

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

RSA No. 5077 of 2017 (O&M)

DATE OF DECISION : 12.12.2017

Late Rajinder Kumar through his LRs

.... APPELLANTS

Versus

Daya Rani

.... RESPONDENT

CORAM :- HON'BLE MR. JUSTICE AVNEESH JHINGAN

Present : Mr. Arun Luthra, Advocate,
for the appellants.

* * *

AVNEESH JHINGAN, J.

The present appeal is at the behest of the legal representatives of the deceased defendant being aggrieved of the concurrent judgments and decrees passed by the learned courts below, whereby suit for ejectment was decreed.

For the sake of convenience, the parties are being referred to as per their original position in the civil suit.

The plaintiff filed a suit for ejectment of the defendant from the premises mentioned in para 1 of the plaint. A prayer was made for a decree for recovery of use and occupation charges and mesne profits at the market rate.

The facts, as mentioned in the plaint, are that the plaintiff purchased the plot, detailed in the suit, vide registered sale deed No. 3823/1 dated 10.10.2003 from Radhe Krishan son of Gurdial Singh resident of New

Anaj Mandi, Kaithal. After purchasing the said plot, construction was raised thereon. After constructing the house, the plaintiff gave the house on rent at the rate of ₹ 1,500/- per month to the defendant, besides house tax, electricity and water charges. It was further averred that there was to be 25% increase in the rent after every three years. The tenancy was stated to be oral and it was assured by the defendant that he will execute the rent note later, but the same was not executed after taking possession of the house. The defendant paid rent upto 31.12.2006, but from 01.01.2007, he failed to pay rent and electricity and water charges etc. It was alleged that notice was issued to the defendant terminating the tenancy. A suit for ejectment was filed, but the same was dismissed vide judgment and decree dated 02.03.2013 on the ground that it was not proved that notice was served on the defendant. After dismissal of the suit, a fresh notice was sent to the defendant through post on 16.04.2013 vide postal receipt No. A RH 1249655435 IN. It was further alleged that the said notice was served upon the defendant by hand also, but the defendant did not give any acknowledgment. It was averred that since the tenancy has been terminated, the defendant is liable to pay the market rent, prevalent in the locality. When the defendant refused to hand over the vacant possession of the house, the suit was filed.

On notice, the defendant filed written statement raising preliminary objections, including maintainability of the suit and the suit being barred by principle of res judicata. On merits, it was averred that the

plaintiff had not purchased vacant land vide sale deed dated 10.10.2013. It was alleged that construction of the house is more than 10 years old. The rate of rent was denied and it was denied that there was any clause for enhancement of rent. It was denied that any notice was served upon the defendant.

Replication was filed by the plaintiff reiterating the averments made in the plaint.

The learned trial court framed five issues.

In order to prove the claim made in the suit, the plaintiff herself appeared as PW.1. Vikas Kumar, Clerk of Shri Vaibhav Nirwani, Advocate, District Courts, Kaithal; and Ishwar Chand Gupta, Deed Writer, appeared as PW.2 and PW.3, respectively. Ram Kumar, Lamberdar, deposed as PW.4. Sale deeds, notice under the Transfer of Property Act, postal receipt, and certified copies of the judgment and decree were exhibited as Ex.P1 to Ex.P6.

The wife of the deceased defendant, in order to rebut the claim of the plaintiff, herself appeared as DW.1 and tendered her affidavit.

The learned trial court, after appreciating the facts and considering the evidence produced, held that construction of the suit property was less than 10 years old. It was further held that the legal notice was issued and served upon the defendant. It was also held that the principle of res judicata will not apply in the present case. It was observed that it has not been proved that there would be any enhancement of rent and further that the defendants,

having paid a sum of ₹ 3,700/- in court, are not in arrears of rent any more.

The net result was that the suit was decreed vide judgment and decree dated 29.09.2016.

Being aggrieved of the said judgment and decree, an appeal was filed by the legal heirs of the defendants. The learned Additional District Judge, Kaithal, vide judgment and decree dated 30.08.2017 dismissed the appeal.

Hence, the Regular Second Appeal.

Learned counsel for the defendants argued that the suit was not maintainable, as the construction of the house was more than 10 years old. He contended that no notice was served upon the defendant. Lastly, he argued that the suit was barred, as principle of res judicata was applicable.

No other contention was raised.

In the appeal, five questions of law have been framed, but the learned counsel, instead of addressing arguments on these questions, has only raised the aforesaid contentions.

The contentions raised by learned counsel for the defendants have no substance and are liable to be rejected.

In order to decide the issue of maintainability of the suit before the civil court, the basic issue to be decided was that whether on the day of filing the suit, the construction of house was less than ten years old or not. The plaintiff was able to prove the sale deed Ex.P2 dated 30.10.2003. The said sale deed was duly proved by the deposition of PW.3 Ishwar Chand Gupta, Deed Writer and PW.4 Ram Kumar, Lamberdar, who witnessed the

sale deed. From the sale deed, apart from the title, it has been proved that a vacant plot was purchased by the plaintiff on 10.10.2003. It is pertinent to note that the suit was instituted on 04.07.2013. Even if for the sake of arguments, it is assumed that the construction was completed within few weeks, in that case also, it has been proved that the construction was less than 10 years old on the day of filing of the suit.

The notice given to the defendant terminating the tenancy was exhibited and the same was proved by the deposition of PW.2 Vikas Kumar, Clerk of Shri Vaibhav Nirwani, Advocate. He deposed that the said notice was not received back undelivered. His deposition proved the notice Ex.P3. The postal receipt was exhibited and same was dated 16.04.2013. From the exhibited documents and deposition of PW.2 Vikas Kumar, it was proved that the legal notice was issued and was served upon the defendant. In absence of any evidence produced by the defendant to prove that he had not received the registered post, in law it is presumed that the same was delivered, as it was not received back undelivered.

It has not been disputed that the earlier suit filed by the plaintiff was dismissed merely on the ground that the plaintiff was not able to prove that the notice was issued and served upon the defendant. The suit was not decided on merits and was dismissed on technical ground only. In such circumstances, the principle of res judicata will not be applicable. Reliance in this regard is placed upon a decision of the Hon'ble Apex Court in **Sheodan Singh Vs. Daryao Kunwar, AIR 1966 SC 1332**, wherein it was held thus :-

14. ... this brings us to the main point that has been urged in these appeals, namely, that the High Court had not heard and finally decided the appeals arising out of suits Nos. 77 and 91. One of the appeals was dismissed on the ground that it was filed beyond the period of limitation while the other appeal was dismissed on the ground that the appellant therein had not taken steps to print the records. It is therefore urged that the two appeals arising out of suits Nos. 77 and 91 had not been heard and finally decided by the High Court, and so the condition that the former suit must have been heard and finally decided was not satisfied in the present case. Reliance in this connection is placed on the well settled principle that in order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the trial Court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of non-joinder of parties or misjoinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letter of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional court fee on a plaint

which was undervalued or for want of cause of action or on the ground that is the premature and the dismissal is confirmed in appeal (if any) the decision not being on the merits would not be res judicata in a subsequent suit.”

There is another angle to this issue. The present proceedings are regarding the ejectment. On issuing fresh legal notice, there was a fresh cause of action. For this reason also, the principle of res judicata will not be applicable in this case.

For the above mentioned reasons, the issues raised by learned counsel for the defendants in the present appeal regarding maintainability of the suit and suit being barred because of res judicata and that no notice was served upon the defendant, cannot be accepted.

Considering the facts and circumstances of the case noted above, coupled with the reasons afore-mentioned, this Court is of the considered view that the present appeal is bereft of merit and without any substance, thus it must fail.

Resultantly, the instant second appeal is dismissed, however, with no order as to costs.

December 12, 2017
ndj

(AVNEESH JHINGAN)
JUDGE

Whether speaking/reasoned

Yes

Whether Reportable

Yes