

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.551 of 2003**

1. Phoolchand Asara S/o Late Vallabhdas Asara, aged about 56 years,
2. Upendra Kumar Asara S/o Late Vallabhdas Asara, aged about 48 years,
3. Gajendra Kumar Asara S/o Late Vallabhdas Asara, aged about 42 years,
4. Ku. Kanti Asara D/o Late Vallabhdas Asara, aged about 40 years,
5. Smt. Hansa Gauri W/o Chandrakant Walesh aged about 50 years,
6. Ku. Aruna Asara D/o Late Vallabhdas Asara, aged about 32 years,

All resident of Gujarati Bada, Halwai Lane, Raipur (CG)

7. Smt. Hemlata W/o Harsukhlal Garach, aged about 52 years, Resident of C/o Chirag Plywood, Near Teen Darwaja, Ghoraji (Gujrat)

---- Appellants

Versus

1. Shri Komalchand Asara, aged about 53 years, S/o. Amritlal Asara, Cloth Merchant, Gandhi Bazar (B), Thok Gole Bazar, Raipur Tahsil & Distt. Raipur (CG)
2. Municipal Corporation, Raipur
3. Appeal Committee of the Municipal Corporation, Raipur.
4. Commissioner, Municipal Corporation Raipur

2 to 4 are having office at Malviya Road, Raipur, Tahsil & Distt. Raipur (CG)

---- Respondents

For Appellants	:	Mr.S.S.Rajput and Mr.Sharad Mishra, Advocates
For Respondent No.1/plaintiff	:	Mr.Manoj Paranjape, Advocate
For Respondents No.2 to 4	:	None present though served

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

19/02/2019

1. The substantial questions of law involved, formulated and to be answered in this second appeal preferred by defendant No.4 are as under:-

“1. Whether the suit itself of the Plaintiff was maintainable in the light of admission of the Plaintiff that when the suit was filed, the Plaintiff had already filed a review petition before the Appeal Committee which had passed the impugned order dated 10.7.1981

2. Whether the finding of the Court below to the extent that the Plaintiff is a tenant in the suit property is correct or not in the light of the fact that the Plaintiff as well as the witness of Municipal Corporation have admitted the fact that the suit property was originally rented out by the Municipal Corporation in the name of Firm M/s Javer Chand Thakarsi of which the Plaintiff's father happened to be one of the partners along with the deceased Appellant-Defendant No.4 ?”

[For the sake of convenience, the parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court].

2. Original plaintiff-Komalchand Asra filed a suit against defendants-Municipal Corporation, Raipur and defendant No.4 stating inter-alia that he is tenant of suit shops No.306 and 307 belonging to Municipal Corporation, Raipur, in which he is running cloth business and has obtained permission from defendant-Municipal Corporation for reconstruction. The defendant-Municipal Corporation issued notice dated 18.6.80 to the plaintiff explaining

his nature of possession over the suit shops and passed an order on 10.7.81 directing mutation in the name of firm M/s. Javerchand Thakarsi leading to filing of suit for declaration of title and permanent injunction.

3. Defendants No.1 to 3 filed their written statement and admitted that the plaintiff was their tenant w.e.f. 17.11.71 and further stated that the suit shops were given on rent to Javerchand Thakarsi on 24.5.42. In the year 1962, the suit shops were recorded in the name of Amrit Lal Thakarsi though it was registered in the name of the plaintiff and on 17.11.1971 it was settled in the name of the plaintiff. Defendant No.4 filed his written statement stating inter-alia that the suit shops are let-out to Firm M/s Javer Chand Thakarsi by the Municipal Corporation, as such, the said firm is tenant of defendant-Municipal Corporation and the suit be dismissed.

4. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 14.10.96, came to the conclusion that the suit shops were let out to Javerchand Thakarsi in his individual capacity on 24.5.42 and thereafter the suit shops were settled in favour of the plaintiff on 17.11.71 as tenant, the order passed by the Appeal Committee dated 10.7.81 is null & void and pendency of review petition filed by the plaintiff against the order dated 10.7.81 would not bar the

plaintiff to file instant suit for declaration of title and permanent injunction and decreed the suit. On appeal being preferred by defendant No.4, the First Appellate Court dismissed the same, against which, this second appeal under Section 100 of the CPC has been preferred by the appellants/defendant No.4, in which substantial questions of law have been framed and set-out in the opening paragraph of this judgment.

5. Mr.S.S.Rajput, learned counsel for the appellants/defendant No.4, would submit that concurrent finding recorded by two Courts below holding the plaintiff to be tenant and the order of the Appeal Committee to be null and void is perverse and contrary to record, therefore, the second appeal deserves to be allowed by setting aside the judgment and decree of the Courts below.

6. Mr.Manoj Paranjape, learned counsel for the respondent No.1/plaintiff, would submit that the second appeal deserves to be dismissed.

7. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

Answer to substantial question of law No.1:-

8. In a suit filed by the plaintiff claiming himself to be tenant he has also questioned the order of Appeal Committee of the

defendant-Municipal Corporation passed on 10.7.81, against that, the plaintiff had preferred review petition, but during pendency of review petition, suit was filed by plaintiff-Komalchand Asra, which has been held to be maintainable by the trial Court holding that pendency of review petition would not bar the civil Court to consider the claim of declaration of title and permanent injunction. There is no legal bar that during pendency of review petition, suit for declaration of title and permanent injunction would not be maintainable. Even otherwise, now the review petition has been dismissed. The substantial question of law is answered accordingly.

Answer to substantial question of law No.2:-

9. Defendants No.1 to 3 in their written statement admitted that the plaintiff is their tenant with effect from 17.11.71 and the trial Court also held that the plaintiff is tenant of defendant-Municipal Corporation, Raipur with effect from 17.11.71. That finding of the trial Court has become final as defendants No.1 to 3 did not challenge that finding by filing cross-objection or by filing cross-appeal before the First Appellate Court, as such, finding to that extent has become final. Therefore, the finding recorded by two Courts below that the plaintiff is tenant of defendant-Municipal Corporation, Raipur is a finding of fact based on evidence available on record and binding to this Court.

10. It is admitted position on record that on 24.5.42 the suit shops

were let-out to Javer Chand Thakarsi in his individual capacity and it was never let-out to Firm M/s Javer Chand Thakarsi. The trial Court has also recorded a finding that by order dated 25.3.74 (Ex.P/41) the Civil Judge Class-I, Raipur in the matter of Ramkishan Sharma and another v. Firm M/s Javarchand Thakarsi and others declared Firm M/s Javer Chand Thakarsi and their partners to be insolvent under Section 26 of the Provincial Insolvency Act, 1920 (hereinafter called as “the Act of 1920”) and further held that by virtue of the provisions contained in Section 42 (d) of the Indian Partnership Act, 1932 (hereinafter called as “the Act of 1932, a partnership firm is dissolved by the adjudication of a partner as an insolvent.

11. Section 28 (1) of the Act of 1920 provides that on the making of an order of adjudication, the insolvent shall aid to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors. Section 27 (2) of the Act of 1920 provides that the Court may, if sufficient cause is shown, extend the period within which the debtor shall apply for his discharge, and in that case shall publish notice of the order in such manner as it thinks fit, as such, it has not been shown that even the firm was discharge after the order dated 25.3.74 (Ex.P/41) was passed.

12. Apart from this, both the Courts below have concurrently recorded a finding that defendant No.4, who is appellant herein,

has not filed any counter-claim in the suit that he is tenant of the suit shops or he did not seek any relief in his favour, as such, both the Courts below have concurrently held that the plaintiff is tenant of the suit shops belonging to defendant-Municipal Corporation and order passed by the Appeal Committee on 10.7.81 is null and void. It has clearly been recorded that the suit shops were not reconstructed by the said firm and firm is not running cloth business, as such, I do not find any illegality or perversity in the said finding.

13. Accordingly, the second appeal deserves to be and is hereby dismissed leaving the parties to bear their own cost(s). A decree be drawn up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-