
(2000) 09 MP CK 0005
In the Madhya Pradesh High Court
Case No : S.A. No. 149 of 1990

Salik Ram Boloram Mehar	Vs	APPELLANT
Smt. Guruvachan Kaur and others		RESPONDENT

Date of Decision : 30-09-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 7, 100

Citation : (2001) 2 MPLJ 34

Hon'ble Judges : S.C. Pandey, J

Bench : Single Bench

Advocate : A.D. Deoras, for the Appellant; Alok Aradhe, for the Respondent

Final Decision : Allowed

Judgement

S.C. Pandey, J.

This is an appeal u/s 100 of the CPC filed by the defendant/tenant Salikram against the original landlord/plaintiff Jogendra Singh Ghai, who had died during pendency of this appeal and his legal representatives have been brought on record.

This appeal is directed against the judgment and decree dated 16th of January, 1990, passed by 1st Additional District Judge, Raigarh, in Civil Appeal No. 17-A of 1983 arising out of the judgment and decree dated 8th of March, 1982 passed by IInd Civil Judge Class-II, Raigarh, in Civil Suit No. 181-A of 1981.

The original plaintiff/respondent Jogendra Singh Ghai filed a Civil Suit No. 181-A of 1981 against the appellant stating that he was the landlord of House No. 208, situate at Koshtapara, Nayaganj Ward No. 12, Raigarh. It was alleged in the plaint that the appellant, on 30th of May, 1967 entered into a portion the suit-house, mentioned in the schedule annexed to the plaint, as a tenant on monthly rent of Rs. 30/-He had executed a document showing his tenancy. The tenancy continued from 30th of every month and ended on 29th of each next month. It was further pleaded that from 30th of November, 1971 to 29th of August, 1974

the appellant did not pay the rent. In the meanwhile, a registered notice dated 20th of June, 1974 calling upon the appellant to pay the rent and terminating his tenancy was served by the original plaintiff/respondent on 21st of June, 1974. The rent was neither paid nor any reply to the notice was received by the respondent. It was further pleaded that the suit-house was required by the respondent/plaintiff for its reconstruction and that could not be done without the house being vacated. The third ground on which the eviction, was sought, was that the original plaintiff required the suit-house to make it office-cum-residence for his son Nirmal Singh Ghai, who was an Advocate. The arrears of rent amounting to Rs. 990/- were claimed by the respondent/plaintiff for the period between 30-11-1971 to 29- 8-1974; and further mesne profit was also claimed by him, after terminating the tenancy of the appellant, for the period 30-8-1974 to 14-4-1975.

In the written statement, the appellant denied that he entered the suit- premises as a tenant on 30-5-1967. He also denied the execution of the document in relation to payment of rent of the suit-house at the rate of Rs. 30/- per month. All other allegations were also denied by the appellant in his written statement and it was specifically pleaded that the appellant was in occupation of the suit-house in his own right as a member of joint Hindu family consisting of his brothers Dharmuram, Kirtiram, and Malikram, It was claimed that this property belonged to joint Hindu family of the aforesaid brothers, who including the appellant were in occupation of the suit-house without any formal partition, according to the mutual understanding among the brothers. It was also specifically pleaded that the document aforesaid regarding creation of tenancy with effect from 30-5-1967, if any, was concocted and forged.

The Trial Court, after recording the evidence of the parties, by its judgment dated 8-3-1982, dismissed the suit filed by the original plaintiff/respondent.

The original plaintiff/respondent, thereafter, filed an appeal against the judgment and decree passed by the Trial Court, before the Lower Appellate Court. The learned Additional District Judge, in the appeal filed before him, passed an order on 6-4-1983 permitting the original plaintiff/respondent to lead the evidence of Hand Writing Expert for proving the signature of the appellant/defendant on Ex. P-2, the alleged rent-note on which the suit was based. It was also stated that the appellant shall have also a right to rebut the evidence led by the plaintiff/ respondent. Instead of setting aside the judgment and decree of the Trial Court, the learned Additional District Judge directed the Trial Court to send it the evidence so recorded by the Trial Court for consideration.

It appears further from the proceedings of the Trial Court that after passing of the order by the Lower Appellate Court dated 6-4-1983, the respondent/plaintiff Jogendra Singh Ghai examined M.R. Deshpande, as P.W. 3, on record. He had deposed in favour of the respondent saying that Ex. P-2 appears to bear the signature of the appellant Salikram. It appears from the order sheet of the Trial Court that the evidence of M.R. Deshpande was recorded on 19-7-1983. The

appellant remained Ex parte from the previous dates and after the evidence was recorded and the case of the plaintiff was closed, the Court fixed the case for further orders. It appears that before any order could be passed, the appellant filed an application under Order 9 Rule 7 of the Code of Civil Procedure, on 27-7-1983. However, the Trial Court rejected that application and, thereafter, sent the evidence of M.R. Deshpande, the Hand Writing Expert to the Lower Appellate Court as per order of remand. Thereafter, it appears that the appellant was given fresh opportunity by the Lower Appellate Court by order dated 31-3-1986, to rebut the evidence of Hand Writing Expert by cross-examining M.R. Deshpande, examined by the plaintiff/respondent. He was further given an opportunity to examine a Hand Writing Expert, if he wanted so, before the Trial Court in support of his case. After the further remand, the appellant did not appear to have prayed for cross-examining the Hand Writing Expert examined by the plaintiff/respondent. He only wanted to examine his own witness C.T. Bhanage, who could not, however, be examined despite several opportunities given to the appellant to produce him before the Trial Court. The Trial Court was, therefore, compelled to send back the case to the Lower Appellate Court, after several hearings, by order dated 4-8-1988.

Thereafter, the Lower Appellate Court reappreciated the evidence on record in the light of the evidence of M.R. Deshpande, P.W. 3, who was not earlier examined at the time when the Trial Court delivered its judgment. The Lower Appellate Court held against the appellant stating that Ex. P-2 was signed by the appellant. The Court-below relied on the evidence of P.W. 3, M.R. Deshpande, who was examined by the plaintiff/respondent as a Hand Writing Expert. The conclusion of the Lower Appellate Court was supported by the evidence on record including the evidence of P.W. 3, M.R. Deshpande, the Hand Writing Expert. Accordingly, the Court below decreed the suit of the plaintiff/respondent under sections 12(1)(a), 12(1)(f) and 12(1)(h) of Madhya Pradesh Accommodation Control Act 1961 (henceforth "the Act"), setting aside the judgment and decree of the Trial Court.

This appeal was admitted by this Court on the following Substantial Question of Law, framed by order dated 19-8-1990:--

"Whether the Lower Appellate Court exceeded in its jurisdiction in interfering with the findings of the Trial Court relating to bona fide need and arrears of rent without discussing the evidence on record in its right perspective?"

Learned counsel for the appellant argued that the respondent had not taken express plea that he is the owner of the suit-house. He relied only on the rent-note dated 30-5-1967 but during the course of evidence before the Trial Court it was sought to be proved that the house was purchased by the respondent from Dharmuram, the elder brother of the appellant. It was argued vehemently that the evidence led by the respondent/plaintiff supported the plea of the appellant that initially the suit-house belonged to the appellant and the members of his family because it was Dharmuram who is alleged to have transferred the suit-

house to the original plaintiff. It was further argued that the Substantial Question of Law was not very happily worded but the sum and substance of the Substantial Question of Law is - Whether the findings recorded by the Lower Appellate Court are liable to upset as not warranted under the facts and circumstances available on record of the case. The learned counsel for the appellant drew the attention of this Court to the decisions of the Supreme Court in the case of Dilbagrai Punjabi Vs. Sharad Chandra, , and in the case of Ishwar Dass Jain (Dead) Thr. Lrs. Vs. Sohan Lal (Dead) By Lrs., , and argued that there are circumstances for interfering with the findings of fact of the Lower Appellate Court. It was argued by the learned counsel for the appellant that under the facts and circumstances of the case, I.A. No. 2457 of 1999 was filed by the appellant for amending his written statement stating that the sale-deed between Dharmu and Jogendra Singh Ghai was a loan transaction. It was further argued that the abrupt plea taken by the respondent without mentioning his title, has misled the appellant and, therefore, it was prayed by the appellant that the interest of justice requires that the permission to amend the written statement be granted to him so that complete justice be done to the parties. The learned counsel for the original plaintiff/respondent, however, opposed the amendment application filed by the appellant and stated that this application is belated. Sufficient opportunity was given by the Trial Court to the appellant, after remand of the case, to produce his evidence but he did not do so. Therefore, his conduct also shows that the appellant wanted to protract the trial of the suit. The learned counsel for the respondent supported the conclusion of the Lower Appellate Court stating that it appears to be correct for the reason there was evidence on record supporting the finding the Lower Appellate Court and the learned counsel for the respondent, therefore, argued that there was relationship of landlord and tenant between the original plaintiff/respondent and the appellant.

It appears to this Court that the Lower Appellate Court had given a fresh finding after permitting the respondent to examine his Hand Writing Expert. The evidence of Hand Writing Expert was not available before the Trial Court. In view of this matter, the appreciation of evidence on record by the Lower Appellate Court would not bind this Court on the principle that this Court is not entitled to interfere with the findings of fact u/s 100 of the CPC and should decide only the Substantial Questions of Law. In this appeal, the position of the Second Appellate Court is that of the First Appellate Court because the findings of the Trial Court in absence of the evidence of Hand Writing Expert lose all significance. It is not correct to say that the High Court, in no circumstance, can decide a question of fact. Section 103(a) of the CPC gives powers to the High Court of hearing in second appeal, to decide the questions of fact which have not been determined by the Lower Appellate Court or by both the Courts-below. This section itself indicates that the High Court has power to appreciate the questions of fact. However, where the finding is recorded in the first appeal by the Lower Appellate Court then the question of reappraisal of the findings of fact at the second appellate stage has not been provided in the Code of Civil Procedure. This Court,

therefore, relies on a decision of the Supreme Court in *Temple Shri Radha Krishna vs. Ramlal Baijlal*, reported in 1965 JLJ 507, wherein under the old Code of Civil Procedure, their Lordships of the Supreme Court pointed out that in certain circumstances, the High Court may interfere with the findings of fact against the order of remand. In that case, the High Court had called for a fresh finding from the Trial Court directly to it and, thereafter, disagreed with the findings of the Trial Court. Their Lordships did not dispute the proposition that the findings of fact of the Trial Court could be interfered with but laid down that the remand order in second appeal should be sent requiring the Trial Court to give the finding and thereafter, requiring the Lower Appellate Court also to give its findings as a First Appellate Court in the case. In this case, the Lower Appellate Court itself has not given the Trial Court an opportunity of giving a finding on the basis of additional evidence. It has itself considered the additional evidence and given a fresh finding. In effect, the findings recorded by the Lower Appellate Court can be held to be findings of the Court of first instance, under the facts and circumstances of the case.

Therefore, under the aforesaid proposition of law, this Court reappreciates the evidence on record, on the basis as if the Lower Appellate Court had recorded its findings for the first time ignoring the findings recorded by the Trial Court as it would be of no consequence in view of the additional evidence of the Hand Writing Expert. Under these circumstances, the Substantial Question of Law framed by this Court loses all its significance.

The original plaintiff Jogendra Singh did not enter the witness-box and his son Nirmal Ghai entered the witness-box. He was, in the year 1981, aged about 30 years. It is he, who proved Ex.P-2 saying that this document was written by Stamp Vendor Banshidhar Tripathi and that one Ganeshram Agrawal had signed the document in his presence as an attesting witness. He was unable to state that how his father became the owner of the suit-property. He stated that his father purchased the suit-property from Dharmu Mehar. He was unable to say that how much consideration was paid for purchasing the suit-property. He was aged about 8-10 years at that time. He further stated that he never lived in the suit-house. He was unable to say that Dharmu had how many brothers. He stated that the suit-house is in Ward No. 18 which was old Ward No. 12. He, however, stated that he knew Kiratiram. Malikram and Salikram but he did not know that Dharmu was the eldest brother of Salikram. He stated that he did not know who was living in the suit-house before 1967 but he said that he knew that Salikram did not live there. He denied that his father did not purchase the suit-house from Dharmu. He denied that the document Ex. P-2 is a forged document. He was unable to say that any receipt was passed by his father Jogendra Singh Ghai. He denied that his father was a money-lender.

P.W. 2, Ganeshram Agrawal was alleged to be an attesting witness of Ex. P-2. He stated that the document Ex. P-2 was written by one Arzi Nawis, namely Tripathi and the appellant had signed it at place B to B and his signature on this

document was at place A to A. In his cross examination, this witness denied that he had no knowledge that the suit-house was the ancestral property of the appellant. He stated that the appellant was living in the suit- house from the date of execution of rent-note. He asserted that he was saying so because the rent-note was executed on that date. He denied that he ever went inside the suit-house. This witness, however, in order to support the case of the original plaintiff/respondent, denied that in the suit-house the appellant and his brother Kiratiram and Malikram etc. resided from day before the rent- note Ex. P-2 was executed. He further denied the suggestion that he did not sign Ex. P-2 as an attesting witness.

The evidence of Hand Writing Expert, M.R. Deshpande, P.W. 3 who was examined after the case was remanded to the Trial Court, is to the effect that the document Ex. P-2 bears the disputed signature of appellant Shalikram at place D1 to D1 and his admitted signature is shown in the photograph Ex. P-11 on record, at place A1 to A1. According to the opinion of Hand Writing Expert the disputed signature of the appellant Salikram is similar to his admitted signatures on the said photograph Ex. P-10 at place A1 to A1 and on the order sheets dated 13-1-1982, 17-9-1979 and 12-12-1975 at place A3 to A3, A2 to A2 and A4 to A4 respectively. It appears that the opinion of the Hand Writing Expert has tilted the view in favour of the respondent, the original plaintiff and against the appellant. Therefore, it is necessary to examine the evidence on record again with a little more care and caution.

The evidence of P.W. 1 Nirmal Ghai does not indicate that he was aware of the execution of the sale-deed by Dharmu in favour of his father. He was at that time, 8 to 10 years of age and, therefore, was not in a position to know if Dharmu had executed any sale-deed in favour of the original plaintiff. The witness further stated that he did not know that he ever lived in the suit-house. He did not know how many brothers Dharmu had. His father, the original plaintiff did not enter the witness-box and, therefore, the execution of the sale-deed was sought to be proved by putting it to D.W. 4 Dharmu, who was examined by the appellant for the purpose of proving that the suit-house belonged to him and his brothers. The witness stated that he had not sold the suit-house to anybody and he did not sell it to the original plaintiff Jogendra Singh Ghai. He denied his signatures on the registered sale-deed Ex P-8. He also denied that he had countersigned the sale-deed. Therefore, it was incumbent upon the Lower Appellate Court, as a Court of fact, to examine the document Ex. P-2 in the light of proof of Ex. P-8. The original plaintiff had not alleged anything about the sale-deed in the plaint. He started with the presumption as if the suit-house belonged to him from the very inception and the appellant or his brothers had to right or title to the suit-house. Even though it was not necessary to amend the plaint for denying the allegations made by the defendant in his written statement, it was necessary for the original plaintiff to show his prima facie title to enter into a transaction of lease. The respondent/original plaintiff could do this by showing his possession over the suit-house prior to the execution of the lease- deed or by

showing that in fact, he was the owner of the suit-house and he allowed the appellant to live in it as a tenant after entering into an agreement. The plaint does not disclose, nor does the evidence on record show that the original plaintiff was placed in possession of the suit-house after the execution of the sale-deed dated 13-8-1958. There is no evidence on record, apart from the sale-deed and its recitals. However, the execution of the sale-deed was denied by Dharmu, D.W. 4, to whom this document was put, in his cross examination for the purpose of proving it by admitting its execution by him, in favour of the original plaintiff Jogendra Singh Ghai. Now, what strikes to the mind is that his document is a registered document and, therefore, giving full premium to the formalities of registration, this Court however, cannot presume that the document Ex. P-8 was executed by Dharmu. There could be no such presumption. The presumption would be that a person who called himself Dharmu went to the office of the Sub-Registrar and executed a document but the actual person, who purported to be Dharmu and who is supposed to have executed the sale-deed, denied its execution. Under these circumstances, it has to be presumed that the execution of the sale-deed has not been proved. Dharmu could not have done more than what he did, if he had not executed the sale-deed. Once the execution of the sale-deed is not proved, the story that the document Ex. P-2 creates a lease in favour of the original plaintiff becomes contrary to the preponderance of probabilities. It is not enough for a landlord to prove the execution of rent-note for proving the lease in all the cases. Normally, the execution of rent-note may be a sufficient note, provided, that the landlord had title and possession of the premises at the time of letting it so that the tenant enters into it as a lessee. If none of these things are available and there is preponderance of probabilities that the original tenant was already in possession of the premises at the time of execution of a rent-note, the plaintiff must prove his title. It appears to this Court that by putting Ex. P-8 before Dharmu, the original plaintiff Jogendra Singh Ghai, did not dispute that at sometime prior to execution of the sale-deed the suit-house belonged at least to Dharmu. This fact lends great support to the case of the appellant that the suit-house belonged to Dharmu and his brothers; and he was living therein from the very inception. D.W. 2 Malikram and D.W. 4 Dharmu, the brothers of the appellant, apart from D.W. 3 Damrudhar, who was also examined by the appellant, support the case of the appellant that he was living in the suit-house for a period of last thirty years and the house, in question, was constructed by their father. Dharmu, D.W. 4 and Malikram, D.W. 2 have stated in their evidence that all the brothers were living in the suit-house from the time of their father for over a period of thirty years, as has also been stated by the appellant in his statement before the Trial Court.

There is no evidence on record that the original plaintiff-Jogendra Singh Ghai was placed in possession of the suit-house soon after the execution of the alleged sale-deed and that he continued to be so in possession till 30-5-1967 when the rent-note Ex. P-2 was executed. There is also no evidence on record how the suit-house was dealt with between the period of 13-8-1958 to 30-5-1967. It is

strange that the respondent/the original plaintiff had pleaded nothing about this period of time. In the opinion of this Court the Lower Appellate Court was unduly impressed by the fact that the respondent had proved that the document Ex. P-2 bore the signature of the appellant Salikram. In this particular case, it was not enough that the execution of rent-note would automatically prove the relationship of landlord and tenant between the original plaintiff and the appellant because it was not proved by the original plaintiff/respondent that pursuant to the execution of the sale-deed Salikram, the appellant, entered the suit-premises. The preponderance of probability points out in the direction that the appellant was already there in the suit-house when the document Ex. P-2 is alleged to have been executed. The language of the document Ex. P-2 does not suggest that on the date of execution of the rent-note the appellant was placed in possession of the suit-house. Under these circumstances, it is difficult to accept the proposition that by proving the signature of the appellant on Ex. P- 2, the original plaintiff/respondent proved his case of relationship of landlord and tenant between him and the appellant. He had not said himself to be in possession of the suit-house at the time of execution of rent-note Ex. P-2 and also he has not been able to prove the execution of the sale-deed by Dharmu. In such a situation, the execution of Ex. D-2 would not make him a landlord.

This is not the case where this Court is required to positively decide the title of the respondent No. 1 by virtue of the sale-deed and, therefore, the matter is only indirectly and incidentally an issue for determining the relationship of landlord and tenant between the original plaintiff/respondent and the defendant/appellant. Therefore, any finding recorded by this Court shall not bind the legal representatives of the original plaintiff/respondent on record in a properly constituted suit for title. The real finding of this Court is that Ex. P-2, the rent-note does not appear to be a genuine document creating a lease in favour of the original plaintiff/respondent.

In view of the aforesaid discussion, this Court is of the opinion that the original plaintiff/respondent has not been able to prove the relationship of landlord and tenant between him and the appellant. Therefore, this appeal deserves to be allowed and the impugned judgment and decree passed by the Court below on 8th March, 1982 are liable to be set aside. Accordingly, this appeal is hereby allowed. The impugned judgment and decree dated 5-3-1982 are hereby set aside. The suit filed by the original plaintiff Jogendra Singh Ghai, before the Trial Court for eviction of the appellant Salik Ram is dismissed. There shall be no order as to costs.