

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

**RSA-79-2024 (O&M)
Reserved on:31.01.2024
Pronounced on:14.02.2024**

Neha Thakur @ Neha

... Appellant

Vs.

Tarsem Lal @ Tarsem Lal Harish & another

... Respondents

CORAM: HON'BLE MRS. JUSTICE SUKHVINDER KAUR.

Present: Ms. Sidhi Bansal, Advocate and
Ms. Ridhi Bansal, Advocate for the appellant.

Mr. Divanshu Jain, Advocate for the respondents/caveators.

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SUKHVINDER KAUR, J.

1. This is a regular second appeal filed by defendant No.1 against the concurrent findings recorded by both the Courts below vide which suit for possession and recovery for use and occupation charges filed by the plaintiff regarding the flat as detailed in the head note of the plaint was partly decreed.

2. Brief facts of the case as per plaint are that one Shiv Kumar S/o Rameshwar Dayal Sharma was the original allottee of the suit property i.e. LIG Flat No.5115, Ground Floor, Sector-38 (West), U.T. Chandigarh. Shiv Kumar appointed Tarsem Lal as his attorney with the power to further appoint the sub attorney, by executing Power of Attorney on 04.09.1997. Initially, the plaintiff being the prospective purchaser was authorized by Shiv Kumar to manage the property as attorney. During the said management, property was given to defendant No.2 for looking after, on

behalf of the plaintiff. Suit property was transferred in favour of plaintiff – Tarsem Lal vide letter dated 16.11.2015 by the Chandigarh Housing Board. Defendant No.1, who was known to defendant No.2 – Bhupinder Singh and his wife Kamaljeet Kaur requested defendant No.2 to allow her to stay in the said flat. Defendant No.2 was not having any authority to give possession or let out the flat to anyone. The plaintiff was residing in England. When he came to India in the year 2012, then he came to know about the possession of defendant No.1 over the said flat and was not allowed by defendant No.1 to enter in the said flat and defendant No.1 alleged that she had been allowed by defendant No.1 to reside in the same. Then again in the month of August, 2015 when the plaintiff visited the said flat, defendant No.1 did not allow the plaintiff to stay there. The plaintiff had renovated the suit property by incurring huge expenditure after obtaining Power of Attorney from Shiv Kumar. But in his absence defendant No.2 illegally handed over possession of the suit property to defendant No.1 without any authority. Legal notice dated 06.10.2015 was sent to the defendants but notice sent to defendant No.1 was received back unserved. Hence, the present suit was filed by the plaintiff and he also sought recovery of Rs.15,000/- per month as mesne profits for unauthorized use and occupation from 01.10.2012 to 05.10.2015 and further from 06.10.2015 to 06.01.2016.

3. Upon notice, defendants No.1 and 2 appeared and filed their separate written statements. Defendant No.1 challenged the suit of the plaintiff on the ground of maintainability, cause of action, concealment of true facts, for want of proper court fee. It was further alleged that defendant No.1 initially took the premises on rent at the rate of Rs.350/- per month

excluding other charges. Thereafter defendant No.2 being authorized person of the owner approached her for increasing the rent at the rate of Rs.550/- per month which was paid to him upto 31.03.2016. Thereafter defendant No.2 refused to accept the rent. There is no relationship of landlord and tenant in between the plaintiff and defendant No.1. However, it was admitted that that defendant No.2 and his wife were known to defendant No.1. But prior to that she was in possession of the flat. Shiv Kumar had not executed any Power of Attorney and the other averments made in the plaint were also denied.

4. Defendant No.2 filed separate written statement wherein he admitted the case of the plaintiff and alleged that he had no objection if suit of the plaintiff was decreed.

5. During the pendency of the suit, learned counsel for the plaintiff suffered statement to the effect that plaintiff claimed no relief against defendant No.2.

6. In the replication, filed by the plaintiff, averments made in the plaint were reiterated while controverting those contained in the written statement.

7. From the pleadings of the parties, the following issues were framed by the trial Court:

“1. Whether the plaintiff is entitled to possession of suit property as prayed for? OPP

2. Whether the plaintiff is entitled for recovery of Rs.5,88,000/- as prayed for? OPP

3. Whether the present suit is not maintainable? OPD

4. Whether the plaintiff has not come to court with clean hands? OPD

5. Whether the present suit is liable to be dismissed as no court fee has been affixed by the plaintiff as per market value of the property? OPD

6. Relief.”

8. During plaintiff's evidence, the plaintiff examined his General Power of Attorney holder Jasbir Singh as PW1, Bhupinder Singh as PW2, Shiv Kumar as PW3, Mukesh Rawat, Sr. Assistant, Chandigarh Housing Board as PW4 and Bhag Chand, Clerk, Office of Sub-Registrar, Chandigarh as PW5 (wrongly written as PW4).

9. On the other hand, defendant No.1 herself stepped into the witness box as as DW1 and examined Anil Kumar, Sr. Assistant, Chandigarh Housing Board, Chandigarh as DW2.

10. Vide judgment and decree dated 24.07.2018 passed by the learned trial Court, suit of the plaintiff was partly decreed in favour of the plaintiff. The appeal was preferred before the First Appellate Court which was dismissed vide judgment and decree dated 12.12.2023. Hence, feeling aggrieved of the same, defendant No.1/appellant is in regular second appeal before this Court.

11. Learned counsel for the appellant/defendant No.1 has contended that the Courts below have not rightly appreciated the evidence on record. Undue weightage has been given to the fact that the appellant had not disclosed the name or particulars of the original owner. It was not open for respondent No.1 to take a complete summersault and deny the existence of tenancy. In the plaint, it has been alleged that respondent No.2 was not having any authority to give possession or rent out the said flat to anybody, but in order to wriggle out the same, respondent No.1 set up the entirely

different case in their rejoinder by alleging that the possession was given to the appellant only for few months whereafter he did not vacate the premises. He has contended that the plaintiff cannot be allowed to introduce new pleas by way of filing rejoinder so as to alter the basis of his plaint or to introduce pleas which are not consistent with earlier pleas. In this respect, he has also placed reliance upon a decision of the Kerala High Court in **P Nanikutty and another Vs. K U Kalpakadevi & others, RFA No. 139 of 2008** decided on 09.05.2023. He has further submitted that tenancy either can be created oral or by reducing it into writing. In oral tenancy, the arrangement, so created is reflected from the conduct of the parties. PW1 Jasbir Singh has admitted in his statement that defendant No.1/appellant is in possession of the suit property since 13-14 years. But it is difficult to fathom as to why the respondents were silent for such a long period. He has argued that a false story has been concocted just to oust the appellant. The appellant had been residing in the property since the year 2003 but during the currency of this period, no complaint was ever preferred by the appellant. So from the conduct of the parties, it is *ex-facie* apparent that the demised premises were let out to the appellant which was also in the knowledge of the plaintiff and to eject defendant No.1, the present suit was filed in order to bypass the rigours of the East Punjab Urban Rent Restriction Act, 1949. He has argued that the plaintiff was required to appear in the witness box and to produce the record in their possession in order to prove that defendant No.1 was illegally continuing in the possession of the suit

property. But he just appeared through his general POA holder which itself gives rise to adverse inference against his claim. He has also contended that once the Courts below have arrived at a finding that appellant/defendant No.1 was in illegal possession of the suit property, they failed to appreciate that the civil suit for possession was time barred in view of Article 65 of Schedule-I appended to the Limitation Act, 1963 which prescribes limitation of 12 years for a suit for possession of an immovable property or any interest therein based on title.

12. Per contra, it has been contended by learned counsel for the respondents that the plaintiff has successfully proved his case by adducing oral as well documentary evidence which has remained unrebutted and the judgments and decrees passed by the Courts below does not call for any interference. Defendant No.1 has taken a specific stand that she was in possession of the suit property as a tenant. But she has denied any relationship with the plaintiff, alleging herself to be in possession of the demised premises as a tenant initially inducted by the original owner. Later on, the rent was got increased by defendant No.2 as authorized by the original owner and as alleged that she has been regularly paying the rent to defendant No.2.

13. I have heard learned counsel for the parties and gone through the records thoroughly.

14. Perusal of the evidence on record reveals that vide the transfer letter Ex.PW4/2, the flat in question had been transferred in favour of plaintiff – Tarsem Lal. Though, it has been claimed by defendant No.1 that

she had taken the flat on rent from the original owner, but name of said original owner had not been disclosed anywhere. When she appeared in the witness box as DW1, she has admitted during her cross-examination that no agreement was executed when she took the demised premises on rent. As per her knowledge, Bhupinder Singh was the actual owner. She had neither seen the ownership proof from Bhupinder Singh nor had she asked from him regarding the same. She admitted that in her affidavit Ex.DW1/A it has been mentioned that when she took the demised premises on rent from the original owner, then Bhupinder Singh was not in picture. When she met Kamaljeet Kaur and Bhupinder Singh, she was already in possession of the demised premises. She had taken the premises on rent from the original owner in the year 2003. She was not in possession of the rent receipts from anyone till today i.e. from the original owner and thereafter from Bhupinder Singh. Bhupinder Singh came into picture immediately when she took the premises on rent from the original owner, who took the rent of the demised premises. She did not know the name and address of the original owner. She had not mentioned the fact regarding the original owner in her affidavit. She had not spent any money on the demised premises. She did not know that Tarsem Lal was the original owner of the demises premises. So from her testimony, it transpires that she has not been able to disclose the name and particulars of the original owner who allegedly inducted her as tenant in the suit premises. But her plea of tenancy in the absence of any material evidence cannot be accepted. The plea taken by the appellant that she had been in possession as tenant since long, does not seem to be convincing, since nowhere it was dilated as to when the tenancy of the defendant started

and under whom.

15. On the other hand, it has been proved by the plaintiff that defendant No.1 was allowed to enter into possession of the flat by defendant No.2 who acted as such on behalf of the previous attorney holder. Defendant No.2 while appearing as PW2 has admitted the case of the plaintiff and has denied that he had given the property in dispute on rent to defendant No.2 – Smt. Neha.

16. The Courts below have rightly held that the license, if ever granted to defendant No.1, stood terminated with the issuance of legal notice Ex.P4. If the said legal notice was not received by her and had remained undelivered even then the license if ever granted to her stood terminated with the filing of the suit itself. The appellant has failed to prove that she is in authorized possession of the suit premises.

17. As defendant No.1 was in unauthorized possession, so she has rightly been held liable to pay mesne profits to the plaintiff/owner for the unauthorized use and occupation of the said flat. As the legal notice remained undelivered so the illegal possession of the flat by defendant No.1 has been rightly considered from the date of filing of the suit and the plaintiff has been rightly held to be entitled to seek mesne profits from defendant No.1 from 25.01.2016. Though, the mesne profits were being claimed by the plaintiff at the rate of Rs.15,000/- per month, yet no such evidence was led by the plaintiff to prove that similarly situated property fetched rent of Rs.15,000/- per month as alleged. When defendant No.1 herself has admitted that similarly situated property fetched rent around Rs.1500/- per month, then the mesne profits to be paid by defendant No.1 to

the plaintiff have rightly been assessed at the rate of Rs.1500/- per month w.e.f. 25.01.2016 till the actual vacation of the flat.

18. So far as the case law cited by learned counsel for the appellant is concerned, the same is not applicable to the facts of the case in hand. In the replication filed in the instant case, no new plea by the plaintiff has been introduced, rather the same facts had been pleaded in the plaint while alleging that defendant No.1 was known to defendant No.2 and his wife, and she was allowed to stay in the flat in question by defendant No.2, though, he was not having any authority to do. So it cannot be said that this plea was not in the plaint and it was introduced only at the time of filing of the replication.

19. No question of law much less any substantial question of law arises for determination in the present second appeal. The appeal is without any merits and is hereby dismissed.

20. Pending application(s), if any, shall also stand disposed of.

(SUKHVINDER KAUR)
JUDGE

14.02.2024

harjeet

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| 1. Whether speaking/reasoned? | Yes/No |
| 2. Whether reportable? | Yes/No |