

(2007) 08 CHH CK 0031
In the Chhattisgarh High Court
Case No : Second Appeal No. 203 of 1995

Jhawarlal Bothara

APPELLANT

Vs

Smt. Kusumlata Agarwal (dead) through her L.Rs. I.D.
Agrawal and Others

RESPONDENT

Date of Decision : 13-08-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, Order 41 Rule 22
Madhya Pradesh/Chhattisgarh Accommodation Control Act, 1961 — Section 12(1)

Citation : (2007) 3 CGLJ 175

Hon'ble Judges : D.R. Deshmukh, J

Bench : Division Bench

Advocate : P. Diwakar and Kunal Das, for the Appellant; Rajeev Shrivastava, for the Respondent

Final Decision : Dismissed

Judgement

D.R. Deshmukh. J.

1. This second appeal by the Defendant is against the judgment and decree dated 09-02-1995 passed in Civil Appeal No. 25-A/1994 by the VIth Additional District Judge, Raipur. The lower appellate Court has, while reversing the judgment and decree dated 23-12-1993, whereby the suit for eviction of the Appellant/Defendant passed by XIIth Civil Judge Class-II, Raipur in Civil Suit No. 107-A/1991 was dismissed, granted eviction of the tenant under Sections 12(1) (c) and 12(1)(f) of the Chhattisgarh Accommodation Control Act, 1961 (hereinafter referred to as "the Act").

2. Admittedly, the Appellant/Defendant is the tenant of the Respondent/Plaintiff in shop No. 3 let out for non-residential purpose (hereinafter referred to as the "suit shop") situated on Great Eastern Road, Tatibandh, Raipur in front of Bharatmata School. An earlier Civil Suit No. 41-A/90 instituted by the Respondent/Plaintiff in the Court of 3rd Civil Judge Class-II, Raipur during the minority of her son Adesh Kumar for eviction of the Appellant/Defendant-tenant

on ground of bona fide requirement for Adesh Kumar u/s 12(1)(f) of the Act was dismissed as withdrawn by the Respondent/Plaintiff.

3. The Respondent/Plaintiff instituted the suit on 28.06.1991 for eviction of the tenant on two grounds. Firstly that she required the suit shop bonafide for starting the business of sanitary fitting, hardware etc. for her major son Adesh Kumar Agrawal, who was an average student and she had no other reasonably suitable accommodation available in Raipur for the said purpose. Secondly, that the Appellant/Defendant had sublet the accommodation to another person.

4. The Appellant/Defendant denied the above and pleaded that after withdrawal of earlier suit, a similar adjacent accommodation i.e. shop No. 4 let out by the Plaintiff had fallen vacant twice and was lastly let on 1.9.1989 to M.K. Juice Center. On 23.02.1992 the tenant in M.K. Juice Center had delivered vacant possession of shop No. 4 to the Respondent/Plaintiff, which was available to the Respondent/Plaintiff. It was denied that the Appellant/Defendant had sublet the suit shop. It was also pleaded that date of birth of Adesh Kumar Agrawal, a minor on the date of suit, was 6.2.1973. Therefore, no cause of action for eviction of the tenant u/s 12(1)(f) of the Act arose in favour of the Plaintiff on the date of suit. Requirement of the Plaintiff was not bona fide as she intended to enhance the rent and did not require the suit shop bona fide for starting business for her son.

5. The XIIth Civil Judge Class-II, Raipur dismissed the suit on the ground that the Respondent/Plaintiff had failed to prove that she required the suit shop bona fide for starting business for her son Adesh, who, on the date of suit, i.e., 28-06-1991 was a minor. It was held that the Plaintiff had, after withdrawal of the prior suit, let the suit shop twice, which ran contrary to the bona fide requirement, pleaded by the Plaintiff. It was also held that the Plaintiff had failed to prove that the Defendant had sublet the suit shop. However it recorded a finding in favour of the Plaintiff that besides the suit shop, no other reasonably suitable accommodation in Raipur was available to the Plaintiff on the date of suit.

6. Aggrieved by the above judgment and decree, the Plaintiff preferred Civil Appeal No. 25-A/1994.

7. The Defendant did not file any cross-objection under Order 41, Rule 22 of the CPC (hereinafter referred to as "the Code") regarding the finding of non-availability of a suitable accommodation at Raipur recorded by the trial Court in favour of the Plaintiff.

8. The lower appellate Court held that the Defendant had failed to prove that shop No. 4 had fallen vacant on 23-02-1992 or was available to the Plaintiff. It also held that Adesh Kumar Agrawal had attained majority on the date of suit and required the suit shop bonafide for starting sanitary business with his mother and that no other reasonably suitable accommodation was available to the Plaintiff for that purpose in Raipur. On the basis of a report by the Inspector under the Shops and Establishment Act that on 11-09-1987 that upon inspection

of the suit shop, Bajranglal was found present in the shop, a finding was recorded that the Appellant/Defendant had sublet the suit shop. On the above premises, the lower appellate Court granted a decree for eviction u/s 12(1)(c) and 12(1)(f) of the Act in favour of the Plaintiff. During the pendency of this second appeal, the sole Respondent/Plaintiff Smt. Kusumlata Agarwal died on 16-06-2003 and her legal representatives have been brought on record.

9. The following substantial questions of law arise for determination in this appeal:

(i) Whether the lower appellate Court could have held that the suit accommodation is required bona fide by the Respondent?

(ii) Whether the lower appellate Court was justified in granting a decree for eviction u/s 12(1)(c) of C.G. Accommodation Control Act?

10. Shri P. Diwakar, learned Senior Advocate for the Appellant/Defendant argued that the finding recorded by the lower appellate Court in favour of the Respondent/Plaintiff regarding the ground of eviction u/s 12(1)(f) of the Act is contrary to law because the ground for bona fide requirement for starting business for her son Adesh did not find place in the notice sent by the Respondent/Plaintiff. It was also contended that the evidence led by the Appellant/Defendant proved that on the date of notice, Adesh had not attained majority and, therefore, the lower appellate Court was in error in granting a decree for eviction u/s 12(1)(f) of the Act. It was also contended that the lower appellate Court did not correctly appreciate the fact that Shop No. 4, reasonably suitable for starting business for Adesh had fallen vacant and was let out by the Respondent/Plaintiff which negated her bonafide requirement u/s 12(1)(f) of the Act. As regards the ground for eviction u/s 12(1)(c) of the Act, it was argued that merely on the basis of an inspection report under the Shops and Establishments Act on 11-09-1987 that Bajranglal, brother of the Appellant/Defendant was conducting the shop, the finding recorded by the lower appellate Court that the Appellant/Defendant had sub-let the shop was wholly erroneous.

11. Shri Rajeev Shrivastava, learned Counsel for the Respondent/Plaintiff, on the other hand, argued in support of the impugned judgment and decree and placing reliance on K.S. Sundararaju Chettiar Vs. M.R. Ramachandra Naidu, , contended that non-mention in the quit-notice of a ground for claiming bonafide requirement would not amount to per se mala fide. It was also contended that the lower appellate Court had objectively tested the bona fide requirement of the Respondent/Plaintiff and had correctly recorded a finding u/s 12(1)(f) of the Act in favour of the Respondent/Plaintiff. Reliance was placed on S.J. Ebenezer Vs. Velayudhan and Others, . Placing reliance on Akhileshwar Kumar and Others Vs. Mustaqim and Others, , it was argued that once the landlord had proved her bona fide requirement u/s 12(1)(f) of the Act to the objective satisfaction of the Court, the choice of accommodation, which would satisfy her requirement, should be left and was rightly left by the lower appellate Court to the landlord's

subjective choice. It was contended that the Respondent/Plaintiff had deposed that the suit shop, being connected to her residence, it was very convenient for her, being a lady, to have access from within her house. Thus, the choice of the suit accommodation for starting business for her son Adesh was her subjective choice, which was tested by the lower appellate Court on the touchstone of the objective satisfaction of the Court and, therefore, no interference was called in the judgment and decree passed by the lower appellate Court.

12. During the course of arguments, it was also contended that since the Appellant/Defendant had not filed any cross-objection under Order 41, Rule 22 of the Code before the lower appellate Court, the finding recorded by the trial Court that the Respondent/Plaintiff had no other reasonably suitable accommodation in the locality for starting business for Adesh had become final and could not be questioned in second appeal by the tenant. Replying to this, learned Senior Advocate appearing for the Appellant/Defendant argued that since the trial Court had passed the judgment and decree in favour of the Appellant/Defendant, it was unnecessary for the Appellant/Defendant to raise any cross-objection under Order 41, Rule 22 of the Code before the lower appellate Court regarding the finding recorded by the trial Judge that the Respondent/Plaintiff had no other reasonably suitable accommodation available in the locality for starting business for Adesh. Reliance was placed on *Jatani Dei Vs. Udayanath Behera*, , *Naresh Ahir and Others Vs. Mst. Barhiya and Another*, and *M. Manoharan Chettiand Ors. v. M/s C. Coomaraswamy Naidu and Sons*, Madras AIR 1980 Mad 212.

13. Having considered the rival submissions, I have perused the record with utmost circumspection.

14. I shall first consider the objection raised by Shri Rajeev Shrivastava, learned Counsel for the Respondent/Plaintiff regarding the right of the Appellant/Defendant to question in second appeal, the finding recorded by the trial Judge that the Respondent/Plaintiff was not in possession of any reasonably suitable accommodation in the locality for the purpose of starting business for her son Adesh. Order 41, Rule 22 of the Code reads as under:

Order 41, Rule 22: Upon hearing Respondent may object to decree as if he had preferred a separate appeal.- (1) Any Respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

Explanation.- A Respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding,

notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that Respondent.

(2) Form of objection and provisions applicable thereto.- Such cross-objection shall be in the form of a memorandum, and the provisions of Rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) Omitted.

(4) Where, in any case in which any Respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to appeals by indigent persons shall, so far as they can be made applicable, apply to an objection under this rule.

15. A reading of Order 41, Rule 22 of the Code leaves no room for any doubt that if the Respondent, in whose favour the decree is passed, desires to support the decree, it is open to him to urge in the other party's appeal that the finding of the Court below against him on any given aspect ought to have been in his favour and it is not mandatory for the Respondent to file a cross objection under Order 41, Rule 22 of the Code. The words "but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour" in Order 41, Rule 22 of the Code permits the Respondent, who may not have appealed from any part of the decree to support the decree and state that the finding against him in the Court below in respect of any issue ought to have been in his favour. When the Respondent, thus, supports the decree, he need not file any cross-objection because when the decree is in his favour, cross-objection in such a situation is inconceivable. Though the Respondent is not precluded under Order 41, Rule 22 of the Code from filing a cross-objection against a finding recorded by the Court passing the decree in his favour, it is not mandatory for him to do so because the decree is in his favour and he may, during the course of arguments, agitate that the finding against him in the Court below in respect of any issue also ought to have been in his favour. A similar view has been taken in *M. Manoharan Chetti and Ors. v. M/s C. Coomaraswamy Naidu and Sons*, Madras AIR 1980 Mad 212 (supra), *Naresh Ahir and Others Vs. Mst. Barhiya and Another*, and *Jatani Dei Vs. Udayanath Behera*, Therefore, the contention of the learned Counsel for the Respondent/Plaintiff that due to non-filing of a cross-objection under Order 41, Rule 22 of the Code by the Appellant/Defendant before the lower appellate Court he is precluded from doing so in second appeal is liable to rejection.

16. I shall now consider the question of law relating to the bona fide requirement of the Respondent/Plaintiff for starting business of sanitary fittings and hardware for her son Adesh. The argument advanced by learned Counsel for the Appellant/

Defendant that non-mentioning of the ground u/s 12(1)(f) of the Act in the notice to quit given by the landlord disentitles the landlord to later seek eviction on the basis of that ground is liable to outright rejection in view of the dictum of the Apex Court in K.S. Sundararaju Chettiar Vs. M.R. Ramachandra Naidu, wherein it was held that non-mentioning in the quit notice of a ground for claiming bona fide requirement does not disentitle the landlord to seek eviction on the basis of that ground if available on the date of suit and if it is well-founded and permissible under the law. It is also to be noted that under the Act applicable to the accommodation, no prior notice for eviction of the tenant on ground u/s 12(1)(f) of the Act was necessary. The bona fide requirement of the landlord u/s 12(1)(f) of the Act has, therefore, to be tested on the date of suit.

17. Regarding the age of Adesh on the date of suit, I am in complete agreement with the finding of fact recorded by the lower appellate Court, which has given cogent reasons for rejecting the testimony of Sister Lily, the Principal of Bharat Mata School for proving the date of birth of Adesh as 06-02-1975 on the basis of the admission register and for placing reliance on the Birth certificate issued by the hospital at Jhansi, where Adesh was born showing his date of birth as 06-02-1973. The finding recorded by the lower appellate Court that on the date of suit, i.e., 28-06-1991, Adesh had attained majority can not be faulted with. As regards the question of availability of a suitable alternative accommodation, the lower appellate Court has, upon a correct appreciation of the evidence, held that the landlord's choice of the suit accommodation is reasonable and not whimsical. It has rightly taken into consideration the fact that the Respondent/Plaintiff is a lady and it would be extremely convenient for her to start the hardware business for her son Adesh in the suit accommodation because the suit accommodation has access from within her house. The landlord has, thus, established that her choice of the suit accommodation is bonafide. It has withstood the test of objective satisfaction of the Court. Under these circumstances, the choice of the landlord has to be respected and the choice of the Appellant/Defendant cannot be thrust on the landlord. In Akhileshwar Kumar and Others Vs. Mustaqim and Others, , the Apex Court has held as under:

Once it has been proved by a landlord that the suit accommodation is required bona fide by him for his own purpose and such satisfaction withstands the test of objective assessment by the court of facts then choosing of the accommodation which would be reasonable to satisfy such requirement has to be left to the subjective choice of the needy. The court cannot thrust its own choice upon the needy. Of course, the choice has to be exercised reasonably and not whimsically.

18. The Apex Court in K.S. Sundararaju Chettiar Vs. M.R. Ramachandra Naidu, held that the bonafide requirement of the landlord has to be ascertained objectively on the basis of evidence led by the parties and the Court has to ascertain the real intention of the landlord objectively on such evidence. The need of the Respondent/Plaintiff for starting hardware business for her son Adesh in the suit accommodation has also been correctly appreciated by the lower

appellate Court by objectively satisfying itself that the need is genuine and bona fide. The dictum of the Apex Court in Akhileshwar Kumar and Others Vs. Mustaqim and Others, applies with full force to the facts of the case. The contention of the learned Counsel for the Appellant/Defendant that the requirement pleaded by the Respondent/Plaintiff falls short of the felt need and is merely a desire under the garb to enhance rent can not be sustained.

19. The judgment of the lower appellate Court is a detailed and exhaustive judgment, which has taken into consideration each and every available piece of evidence and relevant circumstances, assessed with objectivity consistently with the relevant principles of law and, therefore, I am of the considered opinion that the finding recorded by the lower appellate Court that the Respondent/Plaintiff has satisfactorily proved the ground for eviction u/s 12(1)(f) of the Act is impeccable. The first substantial question of law is, therefore, answered against the Appellant/Defendant and in favour of the Respondent/Plaintiff that the lower appellate Court has, upon arriving at an objective satisfaction, rightly held that the ground u/s 12(1)(f) of the Act was established by the Respondent/Plaintiff.

20. I shall now consider the question of law regarding the ground for eviction u/s 12(1)(c) of the Act. Once the Respondent/Plaintiff had succeeded in showing that business in the suit accommodation was being conducted by Bajranglal, it was for the Appellant/Defendant to lead evidence to rebut the presumption against him and to examine Bajranglal in rebuttal. The documentary evidence led by the Appellant/Defendant showing that upon inspection under the Shops and Establishments Act on 31-12-1985 and 11-09-1987, it was found that Bajranglal was conducting the shop and the corrections made by the Appellant/Defendant in the document, Ex. P-23A regarding the name of the owner of the establishment has been rightly appreciated by the lower appellate Court. Due to non-examination of Bajranglal, the lower appellate Court has rightly held that the ground u/s 12(1)(c) of the Act regarding sub-letting of the accommodation by the Appellant/Defendant was proved by the Respondent/Plaintiff. Substantial question of law No. 2 is also answered in affirmative against the Appellant/Defendant and in favour of the Respondent/Plaintiff.

21. In the result, the appeal fails and is dismissed. In the facts and circumstances of the case, the parties shall bear their own costs.

A decree be drawn accordingly.