiff had failed to comply with the terms in the said notice and is continuing in unauthorised and illegal possession of the plaint schedule property. The 2nd defendant is a physically disabled person as his right lower limb was amputated. He was depending upon the rents for his livelihood. The plaintiff is illegally parking his car in the premises of the 2nd defendant. The 1st defendant is a pardanasheen lady residing at Hyderabad. Taking advantage of the inability of the defendants, the plaintiff is harassing them without paying the rents. The tenancy was terminated by the end of 31.03.2012 by giving a statutory notice. He is liable to pay damages for use and occupation @ Rs.5,000/- per month from 01.05.2012.

4.1 In the said written statement/counter claim filed with the above averments, the 1st defendant had sought the reliefs viz., eviction of the plaintiff from the plaint schedule property; recovery of arrears of rent in a sum of Rs.66,460/- with interest at 24% per annum; damages at the rate of Rs.5,000/- per month from the date of the suit till the date of the delivery of possession; and costs.

5. The plaintiff filed a rejoinder/written statement in answer to the claim of the 1st defendant. In the said pleading, he had denied all the allegations in the counter claim/written statement of the 1st defendant, particularly, the averments in regard to the defaults alleged to have been committed by him from March 2009; but, had admitted that the 1st defendant issued the legal notice and had stated that he had given a suitable reply.

6. Basing on the above pleadings, the trial Court had framed the following issues:

1. Whether the plaintiff is entitled for perpetual injunction?

2. Whether the counter claim is maintainable?
3. Whether the plaintiff had paid rents for schedule property regularly?
4. Whether the rent of the schedule property is Rs.1,000/- or Rs.2,795/- per month?
5. Whether the plaintiff is liable to be evicted from the schedule property?
6. To what relief?

7. During the course of trial, the plaintiff and his supporting witness were examined as PWs1 and 2 and exhibits A1 to A6 were marked on the side of the plaintiff. The 1st defendant, the 3rd defendant and a supporting witness were examined as DWs1 to 3 and exhibits B1 to B6 were marked on the side of the defendants.

8. The trial Court had dismissed the suit of the plaintiff and decreed the counter claim of the defendants as already noted in paragraph 1.1, supra. The Court below had confirmed the decrees and the judgment of the trial Court while dismissing the first appeal suit preferred by the plaintiff. Therefore, the plaintiff is before this Court.

9. The learned counsel for the plaintiff while reiterating the case of the plaintiff had *inter alia* contended as follows: "The Courts below had grossly erred in appreciating the evidence in regard to the quantum of rent. The Courts below had erred in holding that the rent is Rs.2,795/- per month. The Courts below had failed to address the fact that the case of the defendants is contrary to the case pleaded in exhibit B4. The Courts below had failed to properly appreciate the evidence of PWs1 and 2. The Courts below ought to have held that the civil Court has no jurisdiction to grant the relief of eviction and that the defendants are required to approach a competent court of the Rent Controller for seeking eviction as per the provisions of the Rent Control Act. The Courts below ought to have held that the learned Rent Controller's Court having jurisdiction is the only proper forum to grant a decree for eviction that too on proof of *bona fide* requirement or wilful default in payment of rents

or any other ground as required under the special enactment. The Courts below had failed to appreciate that no notice demanding arrears of rent was issued prior to the institution of the suit for perpetual injunction by the plaintiff and that not even the monthly rent payable by the plaintiff was mentioned in the caveat petition under exhibit B4. The Courts below ought to have held that the tenant is liable to pay rents only @ Rs.1,000/- per month. The Courts below have wrongly cast the burden on the plaintiff ignoring the fact that the defendants had made a counter claim and that the burden is upon the defendants to establish the quantum of rent. The Courts below have arrived at the quantum of rent erroneously without properly appreciating the oral and documentary evidence brought on record and without applying the test of preponderance of probabilities in a correct manner. In any view of the matter, the counter claim seeking eviction of the plaintiff from the plaint schedule property ought to have been dismissed by the Court below holding that civil Court has no jurisdiction.”

9.1 While so contending, the learned counsel for the plaintiff would submit that the following substantial questions of law are involved and, therefore, the appeal deserves admission and disposal on merits: “(1) The Courts below have wrongly cast the onus of proof on the plaintiff though the 1st defendant filed a counter claim seeking eviction; and that the Courts below had wrongly held that the plaintiff had failed to establish the quantum of rent. (2) The Courts below mis-appreciated the oral and documentary evidence while arriving at a conclusion about the monthly rent. (3) The Courts below ought to have seen that the counter claim seeking eviction of the plaintiff/tenant from the plaint schedule property is not maintainable before a civil Court and that the civil Court has no jurisdiction to grant such relief and that the proper forum for seeking eviction of the plaintiff/tenant from the plaint schedule property is a Rent Control Court as the tenancy is governed by the provisions of the A.P Buildings (Rent, lease and Eviction) Control Act, 1960 (The Rent Control Act’, for short). And, (4) The quit notice issued by the 1st defendant is not valid.”

10. Per contra, the learned counsel for the defendants 1 and 3 having

supported the decrees and judgments of the Courts below had *inter alia* contended as follows: “The issue of jurisdiction was not raised in the pleadings of the plaintiff before the Courts below. This issue of jurisdiction is being raised for the first time before this Court. The said issue being a mixed question of fact and law cannot be permitted to be raised before this Court for the first time in the second appeal. The Courts below have recorded concurrent findings of fact on all issues after appreciating the facts correctly and the evidence in proper perspective. The well reasoned concurrent findings of the courts below do not call for any interference in the second appeal. In this second appeal, no substantial questions of law are involved. The second appeal cannot be admitted when no such questions are involved; and the second appeal is liable for dismissal at the stage of admission.”

11. I have carefully gone through the material record. The plaintiff/tenant brought the suit for perpetual injunction claiming that the defendants are the children of his original deceased landlord and that at the instance of the defendants, he is paying the rents to the 3rd defendant and that he is obliged to file the suit for perpetual injunction when the defendants had refused to receive the rent for the month of January 2012 offered by way of demand draft and tried to forcefully evict him by coming to the property on 18.01.2012. Resisting the suit, the 1st defendant had filed a written statement-cum-counter claim seeking the relief of recovery of plaint schedule property after eviction of the plaintiff from the said property besides other reliefs viz., recovery of arrears of rent and mesne profits. Thus, the jural relationship of tenant and landlords between the parties is not in dispute.

12. Dealing first with the question sought to be raised by the plaintiff in regard to the wrong casting of onus of proof on the plaintiff on the aspect of proving the quantum of rent, what is to be noted is that the plaintiff had contended that the monthly rent is Rs.1,000/- whereas the defendants had contended that at the relevant time the monthly rent was Rs.2,795/- and that the plaintiff had committed default in payment of rents from March 2009

onwards. Exhibit B3, the certified copy of the registered partition deed dated 18.09.2009, would show that the original owner of the property is the mother of the defendants and that in the family partition, the plaint schedule property fell to the share of the 1st defendant. There is no written lease deed between the parties. Exhibit A5 is the returned cover and acknowledgment containing the demand draft for Rs.1,000/- drawn in the name of Md.lsub with the covering letter enclosed to it. Even in the demand draft said to have been sent by the plaintiff towards one month rent, as already noted by the Court below, the name of the 3rd defendant is wrongly mentioned as Md.lsub though his name is Md.lsubuddin. Till the suit is filed by the plaintiff in the year 2012 complaining interference with his possession over the subject property/mulgi just prior to the filing of the suit, there are no disputes between the parties. The 1st defendant became the owner of the property by virtue of the partition deed of the year 2009. There were no disputes till 18.01.2012.

Though the claim of the defendants is that the plaintiff had failed to pay the rents from March 2009 onwards, they did not make any claim till the plaintiff had filed the present suit in the year 2012. Therefore, the Courts below held that the claim of the defendants in regard to arrears of rents from March 2009 onwards is improbable. As rightly pointed out by the learned counsel for the plaintiff, in the caveat petition under exhibit B4 filed by the defendants 1 and 2 on 24.01.2012, there is no mention about the monthly rent though it was mentioned that the 1st defendant had let out the schedule property to the plaintiff. On 13.04.2012, the defendants issued a notice to the plaintiff claiming that the monthly rent by the date of default is Rs.2,100/-. PW2, who is a witness examined on behalf of the plaintiff, it appears, is the only witness who spoke about the quantum of rent other than PW1 and DW1. The plaintiff being a medical practitioner ought to have maintained accounts. Whether he is an income tax assessee or not is not borne out by the record. But, PW1 stated in his evidence that he is having a three storied building and he is residing in the first floor having leased out the shops in the ground floor. According to his evidence the distance between his house and the suit property is about 1 KM and that he is getting a rent of Rs.5,000/- for one

shutter and Rs.2,500/- each for the remaining 6 shutters. PW2 a cloth merchant who is doing business in a premises near the suit property also deposed that he is paying Rs.4,000/- per month towards rent for his shop. From the evidence brought on record, it is manifest that PW1 is having rental income besides his professional income; therefore, he ought to have filed his accounts, if any, maintained or the copies of his income tax returns or some such evidence, which is of reliable character to show the quantum of monthly rent. He did not do so. Therefore, having analysed the available evidence of PWs1 and 2 and DW1, the Courts below had arrived at concurrent conclusion and had held that there is sufficient evidence to accept that the rent at the time of the commencement of the tenancy was Rs.2,100/- and that the same is liable for enhancement by 10% from January 2010 and that if so augmented it works out to Rs.2,320/- and that eventually with the 10% increase every year the rent payable from January 2012 comes to Rs.2,795/-. No specific instances from the evidence and the reasoning of the Courts below are urged either in the grounds or at the time of hearing to show that the appreciation of evidence on this aspect is improper or incorrect. In the well considered view of this Court, on a careful analysis of the evidence, the view that was concurrently taken by the Courts below is possible and plausible. Even assuming for a moment that on appreciation of evidence two inferences, one favourable to the plaintiff and the other favourable to the defendants, are possible, the one drawn by the lower appellate Court is binding on the High Court in the second appeal and adopting any other approach is not permissible, more particularly when the last Court of fact recorded a concurrent finding of fact. Therefore, the said finding needs no interference and the contention that the burden is wrongly cast on the plaintiff needs no countenance.

12.1 Coming to the remaining substantial questions of law sought to be raised as involved in this second appeal, what is to be noted is that the landlord and tenant relationship is admitted and the Courts below had concurrently held that the rent as on the date of the *lis* is Rs.2,795/- per month. Before filing the written statement/counter claim seeking eviction of

the plaintiff from the plaint schedule property, a quit notice was issued terminating the tenancy with the end of the calendar month. In fact, the validity of the quit notice is not challenged in the defence. Further, no infirmity, either factual or legal, is pointed out from the quit notice. Therefore, the concurrent findings that the 1st defendant is entitled to a decree for recovery of arrears of rents, mesne profits and eviction of the plaintiff from the plaint schedule property is sustainable both under facts and in law.

12.2 Dealing in the end with the issue of jurisdiction, the learned counsel for the plaintiff, placing reliance on the provisions of the Rent Control Act, had contended that the provisions of the said Act are applicable to the suit schedule building in view of the provision of Section 32(c) of the said Act.

Section 32 (c) of the Rent Control Act reads as under;

‘32. Act not apply to certain buildings: - The provisions of this Act shall not apply, -

(a).....

(b).....

(c) **to any building the rent of which as on the date of commencement of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control (Amendment) Act, 2005, exceeds rupees three thousand and five hundred per month in the areas covered by the Municipal Corporations in the State and rupees two thousand per month in other areas.**

He would also contend that ‘Khammam’ is a Municipal Corporation and that therefore, the provisions of the Rent Control Act would be applicable to the suit schedule building situated at Khammam. However, the learned counsel for the 1st defendant having produced the timeline of Khammam Municipal Corporation from the Internet had contended that Khammam is declared as a municipal corporation *vide* GOMs.no.399 MA & UD dated 19.10.2012 and not before. In the case on hand, the counter claim-cum-written statement was filed on 01.06.2012 by which time Khammam city has not been announced as a municipal corporation. Since in the case on hand the quantum of rent as held by the Courts below exceeded Rs.2,000/- and as the suit schedule building is not in a Corporation as on the date of institution of the counter

claim, it follows that the provisions of the Rent Control Act have no application to the building in question and that, therefore, the civil Court is having jurisdiction to entertain the counter claim of the 1st defendant and grant the decree of eviction to the 1st defendant/counter claimant against the plaintiff/tenant.

12.3 For the reasons assigned, this Court is satisfied that the concurrent findings of fact recorded by the courts below on all the issues in favour of the defendants and against the plaintiff do not brook interference and that the courts below are justified in dismissing the suit of the plaintiff and in decreeing the counter claim of the defendants. The findings of facts recorded by the courts below were based on proper appreciation of evidence and the material on record and there was neither illegality nor irregularity in those findings and therefore, the said concurrent findings do not require to be upset. Further, the existence of a substantial question of law is a sine qua non for the exercise of jurisdiction by this court as per Section 100 of the Code. The questions raised strictly speaking are not even questions of law let alone substantial questions of law.

13. Viewed thus, this Court finds that none of the questions raised are substantial questions and that there is no substance in the questions raised and that therefore, the second appeal is devoid of merit and is liable for dismissal at the stage of admission. The law is well settled that a second appeal shall not be admitted if no substantial question of law arises for consideration and when no substantial question of law is involved. The view of this court is reinforced by the ratio in the decision in **Gurudev Kaur v. Kaki** (AIR 2006 SC 1975). In the case on hand, as this court finds, after careful examination of the pleadings, the evidence and the contentions, that no substantial question of law is involved, this second appeal is liable for dismissal at the stage of admission in view of the narrow compass of Section 100 of the Code of Civil Procedure.

14. In the result, the Second Appeal is dismissed at the stage of admission. The plaintiff is granted a time of three months, from the date of the

receipt of a copy of this judgment, to vacate and hand over vacant possession of the suit schedule mulgi to the defendants. Failing such compliance, the defendants shall be at liberty to recover possession of the suit schedule property from the plaintiff in accordance with the procedure established by law.

There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this second appeal shall also stand dismissed.

M. SEETHARAMA MURTI, J

18th March 2016
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