

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on 19-8-2019
Judgment delivered on 24-10-2019

FA No. 39 of 2009

1. Manoj Readymade Stores, through its proprietor Gopiram Agrawal, S/o- Kundanlal Agrawal, Aged about- 60 years, Occupation- Business, R/o- Kotra Road, Sattigudi Chowk Campus, Raigarh (C.G.)
2. Gopiram Agrawal, S/o- Kundanlal Agrawal, Aged about- 60 years, Sole Proprietor Manoj Ready-made Stores, Opposite Town Hall, Raigarh (C.G.)

---- Appellants/defendants

Versus

1. Vivek Agrawal, S/o- Parmanand Agrawal, Aged about- 28 years.
2. Ashish Agrawal. S/o- Parmanand Agrawal, Aged about- 22 years.
3. Parmanand Agrawal, S/o- Late Shri Biharilal Agrawal, Aged about – 51 years, Occupation- Business.
All R/o Subhash Chowk, Raigarh, Tahsil & District- Raigarh (C.G.)

---- Respondents/plaintiffs

For appellants	:	Mr. B.D. Guru and Mr. Rajendra Tripathi, Advocates.
For respondents	:	Mr. Ravish Agrawal, Sr. Advocate with Mr. Ashish Shrivastava , Advocate.

SB: Hon'ble Shri Justice Ram Prasanna Sharma

CAV JUDGMENT

1. Heard on application filed under Order 41 Rule 27 read with Section 151 of the Code of Civil Procedure, 1908.
2. By this application, the appellants seek to file copy of the orders passed on 25-7-2014 and 26-9-2014 by the Hon'ble Supreme Court in SLP preferred against the order passed in Writ Petition No. 1358 of 2005 and to bring the aforesaid documents on record for adjudication of the instant case.
3. During the pendency of the instant First Appeal, this court allowed Writ Petition No.1358 of 2005 filed by respondents No.1 and 2 against which the appellants filed SLP in Supreme Court wherein orders have been passed.
4. To decide the application Order 41 Rule 27 of the Code of Civil Procedure may be read as under:

“The parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary, in the Appellate Court. But if -

- (a) The Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
- (aa) The party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within the knowledge of could not,

after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

- (b) The Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate court may allow such evidence or document to be produced, or witness to be examined.

5. It is not the business of the appellate court to supplement the evidence adduced by one party or the other in the lower court. Hence, in the absence of satisfactory reasons for the non production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this Rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal.

6. The two tests for admissibility of additional evidence, is whether the appellate court is able to pronounce judgment on the material before it, without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examine

the evidence, as it stands the court comes to the conclusion that some inherent lacuna or defects becomes apparent to the court. It is only for removing a lacuna in the evidence, that the appellate court is empowered to admit additional evidence. When a party failed to discharge its onus before the trial court, he is not entitled to a fresh opportunity to produce evidence.

7. The trial court has provided full opportunity to adduce evidence to the appellant. It is not a case that this Court is not able to pronounce judgment without taking into consideration the additional evidence sought to be adduced. Accordingly, the application is liable to be and is hereby dismissed.

8. This appeal is preferred under Section 96 of the Code of Civil Procedure, 1908 against the judgment/decreed dated 31-1-2009 passed by IVth Additional District Judge, (FTC), Raigarh (CG) in Civil Suit No. 7-A/2004 wherein the said court decreed the suit filed by the respondent/plaintiff-landlord against the appellant/tenant for eviction of shop situated at old Ward No.15, House No.30/2 area 300 sq. ft., mentioned as “क, ख, ग, घ” in Schedule-A of the plaint and for payment of arrears of rent to the tune of Rs.1800/- per month.

9. Respondents/plaintiffs preferred a civil suit for eviction from shop and arrears of rent. It is pleaded that the appellants have obtained the shop on rent from Smt. Durga Devi who is grand-mother

of respondents No. 1 and 2 and mother of respondent No.3 for carrying on business of ready-made garments on monthly rent of Rs.1800/-. Appellants/defendants made payment of rent till December 2001, however, they stopped making payment from January, 2002. In the meanwhile, Durga Devi died on 22-12-2000 and before her death she executed a will on 14-7-1999 bequeathing the suit premises and other immovable properties to her grand sons i.e., respondents/plaintiffs No. 1 and 2. Respondents No.1 and 2 along with respondent No.3 owned and possessed the property of Durga Devi , as such appellants are tenants. It is stated in the plaint that shop is bonafidely required for carrying on business of ready-made garments for respondents No. 1 and 2 and for that no reasonably suitable accommodation is available in Raigarh town. The other ground for eviction was that the appellants have denied ownership of respondents in the premises which is adversely affecting their interest. The appellants did not pay the rent that is why a legal notice dated 18-7-2003 was served to them but in spite of notice rent was not paid, therefore, they should be evicted from the premises in question. It is further pleaded on behalf of the respondent that the shop is required bona fide for making substantial alteration and that cannot be carried out without accommodation being vacated. As per the appellants the land in which shop is constructed is granted to late Durga Devi on lease and period of lease expired in the year 1969. Though it is

renewed on 8-6-2004, against which appellants submitted a representation before the Department of Revenue, Government of Chhattisgarh. Representation of the appellants was accepted and said plot has been declared as open Nazul land. Though it is admitted on behalf of the appellants that rent was Rs.800/- per month, but respondent No.3 refused to accept the rent from January 2002 by demanding higher rent. The bonafide requirement for opening shop by the respondent is not established because they are in possession of other shops. Again, no re-construction was required for the said shop, therefore, ground for vacation on this count is also not available to them.

10. Learned counsel for the appellants would submit as under:

- i) Appellants have not denied title of landlord, therefore, ground under Section 12(1)(c) of the Chhattisgarh Accommodation Control Act, 1961 is not available to the respondents.
- ii) Respondent are having number of shops in their possession, therefore, ground of bona fide requirement is also not available to them.

- iii) In passing the decree under Section 12(1) (h) of the Act, 1961, the trial court has not given option to the appellants/tenants as per Section 18 of the said Act for recovery of possession.
- iv) The State Government has declared the said plot as open nazul land, therefore, respondents are no longer owners of the said property.
- v) Writ Petition is filed before this court by the respondents which is WP.No. 1358 of 2005 in which this court passed interim order on 8-4-2005 that no third party interest shall be created with respect to land in dispute which can be inferred that order of the Government has not been stayed by this court.
- vi) The trial court failed to appreciate that bona fide dispute about title is not a ground for eviction under Section 12 (1) (c) of the Act, 1961.

- vii) The respondent have not property adduced any evidence that suit premises requires reconstruction which cannot be made without being vacated.
- viii) The finding of the trial court that rent of suit premises Rs.1800/- per month is perverse because same is not established by evidence.

11. On the other hand, learned counsel for the respondents would submit as under:

- i) In the present case title is denied as per Ex. D8 and D/25 much prior to the filing of the suit and title is also denied in the written statement and in deposition which is inconsistent with the purpose for which appellant was admitted to tenancy and it is likely to affect adversely and substantially the interest of the landlord.
- ii) The appellants have not paid arrears of rent regularly after filing Sd/-of the suit

as per provisions of Section 13(1) of the Act, 1961. Sections 13(1) and 13(2) of the Act, 1961 does not confer the power to the court to condone defaults in payment of rent after the suit is filed.

- lii) From the evidence of respondent witnesses it is clear that they have no alternate suitable accommodation for opening of shop and it is settled principles of law that the landlord is best judge for selecting premises which is suitable for him.
- iv) As per evidence on record, it is clear that tenancy was started in the year 1969 and no major repair work was done for long, therefore, repair work can only be taken after vacating the premises in question.

Reliance has been placed in the matters of **Banarsi and others vs. Ram Phal, reported in 2003(9) SCC 606, Ashok Kumar Mishra and others vs.**

**Goverdhan Bhai (died) through LRs
and others, 2018 (12) SCC 533, S.S.
Harischandra Jain and others vs.
Indersingh Bedi , AIR 1977 MP 199,
Shiv Sarup Gupta vs. Mahesh Chand
Gupta, 1999 (6) SCC 222, Damodar
Sharma and others vs. Nandram
Deviram, 1960 MPLJ 925, Namamal vs.
Prakash Chand Jain, 2009(1) MPLJ
313, Deena Nath vs. Pooranlal, (2001)
5 SCC 705 and Sheela and others vs.
Firm Prahlad Rai Prem Prakash (2002)
3 SCC 375.**

12. I have heard learned counsel for the parties and perused the record of the court below including the judgment and decree.

13. The first question for consideration of this court is whether the ground under Section 12(1)(a) of the Act, 1961 is available to the respondents/plaintiffs. The appellants have admitted that they are tenants of late Durga Devi for Rs.800/- per month. The only issue between the parties is whether the rent is increased to Rs.1800/- per month. Respondents filed rent receipts Ex.P/4, P/5 and P/6 which shows that rent for January 1996 to December 1998 was paid @

Rs.1300/- per month and as per documents Ex.P/7, P/8 and P/9 the rent was paid @ Rs.1800/- per month from January, 1999 to December, 2001. Though it is denied by the appellants witnesses DW/1 Pramod Agrawal, but DW/2 Gopiram Agrawal admitted (paa 7) that the rent which was paid is entered in his cash account and regular account, but that cash account and regular account were not produced before the trial court. Again, he admitted (para 8) that he filed income tax return in which he mentioned the amount of rent but no copy of income tax return was produced before the trial court. Cash account, regular account and income tax return which were maintained by the appellants side were material evidence, therefore, it is presumed as per Section 114 (g) of the Evidence Act, 1872 that if those documents which could be produced and not produced were unfavourable to the appellant who withholds it.

14. Looking to the evidence it is established that monthly rent was Rs.1800/- from 1-1-1999. Notice was issued to the appellants for payment of arrears of rent as per Ex.P/11 on 18-7-2003 through speed post which was received by the appellants as per Ex.P/14 and P/15, but arrears were not paid. After filing of the suit rent was not deposited. As per Section 13(1) of the Act, 1961, tenant is required to deposit arrears of rent within one month from service of notice. In the present case, from the order sheet dated 20-9-2004 the appellants were represented through counsel but not deposited the rent within

one month. As per record, it is deposited on 21-2-2005 i.e., beyond one month.

15. The next question for consideration of this court is whether the court can condone the delay under Section 13 of the Act, 1961. It is held by Hon'ble Apex Court in the matter of Ashok Kumar Mishra (supra) reported in 2018 (12) SCC 533 that Section 13 of the Act, 1961 does not confer the power on the court to condone the defaults in payment of rent after the suit is filed. In the present case, rent which is not paid within one month of the notice of the suit is not condonable and again the ground under Section 12(1)(a) of the Act, may be mentioned as under:

“12. Restriction on eviction of tenants. -

(1) Notwithstanding anything to the contrary contained in any other law or contract, no suit shall be filed in any civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds only, namely :

(a) that the tenant has neither paid nor tendered the whole of the arrears of the rent legally recoverable from him within

two months of the date on which a notice of demand for the arrears of rent has been served on him by the landlord in the prescribed manner”.

16. In the present case, notice was issued to respondents in the month of July, 2003 and rent was not paid within two months of the notice, therefore, the ground under Section 12(1)(a) of the Act, 1961 is available against appellants for eviction.

17. It is contended on behalf of the appellants that as per order of the Government, respondents are not owners or landlords of the premises in question. In view of this court, argument advanced on behalf of the appellants is without substance. It is a case between landlord and tenant. No tenant of immovable property or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at beginning of the tenancy a title to such immovable property as per Section 116 of the Indian Evidence Act, 1872. Admittedly, appellants entered into the structure which is constructed by late Durga Devi and her sister and open land is never rented to appellants. The rent is paid only for use of structure. As per evidence, it is clear that the appellants filed an application for settlement of land in their name on 8-9-2003 as per Ex.P/25 which shows that the act of the appellants

was not bona fide. In the said land super structure is created by landlord and any action for the land in question can be taken by the authorities, but it is clear that authorities have not taken any action against the respondents, therefore, relationship between appellants and respondents is intact as tenant and landlord. Possession of the appellants is permissive possession on payment of rent which cannot be termed as adverse as stated by the appellants. From the evidence it is clear that Durga Devi executed a will in favour of respondents No. 1 and 2 for her whole property and respondent No.3 being her son is landlord by operation of law, therefore, the trial court is right in holding that denying the title of respondent and again filling an application for mutation of name of the appellants in the land in question on the ground of adverse possession is an act inconsistent with the purpose for which appellants have been admitted to tenancy which is likely to affect adversely and substantially the interest of respondents, therefore, ground under Section 12(1)(c) of the Act, 1961 is perfect in the present case.

18. The next question for consideration of this court is whether the shop in question is required bona fide for opening shop by adult member of family of respondents. From the evidence of Vivek Agrawal (PW/1) it is clear that he and his brother Ashish Agrawal are adult members of the family and they want to open ready made shop of garments for which they have no other suitable premises. Though

it is stated by Pramod Agrawal DW/1 and Gopiram Agrawal DW/2 that appellants are having other suitable accommodation, but from the entire evidence it is clear that premises in question is centrally located in the city which is most suitable place while the other premises are in old Sadar Bazar which is distant place and when each of the adult member is willing to run his independent shop, it is not the duty of the court to ration the need of the appellants. It is settled principles of law that landlord's option shall prevail for deciding the issue as to which shop is suitable for him.

19. On an overall assessment of the evidence it can be inferred that respondents have established their bona fide requirement. The trial court recorded affirmative finding and this court has no reason to record a contrary finding.

20. The other point for consideration of this court is whether the shop is required for alteration which cannot be carried out accommodation being vacated. Appellant Gopiram Agrawal (DW/2) admitted that he is tenant since 1969. Respondents side adduced evidence that shop in question is in dilapidated condition and its vacation is required for alteration. Looking to the old construction of shop it can be inferred that alteration is required for preventing any Manoj Ready-made stores and that cannot be carried out without being vacated.

21. Learned counsel for the respondents would further submit that the trial court has not passed any order under Section 18 of the Act, 1961 for recovery of possession. In view of this court, recovery of possession is available when suit premises vacated on one ground of Section 12 (1)(h) of the Act, 1961. In the present case, ground under Sections 12(1)(a), 12 (1)(c), 12(1)(f) and 12(1)(h) of the Act, 1961 is available to the respondents and therefore, no order for recovery of possession can be passed in the present case.

22. It is further contended on behalf of the appellants that in revenue record, the land is shown to be used for religious purpose, therefore, it cannot be vacated for the ground as mentioned above.

23. In the present case, appellants themselves were running a ready-made garments in the said shop and religious purpose can be served out of income of premise only when rent is paid regularly, therefore, this argument must fail.

24. On an over-all assessment of the entire oral and documentary evidence, it is not a case where decree passed by the trial court is liable to be interfered with while invoking jurisdiction of the appeal. Argument advanced on behalf of the appellants is not liable to be sustained.

25. Accordingly, decree is passed in favour of respondents and against the appellant s as under:

- (i) The appeal is dismissed with cost.
- (ii) Appellants to bear the cost of respondents through out.
- (iii) Pleader's fee., if certified, be calculated as per Schedule or as per certificate whichever is less.
- (iv) A decree be drawn up accordingly.

Sd/-

(Ram Prasanna Sharma)
JUDGE

Raju