

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No. 5665 of 2015 (O&M)
Date of Decision : 03.11.2016

Ajit Singh

....Appellant

Versus

Parkash Chand (deceased) through LRs Amarjit Singh and another

....Respondents

CORAM: HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Ramneek Vasudev, Advocate
for the appellant.

Surinder Gupta, J.

Respondent-Parkash Chand (since deceased) now represented by his legal heirs filed suit for possession by way of ejectment of defendant-appellant from the shop in dispute, as fully described in headnote of the plaint and also for arrears of rent from September, 2007 to August, 2010 @ ₹450/- per month.

2. In later part of the judgment parties will be referred as 'plaintiffs' and 'defendant' as per civil suit.

3. Case of plaintiff, in brief, is that the defendant-appellant was inducted as tenant in the disputed shop vide rent note dated 04.01.2001. He had not paid the rent for last three years i.e. from September, 2007 to August, 2010. His tenancy was terminated vide notice dated 04.06.2010 under Section 106 of the Transfer of Property Act (later referred to as 'the Act') and he was required to vacate and hand over vacant possession of the shop within 15 days from the date of receipt of notice.

4. Defendant-appellant contested the claim of plaintiff *inter alia* pleading that he had paid rent till July, 2009 and thereafter, plaintiff refused

to accept the rent.

5. Learned Civil Judge (Junior Division), Rupnagar held that tenancy of the defendant has been terminated but did not agree with the contention of plaintiff that defendant-appellant was in arrears of rent from September, 2007. It was held that he is in arrears of rent from July, 2009 to August, 2010. Suit of plaintiff was decreed for possession by way of ejectment of defendant-appellant from the shop in dispute and he (defendant-appellant) was allowed two months' time to vacate and hand-over the vacant possession of disputed shop.

6. Not satisfied, defendant-appellant filed appeal before the District Judge, Rupnagar, which was dismissed and he was directed to vacate the disputed shop and to pay arrears of rent @ ₹450/- per month from July, 2009 onwards till he hands over vacant possession of the shop.

7. Not satisfied, the defendant-appellant have come up with this regular second appeal.

8. I have heard learned counsel for the appellant and perused the paper-book and lower Court record with his assistance.

9. First contention of learned counsel for the appellant is that service of notice on the defendant-appellant required under Section 106 of the Act was not duly proved and this fact has been ignored by Courts below.

10. Learned counsel for the appellant has further argued that photostat copy of notice issued under Section 106 of 'the Act' was produced by plaintiff, which is not a primary evidence of a document, as such, cannot be read in evidence, in the absence of permission to prove the same, by way of secondary evidence. Validity of notice is a substantial question of law and this Court has jurisdiction to entertain second appeal on

this score. In support of his contention he has relied on observation of single Judge of Calcutta High Court in case of **Basudeb Chowdhury vs. West Bengal State Electricity Board, 2004 (2) RCR (Civil) 421.**

11. On perusal of pleadings and evidence on record, I find no weight in the submission of learned counsel for the appellant. In paras 4 and 5 of the plaint, plaintiffs alleged that a notice under Section 106 of the Act was issued to the defendant-appellant on 04.06.2010, copy of which was produced on file as Ex. P-1. While appearing as PW-1 Roshan Lal plaintiff has categorically stated that notice under Section 106 of the Act was issued to the defendant-appellant requiring him to deliver vacant possession of the shop in question and he proved on record copy of notice (Ex. P-1) and postal receipt (Ex. P-2). Though, production of Ex. P-1 was objected to but in cross-examination not even a single question was put to this witness to suggest that notice under Section 106 of the Act was not served on the defendant-appellant. The matter does not end here. The defendant-appellant himself appeared as DW-1 and filed his affidavit (Ex. DW-1/A) as his examination-in-chief, wherein he has nowhere stated that notice under Section 106 of the Act was not served on him. Learned counsel for the appellant has gone through the contents of this affidavit during course of arguments but could not point out a single line to suggest that notice under Section 106 of the Act was not served on the defendant-appellant. This indicates that the appellant has not denied the receipt of notice under Section 106 of the Act and in the absence of denial of receipt of notice, the plea that notice was not served is not available to appellant. Observations in ***Basudeb Chowdhury's case (supra)*** are not applicable to facts of present case. In that case, notice to quit was nullified by the act

of parties and thereafter, second notice was issued terminating the tenancy, which was held as valid. In **Darshan Kaur vs. The Amritsar Primary Cooperative Agricultural Development Bank Limited Amritsar and another, 2010 (1) RCR (Civil) 747**, the mortgage deed was denied in favour of defendant-bank. It was observed that mere production of photocopy of the mortgage deed does not prove its execution. However, in this case, as already discussed, service of notice under Section 106 of the Act is not denied.

12. Learned counsel for the appellant has argued that while appearing as PW-1 Roshan Lal son of plaintiff has referred the appellant as tenant in the shop in question which amounts to waiver of notice and resultantly continuation of tenancy of the appellant despite notice under Section 106 of 'the Act'. Referring the appellant as tenant by plaintiff while appearing as PW-1 shows that they have waived their claim of termination of tenancy vide notice (Ex. P-1). He has argued that this plea of waiver was not raised before the Courts below but can be taken in appeal and has placed reliance on observations of Karnataka High Court in case of **M/s Amar Transport Company vs. Smt. Muthu Ganapathy, 2005 (4) RCR (Civil) 340**.

13. He has argued that Ist Appellate Court allowed decree qua arrears of rent as well despite there being no appeal/cross-objections filed by plaintiffs. This relief was not allowed by learned Civil Judge (Junior Division) and Ist Appellate Court has gone beyond the scope of appeal while allowing this relief to plaintiffs-respondents.

14. So far as argument raised by learned counsel for the appellant about waiver of notice is concerned, the same implies that appellant accepts

service of notice under Section 106 of the Act and this is why he is alleging waiver of the same. There can be waiver of notice to quit if both the parties i.e. party issuing notice and the party receiving notice intentionally agree to waive the same. The appellant has not pleaded waiver of notice in the written statement, still this argument being a legal plea can be looked into. Even observations in case of *M/s Amar Transport Company (supra)* are not helpful to the appellant, wherein it was observed as follows:-

“21.As a matter of fact, the contention of waiver of notice to quit was not at all raised by the appellant before the Trial Court, however, it is a legal plea, therefore, the same is taken into consideration. In order to raise such plea, the tenant must be able to establish that there was either express or implied consent or intention of both the parties to continue the tenancy subsequent to the termination of tenancy i.e. quit notice which is marked at Ex. P.3 dated 20.2.2001. Even as per the contention of the appellant, in terms of Ex.D.1, ₹1000/- is to be adjusted from the advance amount towards the rent of ₹2000/- per month. This would mean, the tenant has to pay ₹1000/- per month as rent in order to make the rent ₹2000/- per month. The tenant is not able to establish such implied continuation of tenancy so as to waive the notice to quit subsequent to Ex.P.3. Reply notice was also not sent to Ex.P.3. Therefore, one has to presume that he accepted the averments mentioned at Ex.P.3. He contested the matter only by appearing in the suit as a defendant. That being the case, now, it not open to him to contend that there is waiver of notice to quit and therefore, termination is not in accordance with law.”

15. It is evident from perusal of above observation that even payment of rent for the period subsequent to service of notice of termination

of tenancy does not amount to waiver of notice. While appearing as PW-1 Roshan Lal addressed the appellant as tenant in the shop in question. This fact in no manner can be taken as waiver of notice because Roshan Lal is not a legal luminary so as to use terms mentioned in legal glossary while making statement. He appears to be semi-literate person. At the time of his statement, the appellant had not vacated the demised premises, as such, he has stated that the defendant-appellant is tenant in the shop in question. His mere addressing the appellant as tenant in his shop cannot be taken as his consent to waive of the notice particularly when he, while appearing as PW-1, is seeking ejectment of the appellant from the demised shop. The argument of learned counsel for the appellant to this effect is discarded.

16. The contention of appellant in written statement is that he had paid rent upto June, 2009. Learned Civil Judge (Junior Division) relying on his plea has held that he is in arrears of rent from July, 2009. However, while passing the decree no relief was allowed for payment of arrears of rent. Ist Appellate Court has not reversed any finding of learned Civil Judge (Junior Division) but has modified the decree only as per observation made by learned Civil Judge (Junior Division). Learned counsel for the appellant nowhere disputes that the appellant is in arrears of rent from July, 2009 onward @ ₹450/- per month. He has even offered to deposit rent in this Court, if allowed time. In view of this, modification of the decree, passed by lower Court, by learned Ist Appellate Court is in spirit with the observation made by learned trial Judge, as such, cannot be termed as illegal or going beyond scope of appeal. Appellate Court under Order XLI Rule 33 CPC can extend the scope of appeal.

17. On perusal of judgments of Courts below and lower Court

record, I find no legal or factual infirmity therein calling for interference and no substantial question of law requiring determination arises in this appeal, which has no merit.

Dismissed.

November 03, 2016
jk

(SURINDER GUPTA)
JUDGE

Whether speaking/Reasoned

Yes/No

Whether Reportable

Yes/No