
(2000) 09 RAJ CK 0011

In the Rajasthan High Court

Case No : Civil Second Appeal No. 20 of 2000

Ashok Kumar and Others

APPELLANT

Vs

Smt. Sohan Bai and Others

RESPONDENT

Date of Decision : 22-09-2000

Acts Referred:

Rajasthan Premises (Control of Rent and Eviction) Act, 1950 — Section 13(1)(g)

Citation : (2007) 3 WLN 554

Hon'ble Judges : N.P. Gupta, J

Bench : Single Bench

Judgement

N.P. Gupta, J.—This appeal has been filed by the appellants who are legal representatives of original defendant tenant Megh Raj against the impugned judgment and decree of the learned lower Appellate Court whereby, by reversing the judgment and decree of the learned trial court, the plaintiffs suit has been decreed for eviction from the suit shop. The suit has been decreed solely on the ground of reasonable and bona fide necessity, by also deciding the questions of comparative hardship and partial eviction in favour of the plaintiff.

2. Brief facts of the case are that it is was back on 10.8.1976 that the deceased plaintiff Bherulal had filed present suit against the deceased defendant tenant Meghraj for eviction from suit shop situated at 242, Bapu Bazar, Udaipur inter alia on the ground of reasonable and bona fide requirement of deceased plaintiff. This suit was dismissed by the learned trial court on 28.10.1980, appeal against that decree also failed on 18.8.1983. While during pendency of the second appeal, on death of the plaintiff the suit was amended which amendment was allowed vide order dt. 11.9.1991 and by setting aside the judgments and decrees of both the courts below, the case was remanded to the learned trial court to proceed in accordance with law.

3. After such remand, trial was commenced wherein, on 2.2.1994 with consent of the parties an additional issue being issue No.2A was framed regarding the question as to whether the suit premises are reasonably and bona fide required

by Chandra Prakash for himself and his family members. Thereafter the parties led their evidence. The learned trial court after completing the fresh trial, dismissed the suit vide judgment and decree dt. 27.9.1995. The learned trial court in its judgment found issue Nos. 2 and 2A in favour of the plaintiff and held that the plaintiff has succeeded in proving the reasonable and bona fide requirement of the suit shop for the plaintiff and his family members. However by deciding issue No.3 relating to comparative hardship against the plaintiff, the suit was dismissed.

4. On appeal by the plaintiff, the learned lower Appellate Court, affirmed the findings of the learned trial court on the question of reasonable and bona fide requirement of the plaintiff for himself and his family members and reversed the findings of the learned trial court on issue No.3 by discussing the issue in detail running into as many as 20 paragraphs and then after discussing the question of partial eviction, also held In favour of the plaintiff. Resultantly the plaintiff's suit has been decreed as above.

5. This Court while admitting the appeal formulated four questions being the substantial questions of law arising in the instant second appeal. Hence the appeal was heard on the substantial questions of law as formulated. At the commencement of the arguments, the learned Counsel for the appellant fairly and frankly conceded that the question No.4 as formulated by this Court does not arise in the instant appeal. Obviously, therefore, no arguments were addressed on that question and the question is, therefore, not being decided.

6. The remaining three questions read as under:

1. Whether both the courts below were wrong in holding that the reasonable and bona fide necessity of the plaintiff respondents is proved without statement of plaintiff Chandra Prakash, for whose necessity the plaint was permitted to be amended by this Court vide its judgment dated",11.9.1991?

2. Whether both the courts below were wrong In considering reasonable and bona fide necessity of the entire family members instead of plaintiff Chandra Prakash for the shop in dispute by going beyond the pleadings as permitted by this Court vide its judgment dated 11.9.1991?

3. Whether both the courts below were wrong in not drawing an adverse inference against the plaintiff when Shri Chandra Prakash, for whose alleged necessity the present suit has been filed, has not been examined?

7. A perusal of these questions show that the three questions comprehend basically two questions.

8. First being covered by question No.2 as according to the appellant the learned courts below have decreed the suit by going beyond the pleadings as permitted by this Court vide judgment dt. 11.9.1991. The scope of the contention is that even by amendment the requirement pleaded was requirement of Bherulal's son Chandra Prakash while the learned courts below have considered the

requirement of other members of the family also, which according to the appellant was never pleaded, and if requirement of Chandra Prakash alone were to be considered, it is clear on record that Chandra Prakash does not have any reasonable and bona fide requirement, for various reasons submitted during the course of arguments.

9. The second question is comprehended in different forms by the two questions No. 1 and 3 viz. the effect of Chandra Prakash having not stepped in the witness box during trial. On the basis of this one fact, the question No. 1 comprehends as to whether the finding about the proof of reasonable and bona fide necessity found is wrong, and the other question is as to whether adverse inference was required to be drawn against the plaintiff on that count.

10. Dealing with the question No.2 first true it is that in the amended plaint, in so many words it had not been pleaded that, the suit shop is required by Chandra Prakash for himself and his family members. True it also is that, the original land lord Bherulal died on 1.10.1990 when the second appeal No. 165/83 was pending before this Court, and on his death his legal representatives were substituted, and taking into account the subsequent event of death of the original plaintiff Bherulal the case was remanded.

11. It is in this background that with consent of the parties, on 2.2.1994 this additional issue No.2A was framed, expressly and categorically comprehending the question that the suit shop is reasonably and bona fide required by Chandra Prakash, for himself and for use of his family members. Admittedly till the date it has nowhere been the case of the appellant that this issue was not framed with consent, nor framing of this issue has ever been assailed in any manner whatever. Not only this the parties have gone to trial with consciousness, and directing themselves specifically also on this issue No. 2A. the plaintiffs have led evidence to prove this issue No.2A, the witnesses of the plaintiff have been cross-examined on this aspect, and even the defendants have led evidence on this question, inasmuch as even D.W.-1 in his examination in chief itself has stated, that mother of Chandra Prakash carries on business by sitting on shop at Lakhara Chowk. All his family members carry on business of bangles, and that Chandra Prakash and his mother do not require the suit shop as they are carrying on the business from their other shop. Thus it is clear that the parties did know as to what is the matter in question involved in the trial and did lead evidence about it. In these circumstances it is to be seen, as to whether the question as formulated by this Court is required to be answered in favour of the appellant? Sufficient guidance is available to me in the judgment of Hon"ble the Supreme Court in Bhagwati Prasad Vs. Shri Chandramaul, wherein it has been held "if a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings, would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But

where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter.

12. In this view of the matter, in the case in hand also, as found above, that issue No.2A was expressly framed, with consent of the parties, and before commencement of the evidence, and both the parties did lead evidence on this issue, with full consciousness about the issue, simply because the decision of that issue has ultimately gone against the defendant, it cannot be said that the learned courts below were wrong in considering the reasonable and bona fide necessity of the family members, instead of that of Chandra Prakash alone, and it is not open to the appellants to contend that, in doing so the learned courts below had gone beyond the pleadings permitted by amendment.

13. It is significant to note here, that the two issues were decided by the learned trial court also against the present appellant, and it was only by deciding issue No.3 that suit was dismissed. But then it does not appear from record that the appellants submitted any cross-objection before the learned lower Appellate Court, to assail the findings of the learned trial court on this issue No.2-A, whether on the ground of absence of pleadings or otherwise. I find from the record that the plaintiff did submit a detailed note of written arguments also before the learned lower Appellate Court, while nothing of that sort had been done by the present appellants. In para 8 the learned lower Appellate Court has of course noticed that the present appellant had assailed the findings of the learned trial court on issues No.2 and 2A. I may make it clear here that, I do not mean to say that for successfully assailing the finding of the learned trial court on issues No.2 and 2A, filing of the cross-objection by the present defendant appellant or submissions of written arguments on his behalf was sine qua non to entitle him to assail the findings, but I have simply tried to comprehend the over all scenario. In this back ground, it is again significant to note that a bare perusal of the impugned judgment shows that, this controversy was never joined issue on the side of the present appellants, that the learned lower Appellate Court was required to consider the requirement of Chandra Prakash alone, and not of his family members. On the other hand even before the learned lower Appellate Court, submissions and counter submissions were made by both the parties on issue No. 2A as well. In this view of the matter, this question No.2 is required to be and is, answered against the appellants.

14. Coming to questions No. 1 and 3, at the out set it may be clarified that

admittedly Chandra Prakash did not step in witness box, and admittedly P.W. 1 Ghanshyam is the general power of attorney holder of Chandra Prakash, and admittedly Chandra Prakash's mother and wife who are the members of the family have also stepped in the witness box. The learned Counsel for the appellant is these circumstances, made two fold submission viz., firstly that on account of Chandra Prakash not stepping in the witness box to prove his reasonable and bona fide requirement, adverse inference should have been drawn against the plaintiff, to the effect that if he would have appeared, he would not have been able to support or establish the requirement. The second submission made was that, reasonable and bona fide requirement is a state of mind which is required to be proved by the plaintiff himself (Chandra Prakash) and his having not appeared in the witness box, as a proposition of law, need cannot be said to have been established.

15. I have considered the submissions and find that, drawing or declining to draw any inference is primarily a limb of appreciation of evidence, inasmuch as, the court may come to a conclusion of fact, one way or the other, by drawing adverse inference for withholding a particular evidence, or by declining to draw adverse inference for non-production of particular evidence. In other words by drawing or declining to draw adverse inference, a court of fact decides a particular question of fact, only on the basis of its satisfaction, or lack of satisfaction about a party having been able to prove or having not been able to prove a particular fact, exercises a discretion. Thus if a court of fact chooses to draw an adverse inference for non-production of a particular evidence and decides the question against a party against whom adverse inference is drawn, it is to be taken to mean that the party has not been able to established or prove that fact by the remaining evidence produced, and conversely if the court of fact declines to draw or it does not draw any such, inference, it should be taken to mean that the court was satisfied that, notwithstanding the non-production of a particular document or evidence, from the remaining evidence produced, the party concerned has been able to prove the particular fact to exist.

16. Thus in the ultimate analysis the drawing or not drawing of adverse inference, in certain circumstances may become a proposition of sufficiency of evidence, for proof of a particular fact. In that view of the matter if two learned courts below, even without drawing adverse inference on account of Chandra Prakash not appearing in the witness box, did find the two issues No.2 and 2A in favour of the plaintiff, the necessary conclusion is that the two learned courts below were satisfied even without Chandra Prakash examining himself, that the plaintiffs have been able to prove their reasonable and bona fide requirement of the suit shop. It is established law, that the question of reasonable and bona fide requirement is a pure question of fact, and the finding on this questions cannot be, and should not be, set aside or interfered with, in second appeal. In the instant second appeal the finding cannot be said to be vitiated on account of the failure of the learned courts below to draw adverse inference on account of Chandra Prakash not having entered the witness box to prove reasonable and

bona fide requirement.

17. The learned Counsel for the appellant cited before me Nanalal Goverdhandas and Co. and Others Vs. Samratbai Lilachand Shah, Chinta Narayanamma Vs. Kholli Sahu and Others, and Mohammed Zaki v. Lekhraj reported in RLR 1987 159 to support his submissions.

18. Having gone through the judgment what I found is that in Nanalal v. Samaratbai the learned Single Judge of the Bombay High Court, as a general proposition observed that the bona fide requirement is in the first place a state of mind though it may be a something more and must therefore, be depose to by the person who is requiring the premises u/s 13(1)(g). It was also observed that if the landlord does not step into the witness box to bring before the Court legal evidence for proving his requirement then it cannot be said that he reasonably and bona fide requires the premises as mentioned in Section 13(1)(g). The landlord can delegate the authority to conduct a case but he cannot delegate the duty to depose. However, this Court In Pit Rom Singh v. Vimla Devi reported in 1992 (3)WLC (Raj.) 636 while dealing with such a situation in an eviction suit upheld the examination of power of attorney holder and in a very categorical terms held that "I am not prepared to accept the submission that mere absence of plaintiff respondent to appear in the witness box could be of any consequence." Not only this, in that judgment this Court further held as under:

I have also gone through the statement of Satya Narain, the husband of the plaintiff-respondent and find the same on scrutiny that it was truthful, consistent and was thus, reliable. I fully agree with the conclusion of the court below that the non-payment of arrears of rent, for which the suit had been filed, was fully established.

19. On the face of this judgment of this Court, I am not inclined to subscribe to the view of the Bombay High Court.

20. Coming to the judgments in Chinta Narayanamma (supra) and Mohammed Zaki (supra), in both these cases the lower court of fact did draw adverse inference and the High Court declined to interfere with such drawing of inference. Suffice it to say that as observed above, drawing or refusal to draw adverse inference being only a matter of appreciation of evidence, it need not be interfered with by the second Appellate Court, and therefore, these two judgments also are of not much help to the appellants. May be that the learned lower Appellate Court, in the instant case, would have thought proper to draw adverse inference for non-production of Chandra Prakash, and may be that even in that even this Court would not have felt inclined to interfere with drawing of adverse inference but then if it has not been drawn, I am not Inclined to interfere with that so as to draw an adverse inference.

21. The next submission that was made by the learned Counsel for the appellant, was a very sweeping submissions that none of the witnesses of the plaintiff have been depose by word of mouth that the suit shop is required by Chandra

Prakash, and therefore, all said and done the findings of the learned courts below on these two issues No.2 and 2A are based on no evidence whatever. Suffice it to say that P.W. 1 Ghan Shyam in his statement has clearly deposed Chandra Prakash Ko Vadgrast Dukan Ki Jarurat Hai.

22. However even otherwise since the suit is of the year 1976 and both the original litigating parties have already died, I myself have gone through the entire evidence of the parties to find as to whether there is any reliable evidence on record to support the findings on issues No.2 and 2A and find that there is sufficient evidence on record to support the findings.

23. No other question has been argued nor any other question arises in the appeal.

24. The appeal, therefore, has no force and is hereby dismissed. The parties are left to bear their own costs.

25. At the request of the learned Counsel for the appellants, the appellants are given nine¹ months" time to vacate the suit premises on the condition that the defendants give an undertaking before the learned trial court within one month from today that on or before the expiry of the above period, they will peacefully hand over the vacant possession of the suit premises to the plaintiff and that during this period, they will not, in any manner, transfer the possession of the suit premises to anybody. Likewise, the entire decretal amount, so also all arrears of rent, if any, shall be deposited by the appellants in the trial court within one month from today and further an amount equal to the monthly rent shall continue to be deposited by way of damages for use and occupation by 15th of each succeeding month, till the actual delivery of possession. In case the appellants fail to comply with any of the above conditions, the respondents will become automatically entitled to execute the decree forthwith.