

(2013) 01 PAT CK 0094
In the Patna High Court
Case No : Second Appeal No. 222 of 2010

Shamim Ahmad @ Shamim Akhter	APPELLANT
Vs	
Bibi Hafiza Khatoon and Others	RESPONDENT

Date of Decision : 21-01-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11, 100, 101

Citation : (2013) 3 PLJR 225

Hon'ble Judges : Chakradhari Sharan Singh, J

Bench : Single Bench

Advocate : Shashi Shekhar Dwivedi, Satish Chandra Mishra and Md. Nurul Hoda, for the Appellant; Raghieb Ahsan and Najeeb Ahmad, for the Respondent

Final Decision : Dismissed

Judgement

Chakradhari Sharan Singh, J.—Heard Mr. Shashi Shekhar Dwivedi, learned Senior Advocate for the appellant and Mr. Raghieb Ahsan, learned Senior Advocate for the respondents. This appeal u/s 100 of the CPC has been placed for hearing under Order 41 Rule 11 of the Code.

2. The appeal has been preferred against the judgment and decree dated 22.3.2010 and 1.4.2010 respectively passed by learned Additional District Judge (F.T.C. No. 1), Purnea in Eviction Appeal No. 4 of 2000, whereby and whereunder he has dismissed the appeal preferred against the judgment and decree dated 17.8.2000 and 31.8.2000 passed by learned Munsif, Sadar, Purnea in Eviction Suit No. 7 of 1996. The appellant herein was the defendant and admittedly the tenant.

3. The suit, vide Eviction Suit No. 7 of 1996 was filed by the respondents for eviction of the appellants on two grounds, namely, on the ground of personal necessity and also on the ground that the appellant willfully defaulted in making payment of rent. The defendant appeared and filed his written statement and contested the suit alleging that there was not default in payment of rent nor the

plaintiff- respondent had any bona fide personal necessity for his own occupation. The trial Court on the basis of pleadings framed" seven issues, including the following two:--

Issue No. (iii)--Whether the defendant is a defaulter in the eye of law?

Issue No. (iv)--Whether the plaintiffs require reasonably and bonafidely the suit premises for their own use and occupation?

4. After examining oral and documentary (sic--materials?) on record, learned Munsif, Sadar, Purnea came to the finding that the defendant was a defaulter. However, as regards Issue No. (iv), learned Munsif Sadar, Purnea held that the plaintiff did not require the suit holding reasonably and bonafidely for his personal use and occupation.

5. The defendant-appellant thereafter preferred an appeal against the said judgment and decree of Munsif Sadar, Purnea vide Eviction Appeal No. 04 of 2000. Learned Additional District Judge (F.T.C. No. 1), Patna, concurred with the finding of fact arrived at by learned Munsif, Sadar, Purnea and dismissed the appeal.

6. In view of the above this appeal has been preferred u/s 100 of the Code of Civil Procedure. In the memo of appeal, the appellant has raised following questions of law to be involved in the present appeal which, according to him are substantial in nature:--

I. Whether the judgments of both the courts and their findings on the point of defaulter are contrary to the evidence on the records and the established principles of law?

II. Whether the learned trial court has rightly held that it is only wish of the plaintiff to evict the defendant from the suit premises on hypothetical ground, but, on the other hand it has declared the defendant to be defaulter merely on the hypothesis that the defendant has become defaulter despite the materials available on the record that the defendant has never failed or refused to make payment of rent and so, the findings of both the court appear to be perverse on this point?

III. Whether both the courts have failed to appreciate that the plaintiff has deliberately and unsuccessfully tried to make the defendant as defaulter technically with ulterior motive to evict him from the suit premises and under the similar situation they had earlier not brought any suit eviction suit?

IV. Whether the concurrent findings of both the courts are contrary to law and facts and the materials available on the record?

V. Whether the judgment of courts below are vitiated on account of misconstruction of documents and adopting dual standards of evaluation in appraisal of evidence lead by the parties?

VI. Whether the learned courts have failed to appreciate that the Respondents have been in habit to accept the rents in on lump sum and therefore, the appellant cannot be held to be defaulter in the facts and circumstances of the case?

VII. Whether the learned courts have failed to appreciate that the Respondents had not been stayed at one place for realization of rent and therefore, payment of by the appellant in the manner prescribed in the W.S. cannot be justified to hold the appellant defaulter?

7. Mr. Shashi Shekhar Dwivedi, learned Senior Counsel appearing on behalf of the appellant in course of argument has submitted additional substantial questions of law which are as follows:--

I. Whether both the Courts below while considering the question of default have failed to take note of and to consider the evidence of D.W. 1, D.W. 2, D.W. 3, D.W. 4. and D.W. 5 along with admission made by P.W. 1 and P.W. 4 the Plaintiff himself that there was a practice of receiving lump sum payment of rent by the landlord from the tenant since long?

II. Whether the appellate Court has committed error of record in construing that "Admittedly" the defendant is in default from period of March, 1994 to November, 1995 and has proceeded with the said assumption without looking into relevant evidence and has further committed error in holding that there is no evidence of showing lump sum payment irrespective of Ext-C which is the receipt of rent from March, 1988 to September, 1993?

III. Whether in view of the admitted fact that Plaintiff No. 1 is Mohammadan Purdah Nashin lady, Plaintiff No. 2 acted as Landlord and realized rent which he cannot have done while being posted in Sitamarhi, Sheohar, Hajipur, Saharsa, Purnea, Katihar, Bhagalpur, and Muzaffarpur?

IV. Whether the rent having been realized by Plaintiff No. 2 on behalf of Plaintiff No. 1 at irregular interval he is estopped from raising the plea of defaulter for that period at interval?

V. Whether the plaintiffs/Respondents are not entitled for decree of eviction on perverse and wrong findings of the Courts below without evidence on the point of willful default on the part of the Defendant/Appellant?

8. Learned senior counsel has vehemently submitted that the Courts below wrongly construed the oral and documentary evidence available on record to reach to a finding that the appellant defaulted in making payment of rent. He submitted that the parties had developed a practice of making and receiving payment of rent in lump-sum for several months. In such situation, he submitted that the appellant could not be held to be a defaulter on the basis of the finding that the payment of rent for few months, were in fact not made to the landlord. He further submitted that the appellant in fact tried his level best to make payment of rent but the respondents for the purpose of making out a case for

eviction refused to accept payment.

9. Learned Senior Counsel has placed reliance on two judgments reported in D.C. Oswal Vs. V.K. Subbiah and other, , M. Naresh Kumar Vs. B. Nagalaxmi, , to contend that unless default in payment of rent is found to be willful, a tenant cannot be declared as defaulter for the purpose of vacating him from suit premises. Referring to these judgments, Mr. Dwivedi has submitted that if the payment had been accepted in past at some irregular intervals, existence of arrears cannot be treated as default. On the basis of these judgments he submits that both the Courts below reached to erroneous finding while holding the appellant to be a defaulter.

10. Mr. Raghib Ahsan learned Senior Counsel appearing for the respondents on the other hand, while supporting the findings of the Courts below submits that the appellant was a habitual defaulter because of which the parties had to enter into an agreement for payment of rent on regular, month to month basis vide Exhibit "C". He submits that there is no illegality in the findings of the Courts below. He further submits that the jurisdiction of this Court to interfere in exercise of power u/s 100 of the CPC is very limited and the same should not be exercised where there is concurrent finding of fact and such finding of fact cannot be termed to be perverse or contrary to material available on record. He has further pr submitted that this Court while exercising power u/s 100 of the Code would not reappraise the evidence.

11. After having heard learned counsel for the parties and perusing the judgment and decree passed by the Courts below and the substantial questions of law as raised by learned Senior Counsel on behalf of the appellant, I am of the view that the appeal does not deserve to be admitted. The judgments relied upon on behalf of the appellants as mentioned above would not apply in the present case, in case of M. Naresh Kumar vs. B. Nagalaxmi (supra), the Apex Court considered the aspect that the default prior to filing of the evection petition was only of two months. Similarly, in case of D.C. Oswal vs. V.K. Subbiah and Others, the default was of three months at the time of filing of the case and, therefore, the Apex Court held that it was not a case of willful default. In the present case, on the contrary there is concurrent finding that there was default for a period of 21 months. In such view of the matter, the two judgments of the Apex Court as cited above cannot have application in the facts and circumstances of the present case.

12. Section 100 of the CPC envisages that a Second Appeal would lie to the High Court from a decree passed in appeal by any court sub-ordinate to the High Court if the High Court is satisfied that the case involves a substantial question of law. In order to reassert the mandatory requirement of involvement of substantial question of law for a second appeal to be maintained u/s 100 of the Code, Section 101 of the Code provides that no second appeal shall lie "except on the ground mentioned in Section 100 of the Code". Such being the legislative mandate, the superior courts have on several occasions laid down law as to what

would constitute and what would not, a "substantial question of law" within the meaning of Section 100 of the Code while scrutinizing scope of the Section. By now, it is settled position of law that the High Court cannot interfere with the concurrent finding of fact unless the same is found to be perverse being based on no evidence or contrary to material available on record or that on the evidence on record no reasonable person could have come to that conclusion. Reference may be made in this regard to the Supreme Court judgments in the cases of Vidhyadhar Vs. Manikrao and Another, ; Mst. Sugani Vs. Rameshwar Das and Another, ; Gurdev Kaur and Others Vs. Kaki and Others, ; Thiagarajan and Others Vs. Sri Venugopalaswamy B. Koil and Others, and Narayanan Rajendran and Another vs. Lakshmi Sarojini and Others.

13. From perusal of the substantial questions of law as raised in the memo of appeal as well as the additional substantial questions of law raised by learned Senior Counsel appearing on behalf of the appellant which have been quoted hereinabove, I am of the view that none of the questions involve any substantial question of law and only refer to the findings of Courts below on the basis of material available on record. It is not within the scope of Section 100 of the Code enter into concurrent findings of fact arrived at by the Courts below.

14. After going through the judgments of the Courts below, I do not find that the findings can be said to be perverse. In such view of the matter, the present appeal is dismissed.