

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

308

RSA No.2683 of 2002 (O&M)

Date of Decision: 26.09.2023

Reserved on: 22.09.2023

Vijay Kumar

... Appellant

Versus

Smt. Ram Kali (since deceased)
through her L.Rs

... Respondent

CORAM: HON'BLE MRS. JUSTICE MANISHA BATRA

Argued by: Mr. Ashutosh Hoshiarpuri, Advocate,
for the appellant.

Respondent proceeded against ex parte
vide order dated 01.09.2023.

MANISHA BATRA, J.

1. The present appeal has been preferred against the judgment and decree dated 15.04.2002 passed by learned Additional District Judge, Gurdaspur in Civil Appeal No.63 of 2000 titled as *Smt. Ram Kali v. Vijay Kumar* whereby the judgment and decree dated 01.03.2000 passed against the plaintiff in Civil Suit No.205 of 1996 by the Court of learned Civil Judge (Junior Division), Pathankot had been set aside, suit was decreed and the appeal was accepted.

2. For the sake of convenience, the parties shall be referred hereinafter as per their original nomenclature as given in the suit.

3. The aforementioned suit had been filed by the plaintiff on the averments that she was owner of a wooden kiosk detailed and described in the head note of the plaint and marked with letters A B C D

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and shown with red colour in the site plan annexed with the plaint. She had let out this kiosk to the defendant on payment of rent @Rs.150/- per month. She alleged that as the defendant was not making payment of the rent regularly and as the kiosk in question was required by her for her own use and occupation, therefore, she terminated the tenancy of the defendant by serving upon him statutory notice under Section 106 of the Transfer of Property Act and calling upon him to vacate the kiosk in question and also to pay the arrears of rent. The defendant failed to either pay the rent or to vacate the kiosk and, therefore, she prayed for passing a decree for possession by way of ejectment of the defendant from the disputed kiosk and also for a decree for recovery of a sum of Rs.1200/- as arrears of rent for the period from 01.01.1996 to 31.08.1996.

4. In response to the notice of the suit, the defendant filed written statement raising preliminary objections as to locus standi, non-joinder of necessary parties and that no relationship of landlord and tenant existed between the parties. On merits, it was submitted that the land of the disputed kiosk was owned by one Nikka Ram son of Sh. Sant Ram who was brother of Sh. Khoji and who had died issueless while bequeathing his properties in favour of Som Raj grandson of Khoji by executing a Will dated 12.11.1987. The said Som Raj who came into possession of the land of the kiosk after the death of Nikka Ram had raised a kiosk over the said site and had rented out the same to the defendant. Subsequently, on 19.07.1996, he sold this kiosk to the defendant for a sum of Rs.5000/- by executing a registered sale deed in his favour and from then onwards, the defendant was in possession of the kiosk in question as owner thereof. It was also submitted that Khoji

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Ram was also father-in-law of the plaintiff after whose death, his two sons, namely, Chand Lal and Bansi Lal had inherited his properties in equal shares and after the death of Bansi Lal, the plaintiff i.e. his widow had inherited his property. It was also submitted that Som Raj used to look after Sh. Nikka Ram during his life time and pleased with his services, the former had executed Will dated 12.11.1987 in his favour. It was denied that the disputed property had ever been rented out by the plaintiff to him or he had ever paid any rent to her. While resisting the remaining pleas, the dismissal of the suit had been prayed for.

5. The plaintiff filed replication controverting the pleas as taken in the written statement and re-asserting those of the plaint. On the pleadings of the parties, the following issues were settled by learned trial Court vide order dated 20.03.1997:-

1. Whether the defendant is a tenant under the plaintiff over the demised premises at the rate of Rs.150/- per month? OPP.
2. If issue no.1 is proved, whether the plaintiff is entitled to recovery of arrears of rent? If so to what extent? OPP.
3. Whether the plaintiff is entitled for recovery of possession of the demised premises from the defendant? OPP.
4. Whether the plaintiff has no locus standi to file the instant suit? OPD.
5. Relief.

6. The parties adduced oral as well as documentary evidence in support of their respective assertions. The plaintiff examined PW-1 Jugal Kishore, a native of her village and herself stepped into the witness box as

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PW-2 whereas the defendant examined four witnesses namely, DW-1 Mangal Singh, DW-2 Bhag Mal, Lambardar, DW-3 Prem Chand, DW-4 Som Raj besides himself stepping into the witness box as DW-5.

7. After hearing the arguments advanced by both the parties and appraising the evidence produced on record, the learned trial Court vide judgment and decree dated 01.03.2000, dismissed the suit of the plaintiff by observing that she had failed to prove her ownership over the disputed property and also the relationship of landlord and tenant between the parties and had also failed to prove that she had inducted the defendant as a tenant over the kiosk in question.

8. Feeling aggrieved, the plaintiff challenged the findings given by learned trial Court by filing the aforementioned appeal which was allowed vide judgment and decree dated 15.04.2002. It was held that the plaintiff was proved to be owner of the disputed property and it was also proved that she had let out the disputed kiosk to the defendant. The appeal was accordingly accepted, the judgment and decree of trial Court was set aside and the suit of the plaintiff was decreed thereby passing a decree for possession of the kiosk in dispute in favour of the plaintiff and her claim for recovery of a sum of Rs.1200/- from the defendant was also allowed.

9. Dissatisfied with the said judgment, the appellant-defendant has challenged the findings as given by learned First Appellate Court by arguing that the learned First Appellate Court had materially erred in holding that the respondent-plaintiff was owner of the kiosk in dispute and that relationship of landlord and tenant existed between them. He argued that the learned First Appellate Court had not appreciated the evidence

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produced on record in a proper perspective and had ignored that no cogent and convincing evidence could be produced by the respondent-plaintiff on record to prove her claim. The findings as given by learned First Appellate Court were based on conjectures and surmises and were not sustainable in the eyes of law. Therefore, it was argued that the impugned judgment and decree as passed by learned First Appellate Court was liable to be set aside whereas the judgment and decree passed by learned trial Court deserved to be restored and the appeal filed by him deserved to be accepted.

10. The respondent had been proceeded against ex parte.

11. At the outset, it would be proper to mention that since the regular second appeals in the State of Punjab, Haryana and UT Chandigarh are regulated by Section 41 of Punjab Courts Act, 1918 and not by Section 100 of the Code of Civil Procedure, therefore, this Court can certainly reappreciate evidence if the judgments passed by the Courts below reflect misreading of evidence and suffer from any perversity. Reference in this regard, can be made to a Constitutional Bench judgment of Hon'ble Supreme Court in **Pankajakshi (Dead) through LRs v. Chandrika**, (2016) 6 SCC 157. More so, it is also well recognized that the rule that in second appeal, the Court must not disturb facts established by trial Court or First Appellate Court, is not an absolute one or in other words, it is not a rule set in stone and a decision based on no evidence or misappreciation of evidence can certainly be interfered with. Reliance in this regard can be placed upon authority cited as **Nazir Mahamed v. J. Kamala**, (2020) 19 SCC 57, wherein it was observed by Hon'ble Supreme Court that the Court of second appeal may disturb findings of fact in the following conditions:-

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- (i) The Courts below have ignored material evidence or acted on no evidence;
- (ii) The Courts have drawn wrong inferences from proved facts by applying the law erroneously; or
- (iii) The Courts have wrongly cast the burden of proof.

Reliance can further be made to **Balasubramanian v. M. Arockiasamy (Dead) through LRs**, (2021) 12 SCC 529, wherein the Hon'ble Supreme Court observed that the restraint in interfering with question of facts under the jurisdiction of second appeal, is not an absolute rule. Where the Court is of the view that the conclusions drawn by the Courts below do not have a basis in the evidence led or it is of the view that the appreciation of evidence "suffers from material irregularity", the Court will be justified in interfering with such findings.

12. Let us now proceed to delve on the contentions as raised by learned counsel for the appellant. The main challenge as laid by him to the findings as given by learned First Appellate Court was that without any sufficient, convincing and reliable evidence having come on record, it had held that the respondent was owner of the kiosk in dispute and the land underneath it and that relationship of landlord and tenant existed between the parties. For arriving at this conclusion, the learned First Appellate Court is mainly shown to have relied upon the averments made by the appellant-defendant in the written statement. It was observed that pleading in the written statement that Nikka Ram and Khoji Ram were real brothers and that the property in dispute over which the kiosk existed, had fallen to share of Nikka Ram amounted to admission that the site in dispute was once

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owned by Khoji Ram and Nikka Ram and since the appellant had not produced any evidence on record to show that any partition had taken place between Nikka Ram and Khoji Ram, therefore, it was probable that the respondent-plaintiff had become owner of the kiosk in dispute. On going through the pleadings in the written statement, this Court is of the opinion that the learned First Appellate Court had misread and misconstrued the pleadings in the written statement. It is of course shown to be pleaded in para No.3 of the written statement by the appellant-defendant that the property in dispute had fallen to share of Sh. Nikka Ram and he was in actual physical possession of the same and that Nikka Ram had executed Will dated 12.11.1987 in favour of Som Raj who had raised a kiosk over the property in dispute. It is also shown to be pleaded that after the death of Khoji Ram, brother of Nikka Ram, his properties were inherited by his sons Chand Lal and Bansi Lal in equal shares. However from this, no inference whatsoever can be drawn that Nikka Ram and Khoji Ram jointly owned the site in dispute. The learned First Appellate Court had considered the respondent as owner of the kiosk in dispute on the basis of probability which cannot be accepted in the eyes of law. Therefore, this Court holds that the observations as made by learned First Appellate Court that the respondent had become owner of the disputed property as it was jointly owned by Khoji Ram and Nikka Ram cannot be accepted to be correct.

13. The learned First Appellate Court had then relied upon the writing Ex.P-6 to arrive at a conclusion that the respondent was owner of the disputed kiosk and she had rented it out to the appellant. It was also observed by learned First Appellate Court that since DW-3 Prem Chand

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who was a witness of the appellant himself had admitted signatures of the former on this document which read that the kiosk in dispute was owned by the respondent and had been let out to the appellant, therefore, not only the factum of ownership of the respondent over this kiosk but relationship of landlord and tenant between them also stood established. However, on a careful assessment of testimony of DW-3 Prem Chand and on going through the contents of Ex.P-6, this Court opines that these observations were based on misappreciation of evidence placed on record. The document Ex.P-6 is bearing heading “agreement”. However, the same is in the shape of an application addressed to the SHO, PS Sadar, Pathankot and a perusal of its contents reveals that previously some application was moved by the respondent regarding her kiosk being given on rent to the appellant and while moving Ex.P-6, it was agreed that the appellant would vacate the kiosk by 15.08.1996. This document is not having any stamp of the SHO, Police Station, Sadar, Pathankot nor any witness of this application had been examined by the respondent to prove that this agreement was submitted before the concerned SHO. The appellant in his sworn deposition had categorically denied his signatures over this document and had taken a plea that there was dispute with regard to the kiosk in question between Som Raj and the respondent-plaintiff and he was also called by the police with regard to that dispute and his signatures were obtained on a blank document. No doubt, DW-3 Prem Chand in his sworn deposition is shown to have admitted that Ex.P-6 was bearing signatures of the appellant but this witness was neither a signatory to Ex.P-6 nor it was his claim that he was present when this document was signed. As such, this Court opines that

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no importance can be given to this document or the recitals thereof for the purpose of concluding that the respondent was owner of the kiosk in dispute or she had inducted the appellant as a tenant in the same.

14. As such, in view of the discussion as made above, it emerges that the findings given by learned First Appellate Court based on Ex.P-6 and admission of DW-3 and pleading in the written statement, were not based on proper appreciation of the pleadings and the evidence so led and, therefore, the same could not be accepted for the purpose of proving the claim of the respondent.

15. Elaborating further, it was for the respondent to bring on record convincing and reliable evidence to prove that she was owner of the kiosk in dispute and land existing beneath it and had let out the same to the appellant. In her sworn deposition, she stated at the first instance that the dispute was with regard to the property of Nikka Ram and then at the second breath, it was deposed by her that the disputed site was a part of property owned by Nikka Ram. Her admission to this effect rather goes a long way to show that the land over which the kiosk in dispute was existing was owned by Nikka Ram. As such, it was for her to prove as to how she happened to become owner of the same. Neither in the plaint nor in the replication, it was explained by her as to how she had become owner of this property nor it was pleaded that Nikka Ram had given his property to Khoji Ram or after his death, it was inherited by Khoji Ram and then by her husband and then she had succeeded to it. The burden lied heavily upon the respondent to prove as to how her ownership in respect of the disputed kiosk had originated but not only the pleadings were silent on this point but

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her own testimony also did not favour her on that point. So far as the evidence led by the only witness examined by her i.e. PW-1 Jugal Kishore is concerned, the same clearly appears to be statement of a tutored witness as he did not utter even a single word as to when the kiosk in dispute was rented out by the respondent to the appellant. He admitted that no writing was executed nor any terms and conditions of the tenancy were settled between the parties in his presence. Most interestingly, he even stated that it was Nikka Ram who owned the disputed site though it was also his version that Nikka Ram was father-in-law of the respondent. Therefore, his statement did not serve any useful purpose. As such, it clearly emerges that the evidence produced by the respondent was not of such nature which could be acted and relied upon to prove that she was owner of the property in dispute or had let out the same to the appellant.

16. At this juncture, it is also relevant to mention that the appellant had set up a case that the property in dispute was owned by Sh. Nikka Ram, who had bequeathed the same in favour of DW-4 Som Raj who was grandson of Khoji Ram by executing Will Ex.D-1 in his favour and Som Raj had sold this property to him vide sale deed Ex.D-2. Though in the replication, the respondent had pleaded that the Will Ex.D-1 was a result of fraud and it was not executed by Sh. Nikka Ram and had also asserted that Sh. Nikka Ram used to live with her and was served by her husband and herself but, neither any counter claim challenging the validity of the Will Ex.D-1 or sale deed Ex.D-2 had been filed by the respondent nor it was pleaded by her that Sh. Nikka Ram had given the disputed site over which the disputed kiosk was existing, either to her father-in-law, husband or to

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herself. The due execution of the Will Ex.D-1 on the other hand, had been proved by the appellant by examining DW-1 Mangal Singh, scribe, DW-2 Bhag Mal, attesting witness to the Will and also by examining the propounder of the Will namely, DW-4 Som Raj who had sold the property in dispute to him. These witnesses were cross-examined in detail by the respondent but the credit of their statements with regard to execution of Will by Sh. Nikka Ram in favour of DW-4 Som Raj and DW-4 having become owner of this property had remained unshattered. As such, there was no reason to disbelieve the execution of Ex.D-1 by Sh. Nikka Ram.

17. While concluding, it may be observed that neither the trial Court nor First Appellate Court are shown to have considered the question as to validity of the documents Ex.D-1 and Ex.D-2 at all. In the peculiar circumstances, when neither the validity of the Will Ex.D-1 nor of sale deed Ex.D-2 had been challenged by the respondent-plaintiff coupled with the fact that there were no clear cut pleadings as to how she had become owner of the property in dispute, her admission that the dispute was with regard to property of Nikka Ram and that the kiosk in dispute was part of land belonging to Nikka Ram, the absence of any rent deed, further absence of pleadings as to when the tenancy with the appellant had come into inception are all important points which lead to an irresistible conclusion that the respondent was neither owner of the kiosk in dispute nor it was she who had let out the same to the appellant. Rather the evidence produced on record by the appellant is cogent and convincing and goes to show that he had previously been inducted as a tenant over this kiosk by DW-4 Som Raj who had become owner of the same by virtue of Will Ex.D-1 and had purchased

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the same from Som Raj vide sale deed Ex.D-2. As such, this Court has no hesitation to say that the findings as given by learned First Appellate Court cannot sustain. Accordingly, the same are reversed. The judgment and decree of First Appellate Court is set aside whereas, the judgment and decree passed by learned trial Court is restored. The suit filed by the respondent-plaintiff is dismissed and this appeal stands allowed. There is no order as to costs.

18. Miscellaneous application(s), if any, also stand disposed of.

26.09.2023

manju

(MANISHA BATRA)
JUDGE

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No