

(2004) 08 JH CK 0025
In the Jharkhand High Court
Case No : Second Appeal No. 378 of 2003

Mayarani Kundu and Others	Vs	APPELLANT
Purushottam Das Jhunjunwala and Another		RESPONDENT

Date of Decision : 23-08-2004

Acts Referred:

Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982 — Section 11(1)

Citation : (2004) 4 JCR 144

Hon'ble Judges : P.K. Balasubramanyan, C.J

Bench : Single Bench

Advocate : S.L. Agarwal, for the Appellant; A.K. Srivastava, A.N. Sahay and Rupesh Raj, for the Respondent

Final Decision : Allowed

Judgement

P.K. Balasubramanyan, C.J.—This second appeal by the defendants in a suit for eviction u/s 11(1)(c) and Section 11(1)(d) of the Bihar Buildings (Lease, Rent and Eviction) Control Act was, admitted on the following substantial questions of law :--

"(i) Whether merely for non-production of postal receipts, when rent was tendered by way of money order and the same was refused by the landlord, it could be held that a default in payment of rent has been proved within the meaning of Section 11(1)(d) of the Bihar Buildings (Lease, Rent and Eviction) Control Act?

(ii) Whether on the pleadings and the evidence in the case, the Courts below were right in law in ordering, eviction u/s 11(1)(d) of the Act?

2. After taking notice of the second appeal, the plaintiff- respondents have filed a memorandum of cross-objections challenging the refusal of the decree by the lower appellate Court u/s 11(1)(c) of the Act. Though the scope of the right of appeal has to be determined on the basis of the provision conferring such an appeal and Order LXI, Rule 22 of the Code contains no restriction in respect of a

memorandum of cross-objections, but in view of the fact that a memorandum of cross-objections in a second appeal is only a substitute for the filing of a separate second appeal by the respondents challenging that part of the decree which has gone against him, that a memorandum of cross-objections has also to be viewed within the confines of Section 100 of the CPC which confers the right of a second appeal, but restricts interference only on a substantial question of law. Therefore, it will be appropriate to frame a substantial question of law, if it arises, based on the memorandum of cross-objections.

3. The trial Court had ordered eviction u/s 11(1)(c) of the Act upholding the plea of the landlord. The lower appellate Court on appeal had reversed it, inter alia, on the ground that the landlord had, pending the proceeding, sold to a stranger, an extent of land that lay adjacent to the suit building. There is no clear finding by the lower appellate Court that the land that was sold did contain a building which was in possession of the landlord and which he could have profitably occupied. In that context, I am of the view that a substantial question of law also arises from the memorandum of cross-objections. That question is framed as under :--

(iii) whether on the pleadings and the evidence in the case, the lower appellate Court was justified in denying a decree for eviction to the plaintiffs u/s 11(1)(c) of the Act and reversing the decree of the trial Court passed in that behalf.

4. I shall first deal with the questions arising out of the memorandum of the second appeal. That is essentially whether the decree for eviction u/s 11(1)(c) of the Act is sustainable in law. The plaintiffs, by virtue of a third amendment to the plaint, which originally contained only a claim for eviction u/s 11(1)(c) of the Act on the ground of a bona fide personal necessity, Introduced a claim for eviction on the ground of default in payment of rent u/s 11(1)(d) of the Act pleading that the rent for the months of July, August and September, 1992 were not paid by the tenants. The defendants-tenants pleaded that the amounts were sent by money orders in due time, but the plaintiffs refused to receive the money orders when tendered, and the money orders were returned with endorsements in that behalf. No replication or additional pleading was filed in that behalf by the plaintiff.

5. In support of his case, in addition to producing the money order coupons, the defendants also examined the Post Man who tendered the money orders to the landlord and he proved the endorsement of refusal made in the money order coupons on such refusal. The only suggestion in the cross-examination to him was a bland one that he had not tendered them. The trial Court, relying on the decision of the Patna High Court in Ujjal Singh and Sons and Others Vs. Rajendra Kr. Kedia and Others, , held that the plea of the tenant that he had tendered the rent in due time could not be accepted in view of the failure of the tenant to produce the money order receipts while sending the money orders to the landlord. This view of the trial Court has been concurred in by the lower appellate Court. The argument on behalf of the tenant is that in addition to producing the

money order coupons, the tenant had also examined the Postman to prove the endorsements of refusal and that is enough in the eyes of law to establish that the rent was tendered in due time and it was refused by the landlord, was rejected by the lower appellate Court, again based on the decision referred to above. But it is seen that in *Ujjal Sing and Sons and Others Vs. Rajendra Kumar Kedia and Others*, the correctness of the above decision fell for consideration before the Supreme Court and the Supreme Court set aside the judgments of the trial Court, the lower appellate Court and the second appellate Court and remanded the case to the first appellate Court with the direction that the tenant be given an opportunity to adduce whatever other evidence that may be available to him so substantiate his contention regarding the tender of the rent due for the period in question. In other words, the Supreme Court did not agree that the failure to produce the money order receipts was fatal to the case of the tenant. No doubt, the failure to produce, may give rise to an adverse inference against the tenant's case, but that does not mean that, the tenant cannot prove his case by evidence aliunde.

6. In that context, it appears to me that the evidence of the Postman who tendered the money orders to the landlord that the money orders were duly tendered, but the landlord refused to accept them and he had contemporaneously noted the refusal and returned the money orders in addition to the production of the money order coupons obviously containing the seal of the post office, would be legal evidence to establish that the rent has been tendered by the tenant as pleaded by him. No doubt, in an appropriate case, the effect of the failure to produce the money order receipts may have to be weighed with the other evidence, while appreciating the evidence of the Postman or the other evidence. But, that is different from saying that, every time, a plea of tender of the rent by money order should be found false for non-production of the money order receipt. In the case on hand, the evidence of the Postman has not, in any manner, been discredited. Evidence of the tenant that he had sent the amounts by money order, the production of the money order coupons, the evidence of the landlord and the only suggestion put to the Postman, all lead to the conclusion that there had been a proper tender of the rent by the tenant. In the background is also the fact that when filing the suit for eviction, the landlord based his claim for eviction only u/s 11(1) (c) of the Act and introduced the claim for eviction u/s 11(1)(d) of the Act only by a third amendment of the plaint. Of course, that by itself is not fatal to the case of the landlord. But, if a claim for eviction u/s 11(1)(d) of the Act the ground of default in payment of rent was available, the landlord would have normally taken that ground even at the inception and the fact that he introduced it at a later stage is capable of indicating that he has introduced that ground, more or less, as an afterthought.

7. It is true that this Court sitting in second appeal cannot re-appreciate the evidence. It is also true that a finding of fact arrived at on a consideration of the relevant materials, could not be interfered with in second appeal. But when the Courts below rest their conclusion on a particular fact, namely non- production of

money order receipts and the significance of that fact has been watered down, if not brushed aside, by the Supreme Court, it has to be held that the finding based on such a fact, becomes a finding that is based on a misunderstanding of the effect of the evidence in the case, generating a substantial question of law. In that view, this Court gets jurisdiction to interfere with such a finding in exercise of its jurisdiction u/s 100 of the Code of Civil Procedure. I am, therefore satisfied that this Court would be justified in holding that the Courts below were substantially in error in granting a decree for eviction u/s 11(1)(d) of the Act. Substantial questions of law (i) and (ii) formulated above and on which the second appeal was admitted, have thus to be answered in favour of the tenants-appellants. In other words, it has to be held that the decree for eviction u/s 11(1)(d) of the Act has to be found to be unsustainable.

8. Now the question is whether the refusal of the decree for eviction u/s 11(1)(c) of the Act by the lower appellate Court is sustainable in law? The case originally pleaded as the owner of the building, was that he was in need of the portion of the building occupied by the tenant-defendants. Subsequently, he introduced a plea that he was the partner of a firm, which was carrying on a business in a part of the building and the portion that was in the occupation of the tenant was needed for the purpose of expanding the business of the firm of which the landlord was an active partner. The tenant resisted the claim on the ground that the need set up was that of a partnership and that the need of the partnership was not a personal necessity of the landlord who was plaintiff No. 1 in the suit. It was also contended that the business proposed could not be carried on in the building in view of the restrictions imposed by the Bihar Agricultural Produce Market Act, 1960. It was also pleaded that the landlord owned and possessed an extent of 13.5 decimals of land adjacent to the suit building. The tenant had a case that the said land contained a building, which had subsequently been pulled down by the landlord. The trial Court found on the evidence that the need set up by the landlord was bona fide; that the fact that an extent of land was sold pursuant to an earlier agreement for sale, which was binding on the landlord, did not mean that the personal necessary put forward was not genuine or that the claim was no a bona fide one and that the need had been established by the landlord Justifying an order for eviction u/s 11(1)(c) of the Act. The trial Court overruled the plea that the Bihar Agricultural Produce Market Act prevented the landlord from expanding the avowed business in the area in question. The lower appellate Court in appeal, agreed with the trial Court that the Bihar Agricultural Produce Market Act did not stand in the way of the claim of the landlord. But it took the view that the need of the partnership set up by the landlord could not be considered as a personal necessity of the landlord within the meaning of Section 11(1)(c) of the Act, justifying an order in favour of the landlord for evicting the tenant. It also took the view that the fact that the landlord had sold 13.5 decimate of land lying adjacent to the building in question disentitled the landlord to an; order for eviction of the tenant u/s 11(1)(c) of the Act.

9. I may incidentally notice that the lower appellate Court did not enter any

finding that the piece of the land sold by the landlord did contain a vacant building which was in possession of the landlord and which he could have used for meeting the necessity put forward by him in the plaint. Learned counsel for the landlord contended that the expression "personal necessity" occurring in Section 11(1)(c) of the Act was wide enough to include the necessity for the purpose of a business run by the landlord in partnership with another, so long as the landlord was not a sleeping partner but was active in the business of the firm. The need of the firm concerned in such a situation would also be his personal necessity. Counsel also contended that in the absence of a clear finding that the landlord parted with possession of a building suitable for his requirement, pending the suit it could not be held that he was disentitled to a decree for eviction on the ground that he had sold a piece of land in the vicinity. Counsel for the tenant, on the other hand, submitted that the two facts taken note of by the appellate Court were relevant and the fact that the landlord had sold 13.5 decimals of land pending the proceedings, was enough to show that his necessity set up was not a bona fide personal necessity. Counsel contended that the said property did contain a room or a building which could have been used by the landlord. The also contended that the need of the partnership could not be treated as the necessity of the landlord justifying an order for eviction, since the need of the firm for expanding its business or to have additional space for its business was not the need of the landlord.

10. Merely because the landlord sets a piece of vacant land lying adjacent to the suit building, would not show that the personal necessity set up by him was not true or that the claim was not bona fide. The position would be different, if the tenant was in a position to establish that the said extent of land contained a building of which the landlord had khas possession and that it was suitable for the purpose for which eviction sought or to meet the necessity put forward and that the landlord had parted with that property during the pendency of the suit. For that, it has to be established that there was a vacant building or a room in the property sold. Except contending that the landlord had sold the land with a building and that the building was demolished after it was sold, the tenant could not justify refusal of a decree for eviction on the ground that the landlord had parted with possession of another building, which could have been used by him for the purpose or necessity put forward. Therefore, that part of the reasoning of the lower appellate Court is unsustainable and in my view the trial Court was justified in holding that the sale was not relevant. Of course, the reason given by it was that the sale was pursuant to a prior agreement for sale and the landlord was only honouring that commitment.

11. The other question is whether the need for expanding the business of a firm of which the landlord is a partner would be a personal necessity as contemplated by Section 11(1)(c) of the Act. It has been held by decisions that the need of a partnership of which the landlord is an active partner, is the need of the landlord, and the expression "personal necessity" need not be so confined as to limit it only to the cases where the landlord by himself proposed to occupy the building

for a personal business. The expression, personal necessity, would take within its sweep the necessity of a firm, of which the landlord is also a partner, but not a sleeping partner. As regards the necessity, it is in evidence that the firm is occupying a portion, of the building and the other portion is in possession of the tenant. The landlord required the portion in the possession of the tenant for the purpose of expanding the business of the firm, of which he is a partner. In the context of the Rent Control Legislation and in the light of the various decisions having bearing on it, I am of the view that the need put forward by the landlord is a necessity within the meaning of Section 11(1)(c) of the Act. On facts, it has been found by the trial Court and that has not been disagreed to by the lower appellate Court that the plea that additional space was needed for expansion, was not a mere ruse put forward for seeking eviction. In this state of the record, it is clear that the lower appellate Court was in error in reversing the finding of the trial Court on the claim made by the landlord u/s 11(1)(e) of the Act. In other words, according to me, the lower appellate Court substantially erred in law in interfering with the decree for eviction u/s 11(1)(c) of the Act by relying on an irrelevant fact of the assignment of an adjacent piece of land without finding that a vacant building was also conveyed and on a misconstruction of Section 11(1)(c) of the, Act as to the content of personal necessity referred to in that provisions. This amounts to a substantial error of law justifying interference in second appeal. Therefore, I answer the third substantial question of law arising out of the memorandum of cross-objections in favour of the plaintiffs, the landlord and hold that the landlord is entitled to a decree for eviction u/s 11(1)(c) of the Act. The third substantial question is thus answered in favour of the plaintiff-respondents.

12. In the result, both the appeal and the memorandum of cross- objections are allowed. The decree for eviction passed u/s 11(1)(d) of the Act is reversed and the claim of the landlord for eviction on the ground of default in payment of rent is rejected. The decree of the lower appellate Court refusing a decree for eviction to the landlord u/s 11(1)(c) of the Act is also reversed and the decree passed in that behalf by the trial Court in favour of the plaintiffs is restored. Thus, the suit by the plaintiffs is decreed on the ground of personal necessity u/s 11(1)(c) of the Act. In the circumstances of the case, the parties are directed to suffer their respective costs in all the Courts.