

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.292 of 2019

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Shri Prem Niranjana Upadhyay (Male), aged about 65 years, Son of Late Suresh Nandan Singh, R/o A.N. Path, North Shri Krishna Puri, P.S.- S.K. Puri, Town and District- Patna- 800001, Proprietor of M/s New Mohan Sweets, Alpana Market, New Patliputra Colony, Patna- 800013.

... .. Defendant No. 2/Appellant/Appellant

Versus

1. Shri Sunil Kumar (Male), aged about 46 years, Son of Late Parmeshwar Sah @ Kaloot Sah, R/o Mohalla- Bakerganj, Gola Road, Post- Bankipur, P.S.- Pirbahore, District- Patna-4.

....Plaintiff-Respondent-Respondent Ist Set.

2. Sardar Devendra Singh (Male), aged about years, Son of Late Sardar Mahendra Singh, Resident of Montessori Gali, C/o Late Sardar Mahendra Singh, Boring Road (Owner of Quality Corner Shop), P.S.- S.K. Puri, Town and District- Patna- 800001.
3. Sardar Bhupendra Singh, (Male), aged about years, Son of Late Sardar Mahendra Singh, Resident of Montessori Gali, C/o Late Sardar Mahendra Singh, Boring Road (Owner of Quality Corner Shop), P.S.- S.K. Puri, Town and District- Patna- 800001.
4. Sardar Narendra Singh (Male), aged about years. Son of Late Sardar Mahendra Singh, Resident of Montessori Gali, C/o Late Sardar Mahendra Singh, Boring Road (Owner of Quality Corner Shop), P.S.- S.K. Puri, Town and District- Patna- 800001.

... .. Defendants/Respondents/Respondents 2nd set/Respondents

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Appearance :

For the Appellant	:	Mr. Dronacharya, Advocate.
For the Respondent No.1:		M/S. Subodh Kumar Jha, Pranav Kumar Jha and Krishna Kumar, Advocates.

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CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH
ORAL ORDER

5 03-03-2020 Heard Mr. Dronacharya, learned counsel for the appellant and Mr. Subodh Kumar Jha learned counsel for respondent no. 1 under Order-XLI, Rule-11 of the Code of Civil Procedure.



2. The plaintiff/respondent filed a Title Eviction Suit No. 26/2001 for eviction of the defendant from the suit premises, with further direction to handover vacant possession to the plaintiff, and for arrears of rent for the period 01.04.2000 to 31.05.2001, and also for recovery of possession in case the defendant not given possession over the suit land.

3. The case of the plaintiff in brief is that the father of the plaintiff who is the owner of the suit land has let out the premises to the defendant on the monthly rent of Rs. 1400/-, defendants running a sweet shop, but after partition in family, the plaintiff became unemployed having no sources of income and thus the plaintiff have bonafide requirement to start business to maintain his family.

4. It was further case of the plaintiff that the defendant paid monthly rent till March 2000 @ Rs. 1400/- per month, for which the brother of the plaintiff Sri Umesh Prakash given receipt with the consent of the plaintiff but after March 2000, the defendant stopped payment of monthly rent, and as such, the defendant became defaulter in payment of monthly rent, and despite of repeated request to vacate the premises as the plaintiff has got personal necessity of the suit premises, the defendant has not vacated the shop described in Schedule-II of the plaint



and has also not paid arrears of rent hence the plaintiff sent a notice on 07.03.2001 and 22.03.2001 by the registered post, but the defendant did not care at all and neither vacated the suit premises nor, has paid arrears of rent and as such the present suit was filed.

5. The defendant no. 1 appeared and filed written statement denying the case of the plaintiff taking defence that the suit is not maintainable, having no valid cause of action, suffers from defect of parties and also barred by provision of 34 of the Specific Relief Act, law of limitation with further case that there is no relationship of landlord and tenant, though this defendant no. 1 admitted that the suit premises was taken on rent by this defendant in the year 1982 through registered Deed of Lease dated 14.01.1982 executed by Prameshwar Sah @ Kalut Sah (father of the plaintiff), the said Deed of Lease was for the period of ten years @ Rs. 1000/- per month, but later on Prameshwar Sah died and his son Umesh Prakash who was Karta and manager of the family was collected rent and despite of expiry of Deed of Lease dated 14.01.1982 the defendant continued @ monthly rent of Rs. 1400/- per month, and regularly paying rent to the landlord Umesh Prakash and as such the plaintiff was never landlord of the suit premises nor the



defendant was ever tenant of the plaintiff. Accordingly, defendant no. 1 claims that neither the suit is maintainable under the provision of The Bihar Buildings (Lease, Rent and Eviction) Control Act nor the plaintiff is entitled to any relief.

6. It was further case of the defendant that notice dated 17.03.2001 was also sent by the plaintiff that the plaintiff has been allotted suit premises by way of family partition but at the knowledge of defendant neither they had any partition between the plaintiff and Umesh Prakash brother of the plaintiff nor the plaintiff was landlord.

7. It was further case of the defendant that he is running a sweet shop and has invested a huge amount but unfortunately the defendant no. 1 entered into an agreement of partnership business with one Niranjana Upadhyay and Moreshwar Rajaran Erande, and according to this agreement for partnership business the entire investment of the business was to be made by this defendant and only a sum of Rs. 1,00,000/- was to be deposited as security money by rest two partners, the further agreement was that rest two partners would be acting partners and it would be their responsibility to look after and run business in lieu thereof would share of 25%.

8. It was further case of the defendant that as two



remain partners have cheated and a criminal case has also been filed against two partners which is still pending but despite of that this defendant is paying rent regularly to his landlord Sri Umesh Prakash.

9. It was further case of the defendant that he has paid monthly rent to Umesh Prakash who granted receipt till March 2000 but thereafter has not granted receipt, though it is fact that the defendant has paid rent only up to March 2000 and as such it cannot be said that the defendant is defaulter in payment and there is no personal necessity of the plaintiff as the plaintiff has got other land and building in many places and as such the plaintiff has got no bonafide personal requirement of the suit premises, has got a lot suitable places for starting any business and hence prayed for dismissal of the suit.

10. The defendant no. 2 has also filed a separate written statement taking all the ornamental plea with the further statement that the plaintiff in garb of eviction suit has filed the present suit for title and recovery of possession, which suffers from non-joinder of the party as Umesh Prakash who is the actual owner of the suit premises has not been made party and has denied relationship of landlord or tenant stating that after death of Prameshwar Sah @ Kalut Sah, Umesh Prakash became



actual owner of the suit premises and as such the suit is fit to be dismissed.

11. It was further case of the defendant no. 2 that Prameshwar Sah @ Kalut Sah settled the land with defendant no. 1 for the period of ten years on the monthly rent of Rs. 1000/- which was started since 01.02.1981 till 31.01.1991 but during the period Prameshwar Sah died and his elder son Umesh Prakash being Karta of the family started realizing rent and has also granted receipt, the defendant no. 1 was facing financial problem in running the sweet shop entered into partnership with Niranjana Upadhyay (brother of this defendant no. 2) and one Moreshwar Rajaran Erande through a Deed of Partnership dated 18.03.1989 and defendant no. 1 became sleeping partner.

12. It was further case of the defendant no. 2 that Umesh Prakash (brother of the plaintiff) being Karta of the family with the consent of the brother decided to sale the suit premises for meeting legal necessity of the family and Umesh Prakash executed a Deed of Agreement for Sale in favour of the father of the defendant no. 2 on 04.03.2000 after taking amount of Rs. 3,50,000/- as earnest money and since then these defendants are running sweet shop as owner of the premises and not as a tenant, and as such since the date of agreement the shop



in the suit premises is running in the name of M/s New Mohan Sweets but later on Umesh Prakash avoiding execution of the Sale Deed and accordingly a Title Suit No. 191/2002 against Umesh Prakash for Specific Performance of Contract has also been filed which is pending in the court of Sub Judge, Patna and Umesh Prakash in collusion with plaintiff with a view to grab the earnest money the present Eviction Suit has been filed.

13. The learned Trial Court altogether framed eight issues these are as follows:-

- (i) Whether the suit as framed is maintainable?
- (ii) Whether the plaintiff has got valid cause of action?
- (iii) Whether the suit is barred by non-joinder and mis-joinder of the party?
- (iv) Whether there is any relationship of landlord and tenant between the plaintiff and defendant and plaintiff is entitled to get decree of eviction?
- (v) Whether the defendants are defaulter in making payment of rent and plaintiff is entitled for a decree of arrear of rent?
- (vi) Whether the plaintiff requires the suit



premises for his bonafide personal necessity and will the partial eviction of the defendant will serve purpose of the defendant.

(vii) Whether the plaintiff entitled to get decree of eviction of suit premises?

(viii) Whether the plaintiff is entitled for any other relief or reliefs.

14. From perusal of the judgment of the Trial Court, it appears that admitted facts has not been denied by the appellants which are as follows:-

(i) That the suit land originally belongs to Prameshwar Sah (father of the plaintiff).

(ii) It is also admitted fact that the suit premises was taken on rent in the year 1981 by Mahendra Singh on monthly rent of Rs. 1000/- by registered Deed of Lease dated 21.01.1981 for the period of ten years.

(iii) It is also admitted fact that even after expiry of period of ten years Mahendra Prasad Singh defendant no. 1 continued with the suit premises by paying rent to Prameshwar Sah who died in the year 1982.

(iv) It is also admitted fact that monthly rent was later on enhanced @ Rs. 1400/- per month and defendant has



paid monthly rent till April 2000 and thereafter no rent was paid.

15. After discussing the material available on record and pleading of the parties the learned Trial Court has decreed the suit holding that there is relationship of landlord and tenant between the plaintiff and defendant. Further holding that the defendant is defaulter in making payment, also holding that there is bonafide requirement and the defendant has not pleaded partial eviction in his written statement nor adduced any evidence on this point and in absence of any pleading or evidence there is no case of partial eviction.

16. Being aggrieved from the judgment and decree of the Trial Court the defendant/appellant /appellant has filed a Title Eviction Appeal No. 07/2015 but the appellate court has also dismissed the appeal by the judgment dated 29th May 2019 hence, the present appeal has been filed.

17. In course of argument the learned counsel for the appellant has only relied one substantial question of law i.e.:-

I. “Whether non-consideration of partial eviction of the building in question as per mandate of Section 11(C) proviso vitiates the impugned judgment and decree passed by both the courts below or not?”



18. Though the learned counsel for the appellant has framed many substantial questions of law but at the time of argument confined his submission only up to the extent of issue of partial eviction arguing that it is settled law that the Trial Court should have to given a finding with respect to partial eviction as in a case of eviction the issue of partial eviction is mandatory and in support of his argument the learned counsel for the appellant has cited the judgment reported in PLJR 2002 (4) 32 (Anil Kumar @ Ani Vs. Sri Bengali Prasad and relying upon a judgment of AIR 1984 SC 1799 (Nasirul Haque Vs. Jitendra Nath Day) (Supra).

19. From perusal of the pleading of the defendant/appellant, it appears that though the case of the plaintiff/respondent was for eviction on the ground of personal necessity and defaulter in payment, the defendant by filing written statement though has denied relationship of landlord or tenant but has not taken a plea of partial eviction nor has tried to adduce any evidence on the issue of partial eviction, that if partial eviction took place will satisfy the need of plaintiff, though the learned Trial Court while framing issues has considered the issue of partial eviction and has framed an issue which is as follows:-



“Whether the plaintiff requires the suit premises for his bonafide personal necessity and will partial eviction of the defendant will serve purpose of the defendant?”

And while dealing with this issue the learned Trial Court in para no. 11(1) has discussed that the defendant has not taken any plea of partial eviction in this case and denied the relationship of landlord and tenant, the defendant has not produced any evidence that the partial eviction will satisfy need of plaintiff though the onus cast upon the defendant to adduce evidence on the issue of partial eviction for which the defendant has failed.

20. It is settled law that if the parties who have not taken any plea in a trial or in a first appellate court cannot take a plea in second appeal and the court cannot decide the suo moto as it is held in case of Food Corporation of India and others Vs. Vishnu Properties Enterprises reported in BBCJ 711 and the onus lies upon the defendant.

21. So far the judgment relied by the learned counsel for the appellant, it appears that in case of Anil Kumar @ Ani Vs. Sri Bengali Prasad it was held that the partial eviction can be considered on the basis of evidence and not mare ipse dixit, and it appears that the defendant has not produced any



document on the point of partial eviction and as such in suit of eviction on the ground of personal necessity the plea of partial eviction became academic.

22. It further also appears from the judgment of the Appellate Court that the defendant/appellant has not taken any plea of partial eviction and keep mum without any evidence on this point. So far the plea that the plaintiff having many of the premises for his business. It is settled law that it is desire of the owner to choose the premises upon which he wants to start his business moreover it further appears from the finding recorded by the Trial Court as well as Appellate Court that the defendant/appellant has failed to discharge his onus by adducing any evidence on this point. It is admitted that the suit premises belongs to father of the plaintiff, and in support of case of the plaintiff his brother has been examined in support of the plaintiff's case and once there is concurrent finding of Trial Court and Appellate Court that there is personal necessity of plaintiff and the defendant failed to discharge his onus, not produced any document to satisfy the issue of partial eviction nor in the Trial Court and the Appellate Court has taken this plea, I find that there is no subsistence in the argument by the learned counsel for the appellant hence, the appeal is dismissed



at the admission stage itself. I.A. No. 01 of 2020 is also dismissed.

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(Sudhir Singh, J)

