

IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

CM No. 13086-C-2009 in/and

RSA-4316-2009

Date of decision : June 16, 2017

Gurbax Singh

... Appellant

Versus

Harminderjit Singh alias Bobby Choudhry

... Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr.Bhrigu Dutt Sharma, Advocate
for the appellant.

Mr.Puneet Jindal, Senior Advocate with
Mr.Varun Goyal, Advocate
for the respondent.

AMOL RATTAN SINGH, J.

1. This is the second appeal of the defendant, after the suit of the respondent-plaintiff herein (hereinafter referred to as the plaintiff) was decreed in his favour by the learned Civil Judge (Junior Division), Jalandhar, and the first appeal filed by the appellant was dismissed by the learned Additional District Judge, Jalandhar.

2. The facts leading up to the filing of the suit by the respondent-plaintiff, seeking possession of a shop and for recovery of Rs.29,700/-, are being taken from the judgments of the learned Courts below.

3. As per the plaintiff, he is the owner of the disputed shop, known as Swami Medical Hall, situated in village Kishangarh, Tehsil and District Jalandhar, fully described in the site plan annexed with the plaint.

The appellant (defendant) was stated to be in possession of the

shop as a tenant, it as a 'medical shop' under the aforesaid name, with the monthly rent being Rs.825/-.

As per the plaintiff the tenancy was from month to month, expiring on 15th day of every month.

The defendant was stated to have not paid rent since July 16, 1998, despite repeated requests and demands from the plaintiff. It was further contended that, moreover, the plaintiff did not want to keep the defendant as a tenant any longer.

Consequently he terminated the tenancy by issuing a registered 'notice' on 29.05.2004, under Section 106 of the Transfer of Property Act, 1882, with the termination of the tenancy to come in effect from June 15, 2004. Vide the notice, the plaintiff called upon the defendant to vacate the shop by the aforesaid date and to pay the arrears of rent. That not having been done, it was further contended in the plaint that the possession of the defendant over the shop was illegal and that of a trespasser.

Yet further, it was contended that though the plaintiff was entitled to recover arrears of rent @ Rs.825/- per month w.e.f. 16.07.1998, however he was restricting his claim for such arrears to the last 3 years only, as the demand for payment of such arrears would not be barred by limitation. Hence Rs.29,700/- was sought to be recovered.

On the aforesaid contentions, Civil Suit no.248/04 was instituted by the plaintiff, on 24.07.2004.

4. Upon notice issued to him, the defendant filed a written statement taking preliminary objections to the effect that the suit was not maintainable, the plaintiff had no locus standi or cause of action and that he (defendant) was not in arrears of rent.

It was further contended that the rate of rent was Rs.700/- per month and not Rs.825/- as claimed by the plaintiff and therefore, he had not come to the Court with clean hands.

Further, it was contended that the notice served upon the defendant was not issued under the provisions of the Transfer of Property Act and that the site plan annexed with the plaint was also “not correct”.

However, on merits, the defendant admitted that he was running a medical shop under the name and style of Swami Medical Hall, but the suit had been filed as a counter blast to the suit filed by the defendant seeking permanent injunction in respect of another shop known as Swami Music & Electric, also taken on rent by the defendant from the plaintiff. In the said suit an interim order in favour of the present appellant-defendant had been granted against the plaintiff.

Yet further, it was stated that rent in any case had been paid in May, 2004 as advance rent to the plaintiff, with only the rent for the months of June and July 2004 still due to the plaintiff, with that also having been offered by the defendant, which the plaintiff had intentionally refused to accept, in the presence of one Nirmal Chand.

It was next averred in the written statement that the shop in dispute was taken on rent from Joginder Singh, grand father of the plaintiff, in respect of which a rent note was executed on 30.05.1994, wherein, clearly, rent @ Rs.700/- per month was settled, and with Rs.60,000/- paid as security to Joginder Singh.

After the death of Joginder Singh, the rent was received by Surjit Singh, (father of the plaintiff), but Surjit Singh never issued any receipt either to the defendant or any of the other tenants of the plaintiff.

(Note:- It is to be noticed that the suit was actually filed by plaintiff Harminderjit Singh @ Bobby Choudhry son of Surjit Singh, through his attorney Smt.Rajwinder Kaur, and consequently the first appeal of the appellant-defendant had been filed by arraying the respondent-plaintiff through the same attorney. The present appeal has been, however, filed by arraying the plaintiff as the respondent, through another 'General Attorney', Harnam Singh).

The further contention of the appellant-defendant in his written statement, was that after the death of Surjit Singh, the plaintiff had been receiving the rent from the defendant and other tenants and after he left for Canada, his attorneys, Rajwinder Kaur and Harnam Singh, received the rent, and between them, they had received the rent upto May, 2004, but had not issued any receipt in favour of any tenant.

Lastly it was contended that the defendant was still a tenant in the demised premises and the tenancy could not be terminated and therefore, the plaintiff was not liable to get a decree of possession in his favour.

5. Upon a replication having been filed by the plaintiff generally denying the contents of the written statement and reiterating those of the plaintiff (as per the judgment of the Civil Judge), the following issues were framed by that Court:-

“1. Whether the legal & valid notice u/s 106 of TP Act has been served upon the defendant?OPP

2. Whether the plaintiff is entitled to recover a sum of Rs.29,700/- from the defendant as prayed for?OPP

3. Whether the plaintiff is entitled for possession of the impugned shop as prayed for?OPP

4. Whether the suit is not maintainable in the present form?OPD

5. *Whether the plaintiff has no locus standi to file the present suit?OPD*

6. *Whether the plaintiff has not come to the Court with clean hands?OPD*

7. *Relief.”*

6. Though the plaintiff listed his mother and attorney, Rajwinder Kaur, as PW1, she was given up as a witness on 26.04.2005 and instead, his other attorney, Harnam Singh, was first examined as PW2, and thereafter as PW3 in rebuttal evidence.

The appellant-defendant examined himself, the aforementioned Nirmal Chand and one Jagir Singh, as DWs 1 to 3 respectively.

Further, as per the judgment of the learned Civil Judge, Nirmal Chand did not subject himself to cross-examination and eventually the evidence of the defendant was closed by an order of the Court, as he did not conclude it despite availing of numerous opportunities.

7. Upon appraisal of the evidence led, the learned Civil Judge found that the tenancy in any case had not been disputed by either party and Ex.D1 was in fact a rent agreement in respect of the suit property, showing that the property had been rented out to the defendant by the predecessor-in-interest of the plaintiff.

From the testimony of PW2/3, Harnam Singh, it was found that the suit property was not situated within the urban area of any Municipal Committee, which testimony remained unrebutted, with the defendant also having admitted in his written statement that the shop falls outside the limits of the Municipal Corporation, Jalandhar.

Hence it was held that the tenancy would be governed by the provisions of the Transfer of Property Act, 1882.

It was then found by the learned trial Court that the legal notice dated 29.05.2004, stated to have been served upon the defendant, was exhibited as Ex.P3 by way of evidence, by which notice the defendant had been informed with regard to the termination of his tenancy over the shop in question and had been directed to vacate it on 15.06.2004, with vacant possession thereof to be handed over to the plaintiff.

Postal receipts in respect of posting of the notice were tendered in evidence as Exs.P4 & P5. Ex.P6 was seen to be the acknowledgement of the defendant, bearing his signature, with regard to the receipt of the notice.

In fact, it was further found, that the notice had even been replied to by the defendant through his counsel, on 10.06.2004.

8. Thereafter, citing Sections 106(iii)(h) and 108 (q) of the Transfer of Property Act, the learned Civil Judge went on to reject the argument of counsel for the defendant, to the effect that since all rent had been paid upto May, 2004 (as contended by the defendant), the tenancy could not be terminated. It was held by the learned Court that there is no provision in the Transfer of Property Act which prohibits a land owner to terminate the tenancy of a tenant even if the tenant has been paying rent. Hence, holding that a notice under Section 106 of the Act had been duly served upon and duly replied to by the defendant, he was bound to vacate the shop and hand over vacant possession to the plaintiff, which he had not done.

9. As regards the payment of arrears of rent, it was found by that Court that the rent agreement, Ex.D1, dated 30.05.1994, indeed provided for a monthly rent of Rs.700/- only and therefore, the contention of the plaintiff that the rate of rent was Rs.825/- per month, was not proved. Though there

was a clause in the said agreement that the rent would be increased by 3% every 15 years, the said period (of 15 years) had not expired.

(It is to be noticed that the judgment and decree of the learned Civil Judge was delivered on 16.03.2007, by which date obviously 13 years had also not expired since the date of the agreement dated 30.05.1994).

As regards the contention that the rent had been paid to the plaintiff till May, 2004, no rent receipt had been produced for the period for which arrears of rent were being claimed by the plaintiff, i.e. from July, 2001 to May 2004, and in fact the defendant, Gurbax Singh (present appellant), in his cross-examination as DW-1 had stated that though he maintained an account of payment of rent with respect to the shop in question, he had not produced the said account on record, (and he had no receipt showing payment of rent upto 2004).

Hence, on account of non-production of even the record of the account of payment of rent stated to have been maintained by the defendant himself, an adverse inference was drawn against him under Section 114 of the Evidence Act, by citing illustration (g) of the said provision.

On the aforesaid finding and inference, the plaintiff was held entitled to recover arrears of rent from July 2001 to May 2004, @ Rs.700/- per month.

10. An argument on behalf of the defendant that the plaintiff not having stepped into the witness box himself, the testimony of her attorney, PW2 Harnam Singh, could not be read into evidence, was rejected by the trial Court by citing from a judgment of the Supreme Court in ***Janki Vashdeo Bhojwani & another vs. Indusind Bank Ltd. and others, 2005(2), Civil Court Cases, 324***, wherein it was held that where the power of

attorney holder has rendered some act in pursuance of the power held by him, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him and of which only the principal has personal knowledge.

11. On the ratio of the aforesaid judgment, further citing from the admission of the defendant himself in paragraph no.5 of the preliminary objection raised in his written statement, it was found by the Court that the defendant had admitted that after the death of Surjit Singh, some times the plaintiff and sometimes Rajwinder Kaur and Harnam Singh, had received the rent upto May, 2004, (though he stated that they had not issued any rent receipt).

Hence, with the defendant himself stating that Harnam Singh, i.e. PW2/3, had been receiving the rent (though the factum of receipt of rent was denied by the plaintiff in his plaint and by Harnam Singh in his testimony), it was held that Harnam Singh had knowledge of the tenancy and its terms and conditions and especially as, during his cross examination, he had stated that he had been managing the disputed shop.

Consequently, it was held that with the attorney, i.e. Harnam Singh, having knowledge of the shop of the plaintiff and he even being contended by the defendant himself to be a rent receiver, he was competent to testify in the shoes of the plaintiff, as his attorney.

12. On the aforesaid reasoning, the primary issues, i.e. issues no.1 to 3, were decided in favour of the plaintiff and against the defendant.

As regards the remaining issues with regard to non maintainability of the suit, locus and the plaintiff not having come to Court with clean hands, they were found to have been not pressed and were

consequently also decided in favour of the plaintiff.

13. The suit was thus decreed in favour of the plaintiff holding him entitled to take possession of the suit property as also to recover rent from the appellant-defendant from July 2001 to May 2004, @ Rs.700/- per month. Costs were also awarded to the plaintiff.

14. In the first appeal filed by the appellant-defendant, the Additional District Judge, Jalandhar, after noticing the pleadings of the parties, issues framed by the learned trial Court and the evidence led before it, found that as a matter of fact, the general attorney of the plaintiff, i.e. Smt. Rajwinder Kaur, had stepped into the witness box as PW1 but had not subsequently subjected herself to cross-examination.

Thereafter, Harnam Singh had testified as PW2, also as the attorney of plaintiff Harminderjit Singh, and had proved the site plan Ex.P2, the copy of the notice sent to the defendant (Ex.P3), the postal receipt thereof (Ex.P4), the 'UPC receipt' (Ex.P5) and the acknowledgement (by the defendant), Ex.P6.

He also testified in respect of the instrument of power of attorney executed in his favour, i.e. Ex.P1.

15. Thereafter, upon examination of the testimonies of the appellant-defendant himself and of Jagir Singh (DW3), he being found to be one of the marginal witness to the rent agreement Ex.D1, the learned first appellate Court also went on to record the same findings as the learned Civil Judge, including on the inference to be taken against the appellant-defendant with regard to payment of rent by him, in the absence of any account books produced by him to that effect. The reasoning of the trial Court with regard to accepting the testimony of PW2 Harnam Singh as the

attorney of the plaintiff, was also accepted in the same manner by the learned lower appellate Court.

16. On the aforesaid reasoning, the first appeal of the present appellant was dismissed, with costs.

17. Prior to the dismissal of the first appeal, the learned Additional District Judge had also dismissed an application filed under Order 41 Rule 27 CPC by the appellant-defendant, seeking to lead additional evidence. That application was dismissed vide an order dated 01.04.2008.

18. As one of the grounds of challenge in the present 2nd appeal, at least in respect of the arrears of rent payable, is that the additional evidence in respect thereof was not allowed to be led by the first lower appellate Court, that order would need to be considered first by this Court.

A perusal thereof shows that the application, other than seeking to lead in evidence income tax returns of the appellant for the years 1996-97 to 2005-06, he also wished to refute the inference taken by the trial Court that the suit property was not falling under any urban area or Municipal Committee and was in fact falling in village Kishangarh, which has a Gram Panchayat.

It was noticed in that order of the learned lower appellate Court, that the Gram Panchayat, Kishangarh, had issued a letter that the property in dispute is situated on the Jalandhar Pathankot Road and falls within the jurisdiction of the Punjab Urban Development Authority (PUDA).

Thus, obviously, other than the issue on payment of rent stated to have been reflected in the aforesaid income tax returns, the appellant wished to prove that the suit property would not be governed by the

provisions of the Transfer of Property Act but by the provisions of the East Punjab Urban (Rent Restriction) Act 1949.

19. As regards the certificate issued by the Gram Panchayat, Kishangarh, that was not allowed to be led by way of additional evidence, on the ground that no such plea had been taken by the applicant-appellant-defendant in his written statement, that the property in question does not fall within the jurisdiction of the said village and no evidence had been brought on record at the time when he was leading evidence, that it falls within the jurisdiction of PUDA and was therefore amenable only to the provisions of the Rent Act and not the Transfer of Property Act.

As regards the additional evidence sought to be led in the form of the income tax returns, that too was rejected, on the ground that it was the defendants' case even in his written statement and till the conclusion of evidence, that he had paid the entire rent upto 2004, but he had failed to lead any evidence to that effect, and eventually his evidence had to be closed by the order of the lower Court dated 18.12.2016, with that order having become final.

Hence, it was held by the learned first appellate Court that the application seeking to lead additional evidence (at the stage of the Ist appeal), was only to ensure that the appeal lingers on, and consequently, the said application under Order 41 Rule 27 CPC was dismissed.

20. Before this Court, learned counsel for the appellant-defendant has framed the following questions of law in the second appeal:-

“a) Whether the suit of the plaintiff-respondent is liable to be dismissed on account of the non examination of the plaintiff and his earlier attorney Rajwinder Kaur?

b) Whether the appellant-defendant has been

materially prejudiced in his defence on account of non-examination of the plaintiff-Harminsterjit Singh and Rajwinder Kaur?

c) Whether PW-2 Harnam Singh, who was appointed as attorney only on 28.2.2005 and was not having personal knowledge about the facts with regard to creation of tenancy, rate of rent, arrears of rent, issuance of notice under the Transfer of Property Act, was competent to depose on behalf of the plaintiff-respondent?

d) Whether both the courts below have illegally drawn adverse inference against the appellant-defendant for not producing the accounts with regard to payment of rent?

e) Whether the learned First Appellate Court is justified in rejecting the application for additional evidence to produce the income tax returns for the years 1996-97 to 2005-2006 on the one side and drawing adverse inference for their non production on the other side?

f) Whether both the Courts below in spite of having accepted the rent note Ex.D1 wherein the payment of Rs.60,000/- as security, returnable at the time of vacating the shop has been duly recorded, are justified in passing a decree for recovery of rent and leaving the appellant-defendant to initiate separate proceedings for the recovery of the said amount of Rs.60,000/-?

g) Whether both the courts below should have granted an adjustment/set off of Rs.60,000/- as per Ex.D1?

h) Whether the judgments and decrees passed by both the Courts below are sustainable in the eyes of law being based upon inadmissible evidence, mis-appreciation of facts, pleadings, evidence and law involved in the present case?"

21. As is obvious, the questions at (a), (b) and (c) are actually a single question of law, as to whether the testimony of the second attorney, i.e. PW-2/3, Harnam Singh, could have been accepted as the testimony of plaintiff Harminderjit Singh or not, without the plaintiff having stepped into the witness box himself.

The questions framed at serial no. (f) and (g) are also actually a single question, as to whether the security for an amount of Rs.60,000/-, shown to have been paid in the rent agreement, Ex.D1, should have been allowed to be adjusted as a set off against the arrears of rent eventually payable by the appellant-defendant, to the respondent-plaintiff.

The third question of law would be as framed as at (d) & (e) hereinabove, as to whether the application under Order 41 Rule 27 CPC was correctly dismissed or not, by the learned lower appellate Court and whether the learned courts below have illegally drawn an adverse inference against the appellant-defendant for not producing the accounts with regard to payment of rent.

The question framed at (h) is actually superfluous, it being only a cumulative amalgamation of the effect of entire *lis* itself.

22. At the time of issuance of notice in this appeal, the following order had been passed by this Court (co-ordinate Bench):-

“C.M.No.13084-C of 2009

Allowed as prayed for.

C.M.No.13085-C of 2009 in/and

R.S.A.No.4316 of 2009

Contends that notice under Section 106 of the Transfer of Property Act was issued by the owner of the property, namely, Harminderjit Singh. He never appeared in the proceedings before the Courts below. The suit was filed

initially by Smt.Rajwinder Kaur as a general power of attorney holder of Harminderjit Singh. Even she was not examined and instead one Harnam Singh who claims himself to be the general power of attorney holder, prosecuted the case. It is now the contention of learned counsel for the appellant that in the absence of the original owner as also the power of attorney holder Smt. Rajwinder Kaur, who was not examined as a witness, he has been deprived of the right to cross-examine her. Even the counsel who issued the notice has not been examined. It is also the contention of learned counsel for the appellant that in view of this the service of notice under Section 106 of the Transfer of Property Act could not be said to have been established.

Notice of motion for 6.8.2010.

In the meanwhile, if the appellant deposits the amount which has been determined by the Courts below within a period of two months from today and also undertakes to continue to pay the rent @ 700 per month which is the rent determined by the Courts below, he shall not be dispossessed. The undertaking shall be furnished before the trial Court within a period of two weeks from today.”

23. When arguments were thereafter first addressed by Mr.B.D. Sharma, learned counsel for the appellant, he first referred to the application under Order 41 Rule 27 CPC filed before the learned lower appellate Court and drew specific attention to the certificate issued by the Gram Panchayat of village Kishangarh, to the effect that the suit property no longer falls within the boundaries of the revenue estate of the said village and that it actually falls within the jurisdiction of the Punjab Urban Development Authority.

Upon the aforesaid contention, learned counsel had been asked to address arguments on whether, even if the shop in question falls outside the revenue estate of the village, would that *per se* mean that the provisions of the East Punjab Urban (Rent Restriction) Act, 1949, apply to the suit property.

Thereafter, as recorded in the order dated 07.09.2016, learned counsel for the appellant had produced in Court a notification issued by the Government of Punjab in the Department of Housing and Urban Development, dated 06.05.2016, by which the Change of Land User charges, External Development Charges, Licence Fee, Permission Fee for various real estate projects etc., were modified by the State.

Upon query of this Court as to how the said notification would in any manner bring the suit property within the purview of the Rent Restriction Act, Mr. Sharma had very fairly admitted that the said notification does not show that the suit land has come within the urban area of the Municipal Corporation, Jalandhar, and consequently, the East Punjab Urban (Rent Restriction) Act 1949, would not be applicable.

Learned counsel had thereafter restricted his argument to whether the notice stated to have been issued under Section 106 of the Transfer of Property Act had been duly served upon the appellant, and even if found to be so served, whether it was a valid notice or not.

24. On the 2nd part of that question, Mr. Sharma, had submitted that as there was admittedly a written contract between the parties (Ex.D1), by which the grand father of the respondent-plaintiff had agreed to return the security amount of Rs.60,000/- paid to him by the appellant-defendant, along with bank interest thereupon, at the time of vacation of the suit

premises, and that amount had not been paid alongwith the notice contended to have been served upon the appellant-plaintiff, therefore, the notice was in fact an invalid and improper notice, even as per Section 106 of the Transfer of Property Act, 1882.

The aforesaid argument of the learned counsel was elaborated upon by him, as would be discussed a little further.

25. First, on the issue of the notice not having been properly served or at least not served as per the requirement of Section 106 of the T.P. Act, Mr. Sharma first wished to refer to paragraph 3 of the written statement filed by the appellant in respect of the aforesaid contention.

However a perusal of paragraph 3 of the reply on merits, (with nothing stated in paragraph 3 of the preliminary objections with regard thereto), shows that, in fact, it is stated that a “detailed reply was given to the plaintiff to the notice served upon the answering defendant. So, there is no question of any demand of rent, because the answering defendant has already offered rent for the month of June and July, 04 in the presence of Nirmal Chand to the plaintiff-attorney i.e. Rajwinder Kaur and Harnam Singh”.

In paragraph 6 of the preliminary objections it is simply stated that the notice served on the defendant was not under the T.P. Act and consequently “the notice is wrong”.

Hence, the first contention of learned counsel is wholly unfounded because once the appellant admitted to having even given a reply to the notice served upon him, obviously the question of non-service of the notice does not arise.

24. However, in the context of the notice itself, learned counsel for the appellant thereafter referred to the affidavit of the mother of the plaintiff, i.e. his original attorney, Rajwinder Kaur, from the record of the learned trial Court, to reiterate what has already been held by the learned first appellate Court, that she was not cross-examined. Thus, Mr. Sharma submitted that her entire testimony is to be discarded. He submitted that therefore, the testimony of the attorney of the plaintiff who eventually testified for him, i.e. Harnam Singh, who also filed his affidavit, Ex.PW2/A, was also to be discarded, as he was not competent to testify, he having been appointed as an attorney only during the pendency of the suit, vide the instrument, Ex.P1, which is dated 28.02.2005, registered on that date.

Learned counsel submitted that this would be especially so, as the notice, Ex.P3, is dated 29.05.2004, i.e. prior to the institution of the suit and hence would not be in the knowledge of the attorney who eventually testified, i.e. Harnam Singh, PW2.

Learned counsel further argued that therefore, with neither the plaintiff himself, nor his mother and attorney Rajwinder Kaur, nor even the Advocate through whom the legal notice had been issued, Sh.Anil Kalia, having been examined, the notice cannot be stated to have been duly proved.

25. He next referred to the agreement between the parties, Ex.D1, to submit that in view of the fact that the written agreement states therein that a sum of Rs.60,000/-, was paid by way of security to the grand father of the plaintiff by the appellant-defendant, to be returned with bank interest on the date that the vacant possession of the shop is handed over to the owner

thereof, and that fact does not even find a mention in the legal notice, the notice is wholly defective and cannot be treated to be one issued under Section 106 of the Transfer of Property Act.

26. Mr. Sharma next submitted that, in fact, not just in the context of the notice, but in fact the entire testimony of PW-2 has to be discarded, as he was not a person conversant with the facts of the case and therefore, could not have testified in place of the plaintiff. Therefore, with the plaintiff not having examined himself, his entire suit must fail.

27. The next argument of Mr.B.D.Sharma was that the aforesaid agreement not being a compulsorily registrable document, the terms and conditions thereof would necessarily need to be complied with, including the clause with regard to the return of Rs.60,000/- with bank interest thereupon, even if eventually this Court comes to the conclusion that the respondent-plaintiff is entitled to a decree of possession of the suit property as per the judgments of the Court below.

In this context, learned counsel referred to Sections 106 and 107 of the Transfer of Property Act, of which Section 106, prior to its amendment in the year 2003, read as follows:-

“106. Duration of certain leases in absence of written contract or local usage.- In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or

lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Every notice under this Section must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.”

“107. Leases how made.—A lease of immoveable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument.

[All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

[Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:]

Provided that the State Government may from time to time, by notification in the Official Gazette, direct that leases of immoveable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.]”

28. The contention of learned counsel for the appellant is that since Ex.D1 is neither a lease agreement from year to year, nor specifically shown to be for a period of more than one year, it was therefore not compulsorily registrable in terms of Section 107 and hence, with all other agreements not being compulsorily registrable, the terms and conditions thereof are to be

On this issue, Mr. Sharma cited the following judgments:-

- “1. *Satish Kumar vs. Zirif Ahmed, 1997(3) PLR 401*
2. *Baldev Singh vs. Surinder Mohan & Others, 2004(2) CurLJ 382*
3. *Nand Lal and another vs. Mengh Raj, AIR, 1940 (Lah) 409*
4. *Ashish Vs. Saleem , 2016(117) ALR 694”*

On the aforesaid arguments, Mr. Sharma, submitted that the appeal be allowed and the suit of the plaintiff be dismissed with costs.

29. In response to the aforesaid arguments, Mr. Puneet Jindal, learned Senior Advocate appearing for the respondent-plaintiff, first submitted that the document, Ex.D1, was denied to have been executed, even in the replication filed by the plaintiff, to the written statement of the appellant-defendant.

Other than that, the document itself shows that it was in respect of a lease of more than one year, with even a clause for enhancement of the monthly rent by 3% of the existing rent, after 15 years. Therefore, it was very obvious that it was a lease exceeding a term of one year and consequently was compulsorily registrable, even in terms of Section 107 of the Transfer of Property Act.

Hence, learned senior counsel submitted, that as the said deed was not registered but the tenancy otherwise admitted, it would necessarily be a lease from month to month in the absence of such registration, and further, the terms and conditions of the lease could not be looked into as per the said document. As such, the right of the lessor to terminate the lease and get the premises vacated, upon issuing a notice 15 days prior to such

30. Mr. Jindal next referred to the written statement of the appellant-defendant, wherein, in paragraph 3, he admitted that a detailed reply was given to the notice served upon him, further stating that there could not be any demand for rent because he had already offered rent for the month of June and July 2004, in the presence of Nirmal Chand, to the attorneys of the plaintiff, Rajwinder Kaur and Harnam Singh.

He further submitted that as regards the receipt of notice, the appellant-defendant had also admitted its receipt even in his cross-examination as DW1.

31. Mr. Jindal next submitted that this itself very obviously showed that the defendant himself had admitted that Harnam Singh knew of the entire case, including the issuance of a notice for termination of the lease, as also of the fact that rent was due from the defendant, and as such, Harnam Singh (PW-2) had personal knowledge on the basis of which he was a competent witness to testify in place of his principal, i.e. plaintiff Harminderjit Singh.

In fact, learned senior counsel submitted, that even in paragraph 5 of the appellant-defendants' affidavit, which was submitted by way of his examination-in-chief (Ex.DW1/A), he stated to the same effect in paragraphs 5 and 9 thereof.

In support of his argument, Mr. Jindal cited a judgment of a coordinate Bench of this Court in *Satnam Channan vs. Darshan Singh, 2006 (2) R.C.R.(Civil), 614*.

32. Lastly, learned senior counsel submitted that no rent was proved to have been actually paid, at least since the time that such rent was claimed by the plaintiff and therefore, the arrears of rent claimed were very

much due, to the plaintiff.

33. In rebuttal, Mr. B.D. Sharma reiterated that the notice was sent through a counsel who did not step into the witness box and therefore it could not be accepted to be a valid notice.

Learned counsel next submitted that PW2, Harnam Singh, having denied the terms of the contract in his cross-examination, he could not be said to have any knowledge of it.

34. Having considered the aforesaid arguments as also the judgments of the learned Civil Judge and the learned Ist appellate Court, as regards the right of the plaintiff to seek possession of the suit property, he admittedly being the owner thereof and having terminated the lease, in the opinion of this Court in accordance with the provisions of the Transfer of Property Act, 1882, I find no ground to interfere with the said judgments and decrees.

This is so because even if the lease deed, Ex.D1, (shown to be dated 30.05.1994), is to be ignored as contended by the learned counsel for the respondent-plaintiff (though in the context of the plaintiff having to pay Rs.60,000/- with bank interest to the appellant, upon vacation of the suit property), however the factum of a lease having existed, has not been denied even in the written statement of the appellant-defendant.

Though the word “lease” is not written anywhere, either in the plaint or in the written statement, however, in terms of Section 105 of the Act of 1882, the transaction of the transfer of the right to enjoy the suit property, for a certain time, in consideration of a price paid or promised, is a lease as per the definition contained in the said provision.

Similarly, the transferor of the property is the lessor and the transferee is the lessee, and the money to be rendered as the price/premium for such transfer, for enjoyment of the property for the time that it is so enjoyed by the transferee / lessee, is defined as rent, in Section 105 itself.

Hence, with the property eventually having been admitted to be not within the purview of the East Punjab Urban (Rent Restriction) Act 1949, it is to be treated to be leased out by the respondent to the appellant, in terms of the Transfer of Property Act itself.

That being so, the plaintiff was within his right to terminate the lease, either in terms of any contract pertaining to the lease, or, in the absence of any written contract, then at any time after giving a notice of 15 days to the defendant-lessee, i.e. the appellant herein.

35. However, before going on to discuss the validity of the notice, Ex. P-3, it would need to be seen as to whether the lease was one deemed to be from month to month, or would be governed by the agreement Ex.D1, and whether the agreement was compulsorily registrable or not.

This would be more so for the reason that the said document (Ex. D-1), does not fix any specific time period of the lease, but envisages two situations; (a) that if the lease is to be terminated by the lessee (present appellant), he would do so by giving an advance notice of two months to the owner (lessor), and (b) whenever the premises is vacated (with no stipulation that it could only be at the instance of the lessee), the amount of Rs.60,000/- paid by the lessee to the lessor by way of security, would be returned with bank interest thereupon.

However, the instrument also speaks of an increase in the rent by 3%, after a period of 15 years. Therefore, in the opinion of this Court,

even with no specific period of the lease given in the instrument, the recital of an increase in rent after 15 years would have to be interpreted to imply that the lease was definitely intended to continue for more than one year, unless it was terminated earlier by the lessee.

36. Thus it is first necessary to examine as to whether the said instrument, propounded by the appellant-defendant, was admissible in evidence at all or not, the lease created thereby, being for a period of more than one year.

Section 107 of the T.P. Act already having been reproduced earlier in this judgment, a perusal thereof shows that any instrument by which a lease of immovable property is created, either from year to year, or for any term exceeding one year, or by which a yearly rent is reserved, must only be a registered instrument.

Any other lease may either be by way of a registered instrument or even by oral agreement accompanied by delivery of possession. The proviso to Section 107 does stipulate that the State Government may by notification in the official gazette direct that leases of immovable property other than leases from year to year or even for any term exceeding one year or reserving an yearly rent, may be made by unregistered instrument, or orally, even without delivery of possession. However, no notification issued by the Government of Punjab has been brought to the notice of this Court by learned counsel for the appellant, by which any lease as is required to be registered under Section 107, is exempted from being so registered.

Admittedly, Ex.D1 is not a registered instrument though the language thereof, stipulating an increase in rent of 3% after 15 years, would, in the opinion of this Court, make the lease in question to be one executed

for a term exceeding one year, as already held.

Therefore, once it is accepted that the lease between the parties is a lease which is either from year to year, or for any term exceeding one year, the document, Ex. D-1, was to be compulsorily registered.

37. Though this Court may otherwise have no doubt that the said instrument was actually executed between the appellant and Joginder Singh, i.e. the grand father of the plaintiff, Harminderjit Singh, with even one of the witnesses thereto (Nirmal Chand) having testified to that effect as DW2, yet, the instrument being compulsorily registrable as per Section 107 aforesaid and it not having been registered, it cannot be held to be admissible in evidence, in view of Section 49 of the Registration Act 1908, which reads as follows:-

“49. Effect of non-registration of documents required to be registered.—No document required by section 17 [or by any provision of the Transfer of Property Act, 1882], to be registered shall—

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power,

unless it has been registered:

[“Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of any collateral transaction not required to be effected by registered instrument.”]

Hence, once an instrument is compulsorily required to be

registered under the provisions of the Transfer of Property Act and it is not

so registered, it cannot be received as evidence of any transaction affecting such property, except in relation to a suit seeking specific performance.

38. As regards the judgment of the Supreme Court in *Satish Kumars' case (supra)*, cited by Mr. Sharma in that context, the said judgment holds to the effect that a lease deed executed from month to month, reduced into writing, with possession delivered to a tenant, need not be registered, but would still be admissible in evidence, it not being a compulsorily registrable instrument.

Hence, in the present case, in view of it having been held by this Court that Ex. D-1 was a compulsorily registrable instrument in terms of Section 107 of the Act of 1882, that judgment is not applicable.

39. The upshot of the aforesaid discussion is that with Ex.D1 having been denied by the plaintiff altogether in his replication, but with the lease otherwise not denied in any manner by the appellant-defendant, a lease in respect of the suit property, i.e. the shop in question, has to be accepted to have been entered into by way of an oral agreement, accompanied with the possession of the suit property delivered to the appellant, and therefore, in terms of Section 106 of the Transfer of Property Act, it not being agricultural or industrial property, the lease has to be treated to be one from month to month, terminable on the part of either the lessor or the lessee, by giving 15 days notice by the person wishing to terminate it.

40. Coming therefore to the other contention of Mr.B.D. Sharma, that the notice itself, Ex.P3, has not been validly issued.

First, it is to be noticed that though learned counsel had initially argued that no such notice was received, however with the appellant-defendants' admission to the receipt of the notice and his having replied to

it, as contained in the written statement, obviously issuance and receipt thereof need not to be gone into any further.

41. As regards the contention that it was not a valid notice because it did not refer to the terms of the agreement, Ex.D1, pertaining to the security of Rs.60,000/- to be repaid at the time of the vacation of the premises, this Court already having held that Ex.D1 (even though otherwise possibly believable), cannot be admitted in evidence, it not being a registered document, the terms and conditions thereof also cannot be looked at and therefore, at least on that score, the notice cannot be held to be defective.

The other contention, on the notice being defective because the learned Advocate who had issued it (Sh.Anil Kalia), was not examined, that also is an argument without any basis, once the appellant-defendant had admitted receipt of the notice in his written statement itself, as also in his examination-in-chief and in his cross-examination, (the examination-in-chief being by way of his affidavit, Ex.DW1/A).

In fact, he even admitted to having replied to the said notice dated 29.05.2004, on 10.06.2004.

Consequently, that argument of learned counsel for the appellant also has to be rejected.

42. Coming to the issue of whether the suit of the plaintiff can be held to have been proved by way of the testimony of his attorney, PW2 Harnam Singh, with the plaintiff himself not having stepped into the witness box, it first needs to be stated that with the lease itself not being in doubt in any case, it having been admitted categorically at all stages by the appellant-defendant, the question then would only be as to whether the respondent-

plaintiff is entitled to recovery of rent for the period from July, 2001 till May, 2004, as also prayed for by him in his plaint. Because as regards the termination of the lease itself, it having been held to have been one from month to month, with the notice of termination having been accepted to have been received by the appellant himself, the right of the lessor (respondent-plaintiff) to terminate it in terms of Section 106, has to be upheld.

43. Even in respect of the testimony of PW-2 being admissible, in view of the fact that the appellant himself admitted in paragraph 5 of the preliminary objections of his written statement that the attorneys of the plaintiff, i.e. his mother Rajwinder Kaur and Harnam Singh, had been receiving rent upto May, 2004 and he had repeated the same contention in his affidavit by way of examination-in-chief, very obviously PW2 Harnam Singh was aware of the factum of the lease being existent between the parties even before the suit was instituted, and therefore simply because he was appointed as the attorney for the plaintiff (who is shown to be a resident of Canada even in the memo of parties), only during the pendency of the suit, that would not change his personal knowledge of the facts of the case.

Though there would be no reason to doubt that such an attorney also had knowledge of the notice issued for termination of the lease, however, that knowledge by the attorney loses significance once the notice is admitted to have been received and even replied to, by the appellant-defendant himself.

Consequently, I see no reason to hold that the plaintiff failed to prove his case by not stepping into the witness box himself but by appointing an attorney to testify on his behalf, with such attorney having

knowledge of the factum of the lease qua the suit property in question, as also the said attorney admittedly being one of the persons to whom the appellant contended that he had even paid rent in the absence of the plaintiff and his mother Rajwinder Kaur (i.e. the other attorney of the plaintiff).

Hence, the judgment of the Supreme Court in in *Man Kaur (dead) by LRs v. Hartar Singh Sangha (2010) 10 SCC 512*, would be applicable in the present case in favour of the respondent-plaintiff, wherein it has been held that an attorney who has no knowledge of the facts of any particular aspect in respect of which he is testifying cannot be held to have sworn an acceptable testimony, but one who had personal knowledge can testify in the shoes of his principal (the plaintiff in this case).

44. In view of the entire discussion hereinabove, I find no error in the judgments of the Courts below as regards the decrees issued by those Courts holding the respondent-plaintiff entitled to possession of the suit property, he having terminated the lease in favour of the appellant by way of a valid notice issued under Section 106 of the Transfer of Property Act, more than 15 days before actual termination of the lease, as per the dates given in the notice itself, i.e. the notice being dated 29.05.2004 and the date of the termination of the lease being 15.06.2004, by which date the appellant had been directed to hand over the vacant possession of the suit property.

45. The first question of law, framed by this Court in paragraph 21 hereinabove, as an amalgamation of question (a), (b) and (c) framed by learned counsel for the appellant, is therefore answered to the effect that the learned courts below made no error in accepting the testimony of PW-2/3, Harnam Singh, as the testimony of the plaintiff himself, Harnam Singh

having complete knowledge of the facts of the case, as were averred by the plaintiff in his suit.

46. Coming then to the issue of whether the respondent-plaintiff is also entitled to recovery of arrears of rent as awarded by the learned Courts below.

In this regard, it needs to be said that once this Court has held that Ex.D1, i.e. the lease agreement dated 30.05.1994, is not admissible in evidence, then obviously the rate of rent fixed in that agreement can also not be relied upon on the issue of recovery of rent. However, in view of the fact that the plaintiff had claimed that the rent was Rs.825/- per month and that had been disbelieved by the Courts below on the ground that the aforesaid rent agreement stipulated a rent of Rs.700/- per month for 15 years and the appellant-defendant in any case is not refuting that rent was payable @ Rs.700/- per month by him to the respondent-plaintiff, I see no reason to reverse that finding of the Courts below, even while rejecting Ex.D1 on the ground that it is not admissible in evidence though otherwise it may have actually been executed between the parties. In other words, even *de hors* the said rent agreement, with the appellant himself admitting a rent of Rs.700/- per month, there would be no ground to hold otherwise.

47. That having been said, the next question is as to whether the appellants' contention can be accepted that rent had actually been paid by him even for the period in question, i.e. July 2001 to May 2004, but with no rent receipts issued by either the plaintiff or his mother Rajwinder Kaur, or his attorney, i.e. PW2 Harnam Singh.

The Courts below have held that in the absence of any substantive evidence led with regard to such payment of rent for the said

period, other than the oral evidence on both sides in terms of the pleadings of each party, it cannot be accepted that such rent was paid, especially with the appellant even not having produced the account books that were allegedly being maintained by him in respect of rent being paid to the respondent-plaintiff/his attorneys.

Undoubtedly, the appellant filed an application under Order 41 Rule 27 CPC before the learned lower appellate Court, wishing to place on record his income tax returns for the period in question, to try and show that he had actually paid the rent to the plaintiff for the said period.

In the opinion of this Court that application was also correctly dismissed by the first appellate Court, in view of the fact that despite a large number of opportunities having been granted by the trial Court itself, to the appellant, to conclude his evidence, including many “last opportunities”, then at the appellate stage it would have to be taken (as has been taken by that Court), that the application for additional evidence was only in order to try and 'linger on' the proceedings.

48. Otherwise also, even if the income tax returns had been admitted as additional evidence by the lower appellate Court, in my opinion that would not still be conclusive proof of actual payment of rent, with no bank statement even attempted to be led by way of evidence, to show that money had actually been transferred by the appellant to the respondents-plaintiffs' accounts, or that he had paid cash on receipt in each month. Admittedly there being no receipts and no bank statements even attempted to be led by way of evidence before this Court, in the application now pending before this Court also for leading additional evidence in the form of income tax returns for the period 1996-97 to 2005-06, it has to be held that

there is no substantive evidence available with the appellant to prove payment of rent from July 2001 to May 2004.

A perusal of the aforesaid returns, annexed as Annexure P4 with the aforesaid application filed before this Court along with appeal itself, does show that along with the returns for the years 1996-97 till 2005-06, the appellant has been annexing his trading and profit and loss accounts, in which, for the years 2004-05 and 2005-06, no rent has been shown to be paid, but in the previous years, amounts ranging from Rs.8400/- to Rs.10,200/- have been shown to be paid, with the 3rd figure in between these two figures being Rs.9600/- in different years. Very possibly the trading accounts would otherwise be believable, but for the fact that no books in support thereof have been produced, or even attempted to be produced, at any stage before this court, or the Courts below, and as already stated, there are in any case no rent receipts for the said period.

Consequently, neither does this Court find any error in the order of the learned lower appellate Court, dismissing the application filed before it under Order 41, Rule 27 CPC, nor is there any ground to accept the application (CM 13086-C-2009) filed under the same provision before this Court. Hence, the said application before this Court is hereby dismissed.

49. Therefore, payment of arrears of rent for the period claimed by the respondent-plaintiff, i.e. July 2001 till May 2004, is held to be payable by the appellant-plaintiff, along with subsequent payment of the same rent, i.e. @ Rs.700/- per month, during the pendency of this appeal, as had already been ordered while issuing notice in the appeal itself on 19.04.2010, as already noticed.

Thus, if the aforesaid rent as directed by this Court, along with

the arrears thereof as directed by the Courts below, has not been paid despite the aforesaid order of this Court, it shall now be payable by the appellant, along with interest @ 6% per annum thereupon; but if it has already been paid, of course nothing further then would remain to be paid other than continued payment of rent @ Rs.700/- per month till the actual vacation of the suit property, with vacant possession being handed over to the respondent-plaintiff.

50. It is considered necessary to again observe at this stage, that though otherwise this Court is not inclined to disbelieve the fact that Rs.60,000/- must have been paid to the grand father of the respondent-plaintiff when the shop was actually taken on lease by the appellant-defendant, but with no specific receipt to that effect issued on the date of the agreement, led by way of evidence, with regard to such payment having been received, that contention also cannot be accepted, the agreement Ex.D1 being the only writing in respect of such payment.

It needs to be noticed here that receipts written in 'Urdu', seen to be signed in English by Joginder Singh, grand-father of the plaintiff, for the period from 10.12.1995 till 10.05.1996, have been led by way of evidence by the appellant as Exs.D2 to D13. However, there is no receipt of rent after that period, as was exhibited before the Courts below.

51. Consequently, the question of law at serial no.(d) reproduced in paragraph 20 hereinabove, is answered to the effect that the Courts below have correctly drawn an adverse inference against the appellant-defendant for not producing the account with regard to payment of rent to the respondent-plaintiff.

Similarly, the question of law at serial no.(e) is also answered

by holding that the first appellate Court did not err in dismissing the application seeking to lead additional evidence to produce the income tax returns for the year 1996-97 to 2005-06, both, on account of the fact that such evidence was led at an extremely belated stage, with more than ample opportunity given to the appellant by the trial Court itself; and further because simple production of the income tax returns, without any supporting receipts or book of accounts accepted by the income tax authorities, would in no way prove the actual payment of rent for the period in question.

As regards the questions at serial no.(f) and (g), with regard to whether the payment of Rs.60,000/- as security has correctly not been held to be adjustable by the Courts below against the arrears of rent awarded to the respondent-plaintiff, it is held that the learned Courts below actually erred in accepting the rent agreement, Ex.D1, as admissible in evidence, as per Section 49 of the Registration Act, 1908, despite it not being a registered document that was compulsorily registrable in terms of Section 107 of the Transfer of Property Act, 1882. Hence, the aforesaid amount of Rs.60,000/- cannot be held to be adjustable against the arrears of rent payable by the appellant to the respondent-plaintiff.

Those questions are thus also answered against the appellant.

[It needs to be noticed here that the learned Civil Judge did not discuss the issue of the aforesaid amount of Rs. 60,000/- to be set off or not against the arrears of rent payable by the appellant-defendant and the learned first appellate Court, though referred to in paragraph 20 of its judgment, however did not actually decide it one way or the other].

The question framed as the first question of law by this Court in

paragraph 21, as an amalgamation of the questions framed at serial nos. (a) (b) and (c), already having been answered in paragraph 44 hereinabove,

again in favour of the respondent-plaintiff, this appeal has to be dismissed.

52. Consequently, the suit of the plaintiff having been correctly decreed in his favour by the courts below, in view of what has been held hereinabove, this appeal is dismissed, but with no order made as to costs.

(AMOL RATTAN SINGH)
JUDGE

June 16, 2017.

Davinder Kumar

Whether speaking / reasoned	Yes
Whether reportable	Yes