

(1986) 11 DEL CK 0056

In the Delhi High Court

Case No : Second Appeal No. 54 of 1983

Nihal Chand Agrawal and others

APPELLANT

Vs

Gopal Sahai Bhartia and others

RESPONDENT

Date of Decision : 10-11-1986

Acts Referred:

Citation : AIR 1987 Delhi 206

Hon'ble Judges : Sunanda Bhandare, J

Bench : Single Bench

Advocate : V.B. Andley, for the Appellant; Y.K. Jain, for the Respondent

Final Decision : Dismissed

Judgement

Sunanda Bhandare, J.—Late Shri Gopal Sahai and his two minor sons became the owners of property No. VII/558, Zer Fasil, G. B. Road Shardashanand Marg, Delhi after the partition between the heirs of Smt. Sarti Devi who was the original owner of the property. A suit for recovery of possession and damages for wrongful use and occupation of a Kothri and one garage situated on the ground floor of this property was filed against the defendants i.e. the present appellants, in the court of Sub Judge. 1st Class, Delhi. During the pendency of the suit Shri Gopal Sahai died and his name was deleted from the array of parties and the suit was prosecuted by the mother who was the natural guardian of the two other plaintiffs. On the pleading of the parties, the following issues were framed :

1. Whether the defendants are trespassers in the disputed premises as alleged?
2. Whether defendant No. 1 is a tenant in the disputed premises? If so, to what effect?
3. Whether the suit is bad for non-joinder of parties as alleged? If so, its effect?
4. Whether the defendants are liable to pay damages as alleged?
5. Relief.

Addl. Issue No. 1 :

Whether the plaintiffs are the owners of the property in dispute?

Addl. Issue No. 2 :

Whether the suit has not been properly valued for the purposes of Court-fee and jurisdiction?

2. The learned Sub Judge, 1st Class, Delhi decided issues Nos. 1 and 2 together and held that relationship of landlord and tenant between defendant No. 1 and Shri Gopal Sahai had not been established and, therefore, he was a trespasser. On issue No. 3 and additional issue No. 1 the trial court held that the suit was not bad for non-joinder of parties and held that Shri Gopal Sahai had become exclusive owner of the property in dispute and as such there was no other necessary party to be joined. On issue No. 4, the trial court held that the defendants were liable to pay damages for wrongful use and occupation of the property in dispute. On additional issue No. 2 the trial court held that the suit was properly valued and accordingly decided this issue in favour of the plaintiff. Accordingly, a decree for possession of the property was passed in favour of the plaintiff. An appeal was filed by the defendants against this order before the Court of Additional District Judge, Delhi being RCA No. 28 of 1978. Before the First Appellate Court though in the grounds of appeal the finding of the trial court on all the issues was challenged, at the hearing, only two issues were pressed. One was regarding the ownership of Shri Gopal Sahai and the second was regarding issue No. 2 namely whether defendant No. 1 was a tenant in the disputed premises. On both these issues the First Appellate Court held against the "defendants and in favour of the plaintiff and dismissed the appeal. This Regular Second Appeal is filed against this judgment of the Additional District Judge, Delhi dated 8th February, 1983.

3. At the time of the admission of the second appeal, following two questions of law were framed :

1. Whether the two courts below have correctly interpreted Ext. DW3/1, the extract of the municipal record, showing appellant as a tenant?

2. What is the effect of non-consideration of the admission by PW 3 that the appellant was a tenant in the suit property?

4. However, at the hearing of the appeal before me. apart from substantiating the questions raised hereinabove, Learned Counsel for the appellant assailed the judgment of the First Appellate Court mainly on the ground that the First Appellate Court had not dealt with issues Nos. 1 and 2 at all and had not considered or discussed the evidence of any single witness and had mechanically upheld the finding recorded by the Sub Judge, 1st Class on these issues. It was contended that since the Additional District Judge was the final court of fact it was incumbent upon the court to record its finding on each material question of law or fact in issue between the parties. It was submitted that the findings as

recorded by the First Appellate Court did not comply with the requirements of O. 41, R. 31 read with O. 20, R. 5 of the C.P.C. It was further submitted that the finding of the Additional District Judge that the status of the appellants who were not tenants under Shri Gopal Sahai could be only that of a trespasser, was without any reason and was based only on the reasons given by the trial court and the First Appellate Court did not apply its independent mind to this issue. Learned Counsel stated that DW3 Kuldeep Kumar who was the Record Keeper of the Municipal Corporation of Delhi had categorically made, a statement that the appellant is the tenant in the property and he paid a rent of Rs. 20/- and this was borne out by the record of the Corporation Ext.DW3/I which was a public document which showed that the appellant was the tenant and paid Rs. 20/- as rent. Learned Counsel also referred to the evidence of PW3 Vishwa Nath and submitted that this witness has specifically stated that the appellant was the tenant of the respondent. Learned Counsel submitted that the courts below and particularly the First Appellate Court had not referred to the evidence at all while coming to the conclusion that the relationship of landlord and tenant between the parties was not established.

5. On behalf of the respondents, it was contended that though it is true that the First Appellate Court had not given its own reason for coming to a conclusion that the relationship of landlord and tenant was not established and also that the appellant was a trespasser, in view, of S. 103 of the Code of Civil Procedure, it is open to this Court to consider all the evidence in a second appeal and determine the issue necessary for the disposal of the appeal Learned Counsel stated that PW3 had been brought to prove the will and a very casual question was asked to this witness about the tenancy of the appellant and this witness in a casual and colloquial language referred to the appellant as a tenant, however, he could not tell what was the rent paid and since when the appellant was put in occupation as a tenant. Learned Counsel submitted that the appellant had not produced any rent note or rent receipt in support of his contention that he paid rent to the respondent nor was there any evidence on record to show that he was inducted by the respondent as a tenant at any time. As regards the evidence of DW3 and document Ext.DW3/I it was contended that the Municipal record only indicated who was in occupation of the premises and this record was created in the absence of the respondent. It was not doubted that the appellant was in occupation, however what was doubted was that he was a tenant of the respondent. Even a trespasser is in occupation and when the Inspector of the Corporation goes to the site he only asks the person present there and the statement of that person is recorded. Learned Counsel, therefore, stated that this document was of no value and it did not prove the tenancy of the appellant.

6. Under O. 41, R. 31 of the C.P.C. it is mandatory upon the appellate court to independently weigh the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Thus, the First Appellate Court being the final court of fact, a mere general expression of concurrence with the trial court judgment is not enough. I find that

the First Appellate Court, in the present case while deciding issue No. 2, has not discussed the evidence at all and has disposed of this issue by observing that the evidence of the defendant has received thorough objective appreciation, by the learned Sub Judge, 1st Class and, therefore, there is no ground for interference. It may be useful to reproduce the observation of the First Appellate Court which reads thus :

The finding of issue No. 2 whether Nihal Chand was a tenant under Gopal Sahai was decided by a well-reasoned finding in the lower court. There was neither rent note nor rent receipt. There was not even any oral evidence worthy of any credence that Gopal Sahai inducted Nihal Chand as a tenant defendants received thoroughly objective appraisal by the learned Sub Judge and there is no ground whatsoever for interference. The status of the appellants who were not the tenants under Gopal Sahai could be only that of trespassers and the learned Sub Judge rightly held so.

7. In my opinion, therefore, there is substantial force in the contention of the Learned Counsel for the appellant and the judgment of the First Appellate Court not being in accordance with the rules cannot be upheld.

8. But, then the next question is, should this judgment be set aside and the case remanded back to the First appellate Court to decide the appeal according to law or proceed to decide the issue in this second appeal itself. After the amendment of the CPC in 1976 if the evidence on the record is sufficient the High Court can in a second appeal determine an issue necessary for the disposal of the appeal if the same has not been determined by the lower appellate court. Thus, there is no bar in deciding the question in this second appeal itself. This being the position it was felt that considering the fact that the suit was filed by the plaintiffs as early as in the year 1973 and almost 13 years having elapsed since the institution of the suit, the remand order would further delay the final disposal of the suit and the ends of justice will be better served if the issues between the parties are decided once for all in this second appeal. Though in the grounds of appeal the appellant had taken several grounds, at the hearing, Learned Counsel for the appellant limited his arguments only to issue No. 2 and contended that the; evidence of two witnesses namely Shri Vishwa Nath P. W. 3 and Shri Kuldeep Kumar D.W. 3 and the Municipal record Ext. D.W. 3/1 was not correctly interpreted by the two courts below Thus, with the assistance of the Learned Counsel, statements of P.W. 3 and D. W. 3 were perused. Learned Counsel for the appellant referred to the certified copy of the inspection Ext. D.W. 3/1. According to the appellant, he was inducted as a tenant in the suit premises by Shri Gopal Sahai at a monthly rent of Rs. 20/- and a rent note was written to this effect. The best evidence to prove the tenancy would have been to produce the rent note or the rent receipt. Admittedly, neither the rent note nor the rent receipt was produced by the appellant in the court The only document on which the appellant relied to prove this fact was Ext. D.W. 3/1. The appellant therefore relied on the evidence of P.W. 3 Shri Vishwa Nath. In his cross-examination, P.W.

3 mentioned that the appellant was inducted as a tenant by Shri Gopal Sahai 4 or 5 years ago. From the statement of this witness, it appears that his examination-in-chief was only regarding the will made by Shri Gopal Sahai because this witness had only attested the will of Shri Gopal Sahai. However, in his cross-examination, he states that the property in dispute is with Nihal Chand i.e. the appellant herein. He, however, is not in a position to say since when Nihal Chand has been occupying this property. He states that he was a tenant of Gopal Sahai and was inducted by him and he could not say what was the rate of rent. If the whole of the statement is read together, it does appear that this witness has referred to the appellant as a tenant in a casual manner without understanding the implication. He only knew that the appellant was in occupation of the premises.

9. Now coming to the statement of D.W. 3 Shri Kuldeep Kumar, Record Keeper of the Municipal Corporation of Delhi this witness has categorically stated that no rent receipt was shown by the appellant to the inspector of the Corporation who visited the premises. He also stated that he could not say who had told the inspector that Nihal Chand was the tenant of the respondent. He also admitted that if no rent receipt is shown, estimated rent is indicated in the document prepared by the inspector for the purposes of determining the house-tax. In fact this witness has categorically stated that the record is prepared only for the purposes of determining the house-tax.

10. The next to be considered is the document Ext. D. W. 3/1. It is a certified copy of House-tax Survey Register of the Municipal Corporation of Delhi for the year 1971-72. This document as stated by D. W. 3 was prepared by one Shri F. C. Mishra, Inspector of the Corporation who was not examined by the appellant though he was in service of the Corporation. However, D. W. 3 Shri Kuldeep Kumar, Record Keeper of the Municipal Corporation of Delhi was examined to prove this document. In my opinion, this document, in no way indicates that the appellant was the tenant, though it does indicate that he was the occupant of the premises. Even if the fact that Rs. 20/- is entered in the wrong column in this document is ignored, the mention of Rs. 20/- against the name of the appellant in this document, in no way proves that Rs. 20/- was the rent, in fact, paid by the appellant to Shri Gopal Sahai. On perusal of this document one finds that the rent of premises in occupation of Shri Gopal Sahai who is now the owner is shown as Rs. 50/- and even the portions in the premises which were found to be locked, estimated rent has been shown. Thus, if the document is seen in the light of the statement of D.W. 3 it does not indicate that the appellant was a tenant of respondent No. 3.

11. In my opinion, therefore, neither the document Ext. D. W. 3/1 nor the statements of P.W. 3 Vishwa Nath and D.W. 3 Kuldeep Kumar proves the relationship of landlord and tenant between the appellant and Gopal Sahai. Thus, issue No. 2 was rightly held by the trial court in favour of the plaintiff-respondent.

12. Since the relationship of landlord and tenant is not established, the appellant

could be in possession of the premises either as a trespasser or as a licensee. This appellant had never claimed to have occupied the premises as a licensee of the respondent. That being the position, it has to be held that the appellant was a trespasser. Thus, issue No. 1 was also rightly held in favour of the plaintiff-respondent.

13. The appeal, therefore, fails and is dismissed. There will be no order as to costs.