
(2010) 02 RAJ CK 0126
In the Rajasthan High Court

Subhash Sharma

APPELLANT

Vs

Chhinna Ram and Others

RESPONDENT

Date of Decision : 01-02-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 19 Rule 1, Order 19 Rule 2, Order 20 Rule 4, Order 21 Rule 100, Order 21 Rule 101
Evidence Act, 1872 — Section 101, 3
Rajasthan Premises (Control of Rent and Eviction) Act, 1950 — Section 19(A)

Citation : (2010) 3 CivCC 294 : (2010) 2 RLW 1039 : (2010) 2 WLN 292

Hon'ble Judges : H.R. Panwar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

H.R. Panwar, J.—This civil second appeal u/s 100 of the Code of Civil Procedure, 1908 (for short "the Code" hereinafter) is directed against the judgment and deemed decree dated 29.7.2009 passed by learned Additional District Judge No. 1, Jodhpur (for short "the first appellate court" hereinafter) whereby the appeal filed by the appellant against the order (decree) dated 23.1.2009 passed by Additional Civil Judge (Junior Division) No. 2, Jodhpur (for short "the trial court" hereinafter) in Civil Misc. Case No. 28/06 in Execution Case No. 26/06 under Order 21 Rule 97 of the Code has been dismissed.

2. Briefly stated the facts of the case to the extent they are relevant and necessary for the decision of this second appeal are that a civil suit for eviction and arrears of rent came to be filed by the respondent landlords against tenant Ramgopal on the ground of default in payment of monthly rent and subletting the premises to the applicant Subhash Sharma and Dilip Sharma before Additional Munsiff No. 2, Jodhpur being Civil Original Suit No. 52/93. The suit came to be decreed by the trial court by judgment and decree dated 3.2.1994 against tenant Ramgopal. Tenant Ramgopal did not challenge the judgment and decree of eviction and arrears of rent. The landlord filed execution proceeding before the trial court and in the execution proceeding an application u/s 151 of

the Code came to be filed by appellant Subhash Sharma on 28.9.2006 stating therein that the decree of eviction has been passed against tenant Ramgopal whereas the appellant claims to be direct tenant of the respondent landlord with effect from May, 1982 and on that strength he is in possession of the suit premises. It has been further stated that the appellant filed a civil suit for declaration and permanent injunction seeking to declare the judgment and decree dated 3.2.1994 passed in Civil Original Suit No. 52/93 against tenant Ramgopal as null and void. The suit was partly decreed, however, on appeal before the Additional District Judge No. 1 Jodhpur, by judgment dated 21.9.06 the appeal filed by the respondent." landlord came to be allowed and appeal filed by appellant Subhash Sharma came to be dismissed. Thereafter, appellant Subhash Sharma filed an application u/s 151 of the Code before the trial court and on application of the appellant, the trial court directed landlord respondents to file an application under Order 21 Rule 97 of the Code. That order came to be challenged by the respondent's landlord before this Court by way of writ petition being S.B. Civil Writ No. 1328 (07) Chinna Ram and Anr. v. Civil Judge (J.D.) No. 2, Jodhpur and Ors. By order dated 17.5.2007, this Court set aside the order impugned therein dated 27.1.2007 and directed the Executing Court to treat the application of the appellant Subhash Sharma u/s 151 of the Code filed on 28.9.06 as application under Order 21 Rule 97 of the Code. This is how, the trial court proceeded on the said application and passed the order dated 23.1.2009 dismissing the application under Order 21 Rule 97 of the Code. On an appeal against the said order dated 23.1.2009, the first appellate court passed the judgment impugned dismissing the appeal. Hence, this second appeal.

3. I have heard counsel for the parties. Carefully gone through the orders passed by both the courts below on an application under Order 21 Rule 97 r/w Section 151 of the Code.

4. It is contended by learned Counsel for the appellant that the judgment of the court as well as the first appellat court trial are perverse and therefore, this second appeal involves substantial question of law. It is further contended that in the month of May, 1982 the original tenant Ramgopal vacated the disputed premises and appellant became the tenant at the rate of Rs. 500/- per month. At the time of vacating the disputed premises, the original tenant Ramgopal has handed over the rent note executed by him at the time of entering into tenancy in the year 1979. It is further contended that the rent receipt filed by the respondent's landlord before the trial court in the eviction suit was at the rate of Rs. 400/- per month whereas the respondent's landlord claimed the rent at the rate of Rs. 500/- per month which according to the learned Counsel for the appellant was the rent payable by the appellant from 01.5.1982. Though learned Counsel for the appellant contended that the appellant paid the rent, but no rent receipt has been placed on record. Learned Counsel for the appellant has further contended that the rent was sent by Money Order which the respondent landlord refused to accept. However, thereafter no amount was deposited by the appellant before the trial court u/s 19(A) of the Rajasthan Premises (Control of Rent and

Eviction) Act, 1950 (for short "the Act of 1950" hereinafter). Learned Counsel for the appellant submits that in support of the application u/s 151 of the Code which subsequently came to be treated as an application under Order 21 Rule 97 of the Code by the order of this Court, the appellant filed an affidavit and controverting the appellant's affidavit. The appellant moved before the trial court under Order 19 Rule 2 r/w 151 of the Code seeking to call the respondent landlord for the purpose of cross-examination which came to be dismissed by the trial court by order dated 21.4.2008. According to learned Counsel for the appellant, the affidavit is not an evidence at best it can be said to be the evidence in ones own favour and it cannot be used unless the deponent of such affidavit is subjected to cross-examination. Learned Counsel for the appellant has relied on decision of Hon"ble Supreme Court in New India Assurance Company Ltd. Vs. Nusli Neville Wadia and Another, , in The Range Forest Officer Vs. S.T. Hadimani, and in Sudha Devi Vs. M.P. Narayanan and Others, . According to learned Counsel for the appellant, return of rent note executed by the original tenant Ramgopal in favour of respondent landlord amounts to surrender of tenancy by the original tenant. It was further contended that though there is concurrent finding of fact recorded by the counts below but when the finding is Reverse it amounts to involving a substantial question of law in the appeal. He has relied on decision of Hon"ble Supreme Court in Kulwant Kaur and Others Vs. Gurdial Singh Mann (dead) by Lrs. and Others etc., and in Hero Vinoth (minor) Vs. Seshammal, and lastly it was contended that the burden of proof is no the decree holder to prove that the person claiming tenancy is not the tenant. He has relied on a decision of this Court in Balraj Singh and Anr. v. Ajit Singh 2004 (4) WLC (Raj.) 85 and a decision of Hon"ble Supreme Court in Anwarbi Vs. Pramod D.A. Joshi and Others,

5. Per contra, learned Counsel for the respondent landlord contended that in the application filed by the applicant u/s 151 of the Code which was subsequently came to be treated as an application under Order 21 Rule 97 of the Code, there is no such pleading as has been contended by counsel for the appellant before this Court and therefore, in absence of the pleadings and the case founded, the contentions raised by the learned Counsel for the appellant for the first time before this Court cannot be accepted. Learned Counsel for the respondent has relied on decision of Hob"ble Supreme Court in Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, and decisions of this Court in Tarachand and Anr. v. Paltu Nath 1996 (3) CCC 244 and in legal Representatives of Meerabux and Ismial and Ors. v. Ranchhod Das and the Legal Representatives of Alladeen 1987 2 RLR 108. Learned Counsel for the respondent further contended that the scope of Order 21 Rule 97 of the Code is very limited and the questions first time agitated before this Court cannot be gone into. He has relied on decision of Hon"ble Supreme Court in Kazi Akeel Ahmed v. Ibrahim and Anr. 1996 DNJ (SC) 227 and in Silverline Forum Pvt. Ltd. Vs. Rajiv Trust and another, Learned Counsel for the respondent further submits that the application filed by the appellant seeking to cross-examine the witnesses who produced the affidavit came to be rejected by

a well reasoned order by order dated 21.4.2008 and that order was not challenged promptly before decision of the appeal by the first appellate court and therefore, on the facts and circumstances of the case at the stage of second appeal, the appellant cannot be permitted to cross-examine the deponent of the affidavit. He has relied on decision of Shreenath and Another Vs. Rajesh and Others, and a decision of this Court in Sri Vaishnav Brahmin Trust, Jodhpur v. Ramesh Chandra and Ors. 2001 (3) CCC 651 (Raj.) and in Lalita v. Civil Judge and Ors. 2005 (2) RDD 35 (Raj.) 35, in Mukesh Chouhan v. Ram Prasad and Anr. 2007 WLC (Raj.) UC 21 and a decision of Bombay High Court in West Coast Paper Mills Ltd. v. Trustees of the Port of Bombay 2000 (2) CCC 339 (Bom). Lastly it was contended that burden to prove that the appellant was direct tenant to the respondent landlord is on the appellant and the appellant failed to discharge such burden. According to learned Counsel for the respondent, Section 101 of the Indian Evidence Act provides that burden lies to prove the fact on the person who asserts and in the instant case the appellant failed to discharge the burden in proving that he is direct tenant to the respondent landlord.

6. According to learned Counsel for the appellant, the burden to prove that the appellant is not direct tenant of the respondent landlord is on the respondent landlord. Learned Counsel for the appellant has relied on a decision of this Court in Balraj Singh and Anr. v. Ajit Singh (Supra) and a decision of Hon''ble Supreme Court in Anwarbi v. Pramod D.A. Joshi and Ors. (Supra).

7. I have given my thoughtful consideration to the rival submissions made by learned Counsel for the parties and carefully gone through the judgment and decree passed by the trial court as well as by the first appellate court.

8. In Kulwant Kaur and Ors. v. Gurdial Singh Mann (Dead) by LR.s. and Ors. (supra), Hon''ble Supreme Court held that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-a-vis the concept of justice.

9. In Hero Vinoth (Minor) v. Seshammal (supra), Hon''ble Supreme Court held that it is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences of fact are possible, the one drawn by the lower appellate court will not be interfered by the High Court in second appeal.

Adopting any other approach is not permissible. The High Court will, however, interfere where it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at by ignoring material evidence.

10. In *Anwarbi v. Pramod D.A. Joshi and Ors.* (supra) Hon"ble Supreme Court held that the obstruction raised in execution of decree, the rights of the obstructionist will have to be decided in appropriate proceedings, in accordance with law. Unless and until such proceedings terminate in favour of the decree-holder, the decree-holder cannot take possession and the appellant therein is entitled to retain possession.

11. In *Balraj Singh and Anr. v. Ajit Singh* 2004 (4) WLC (Raj.) (supra), this Court held that the adjudication mentioned in Order 21 Rule 97(2) CPC need not necessarily involve a detailed enquiry or collection of evidence. The Court can make the adjudication on admitted facts or even on the averments made by the resister and the Court can direct the parties to adduce evidence for such adjudication if the Court deems it necessary. While considering facts of that case, this Court held that it is not clear as to what is the position of the obstructer, therefore, if the learned District Judge through impugned judgment had given directions to the Executing Court to make enquiry under the provision of Order 21 Rule 97 onwards of CPC, he was committed no illegality or irregularity in doing so.

12. In *New India Assurance Co. Ltd. v. Nusli Neville Wadia and Anr.* (supra), Hon"ble Supreme Court observed as under:

We, therefore, must not shut our eyes to the objects for which the Act was enacted. It provided for a speedy remedy. The Estate Officer is expected to arrive at a decision as expeditiously as possible. The provisions of the CPC and the Evidence Act being not applicable, what is necessary to be complied with is the principles of natural justice.

13. In *Range Forest Officer v. S.T. Hadimani*, (supra), Hon"ble Supreme Court observed as under:

In the instant case, dispute was referred to the Tribunal that the claimant/workman had worked for 240 days and his service had been terminated without paying him any retrenchment compensation. It was the case of the claimant/workman that he had so worked but this claim was denied by the management. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any Court of Tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period

was produced by the workman. Burden cannot be placed on management to show that there was justification in termination of service without first determining on basis of cogent evidence that workman/claimant had worked for more than 240 days in a year preceding his termination.

14. In *Smt. Sudha Devi v. M.P. Narayanan and Ors.* (supra), the Apex Court held that affidavits are not included in the definition of "evidence" in Section 3 of the Evidence Act can be used as evidence only if for sufficient reason Court passes an order under Order XIX, Rule 1 or 2 of the Civil P.C.

15. In *Trojan & Co. v. RM. N.N. Nagappa Chettiar* (supra) while considering the provision of Order 6 Rule 2 and Order 20 Rule 4 CPC, Hon"ble Supreme Court held that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint the Court was not entitled to grant the relief not asked for. A similar view has been taken by this Court in *Tarachand and Anr. v. Paltu Nath* (supra) and in *Legal Representatives of Meerabux and Ismial and Ors. v. Ranchhod Das and the Legal Representatives of Alladeen* as also by Delhi High Court in *Ved Parkash v. Marudhar Services Ltd.* 2000 (3) CCC 690 (Delhi).

16. It is settled law that the proof beyond pleading is not permissible and the case pleaded has to be founded. In the instant case, in the application u/s 151 of the Code which was subsequently came to be treated as an application under Order 21 Rule 97 of the Code by the order of this Court, what has been contended before this Court has not been pleaded.

17. In *P. Janardhana Rao. v. Kantian and Ors.* 2004 (4) CCC 113 (SC), while considering the provisions of Order 21 Rule 97 of the Code, Hon"ble Supreme Court held that Order 21 Rule 97 of the Code is the provision for removal of the person bound by the decree who does not vacate. It takes into account a situation where resistance to possession is offered by the judgment debtor or any other person bound by the decree which will include the claim of a person who claims to be in possession in his own right and independently of the judgment-debtor but whose claim ex-facie is unsustainable. Where, however, resistance is offered or where obstruction proceeds from the claimant claiming to be in possession in his own right and whose claim cannot be rejected on the ground of want of good faith, without investigation, the decree-holder must proceed under Order 21 Rule 97 CPC.

18. In *Silverline Forum Pvt. Ltd. v. Rajiv Trust and Anr.* (supra), Hon"ble Supreme Court while considering the provisions of Order 21 Rule 97 of the Code held that resistance or obstructions made even by a third party to the execution of decree can be gone into under Order 21 Rule 97. Rules 97 to 106 in Order 21 are subsumed under the caption "resistance to delivery of possession to decree-holder or purchaser. Those rules are intended to deal with every sort of resistance or obstructions offered by any person. Rule 97 specifically provides that when the holder of a decree for possession of immovable property is

resisted or obstructed by "any person" in obtaining possession of the property such decree-holder has to make an application complaining of the resistance or obstruction. Sub-rule (2) makes it incumbent on the Court to proceed to adjudicate upon such complaint in accordance with the procedure laid down. It was further held that the words "all questions arising between the parties to a proceeding on an application under Rule 97" would envelop only such questions as would legally arise for determination between those parties. In other words, the Court is not obliged to determine a question merely because the resistor raised it. The questions which executing Court is obliged to determine under Rule 101, must possess two adjuncts. First is that such questions should have legally arisen between the parties, and the second is, such questions must be relevant for consideration and determination between the parties e.g. if the obstructor admits that he is a transferee pendente lite it is not necessary to determine a question raised by him that he was unaware of the litigation when he purchased the property. Similarly, a third party, who questions the validity of a transfer made by a decree-holder to an assignee, cannot claim that the question regarding its validity should be decided during execution proceedings. Hence, it is necessary that the questions raised by the resistor or the obstructor must legally arise between him and the decree-holder.

19. In *West Coast Paper Mills Ltd. v. Trustees of the Port of Bombay* (supra), while considering provisions of Order 21 Rule 97(2) CPC, Division Bench of Bombay High Court held that in execution of eviction decree, obstructor inducted by judgment debtor claimed possession since 1960, resistance was not justified even if the entire case of objector is accepted. Framing of issues and allowing to lead evidence is not required. The obstructionist is not entitled to any relief.

20. In *Mukesh Chouhan v. Ram Prasad and Anr.* (supra), this Court held that even a stranger has right to resist execution of decree but for that mere possession short of right or interest not sufficient to. The Court can determine its own mode of adjudication of dispute and each such application under Rule 97 cannot be tried as suit. There being no independent right or title in objector, the application filed by him came to be dismissed on that premises. A similar view has been taken by this Court in *Sri Vaishnav Brahmin Trust Jodhpur v. Ramesh Chandra and Ors.* 2001 (3) CCC 651 (Raj) and other High Courts as relied on by learned Counsel for the respondents.

21. In the instant case, a suit came to be filed by the respondent plaintiff against tenant Ramgopal seeking eviction of the rented premises and the arrears of rent. In the grounds mentioned in the plaint, it was specifically mentioned that the suit premises has been sub-letted or otherwise parted with possession in favour of Subhash Sharma and Dilip Sharma. On the pleadings of the parties and on the evidence led, the suit came to be decided in favour of the respondent plaintiff and that judgment and decree of eviction and arrears of rent of the trial court has not been appealed against and challenged by the original tenant Ramgopal. On an execution proceeding initiated by the plaintiff respondent, the appellant

resisted the execution of the decree and filed objection merely in the form of application u/s 151 of the Code which subsequently came to be treated as an application under Order 21 Rule 97 of the Code. The trial court adjudicated the application holding inquiry therein and came to the conclusion that the appellant obstructer failed to establish his independent right of tenant to be in possession of the property in question. The appellant claimed to be in possession since May 1982 in his own capacity as a tenant but no rent receipt or documentary evidence supporting his case has been filed by him and only a bald statement was made that he is a direct tenant. The appellant came with a case that he offered the rent which was declined by the respondent plaintiff and thereafter the Money Order was sent which was refused. However, thereafter the appellant has not made any efforts to deposit the rent in the Court u/s 19A of the Old Rent Control Act for good number of years even for the period right from May 1982 till he raised the obstruction and resisted the execution of decree.

22. So far as monthly rent claimed by respondent plaintiff at the rate of Rs. 500/- but having failed to establish this rate in trial and the trial court accepted that the last rent paid was at the rate of Rs. 400/- per month by original tenant Ramgopal, cannot rise to give impression that the appellant entered into a tenancy of the rented premises with the landlord plaintiff. The appellant failed to show even a single receipt of having paid Rs. 500/- per month from May 1982 till date. Had the appellant been the tenant of landlord, the appellant could not have remained silent in not making the payment of monthly rent for the period of about 29 years. If the contention of the appellant is accepted for the sake of argument that he sent the rent for the month of May 1982 by money order and the respondent plaintiff refused to accept, then the remedy is very much provided under the provisions of the Old Act of 1950 i.e. Section 19-A which provides the deposit of the monthly rents with the court so that the trial court could have issued notice to the landlord and the landlord could have "appeared and shown his case before the trial court that the person depositing the rent in Court is not his tenant and the matter could have been decided by the trial court, but the appellant's keeping silence for payment of rent for such a long period now by claiming to be a tenant, in my view, cannot resist the execution of the judgment and decree against tenant Ramgopal which has attained finality. Merely because the original rent note which was executed between the plaintiff respondent and tenant Ramgopal happened to be in the hands of the appellant, it would not amount to creation of new tenancy by the respondent landlord in favour of the appellant. There being no evidence that the original tenant Ramgopal surrendered the tenancy in favour of respondent landlord and thereafter the respondent plaintiff let out the premises to the appellant and therefore, such contention raised by the counsel for the appellant merits rejection.

23. Both the courts below concurrently found that the case set up by the objector cannot be accepted in absence of reliable evidence. The burden to prove that the objector is a direct tenant to the respondent landlord is on the appellant

and the appellant failed to discharge the burden except saying that he is a direct tenant no other material has been shown. On the contrary, the plaintiff respondent from his evidence has established that the appellant objector is a sub-tenant of the original tenant Ramgopal. The facts on the basis of which the contention was raised before this Court have not been pleaded nor proved by evidence. So far as the appellant moving before the trial court for cross-examination of the plaintiff respondent who filed affidavit in support of his case, the trial court by a well reasoned and detailed order dismissed the said application. In my view, calling of the deponent for the purpose of cross-examination at a belated stage on the questions which legally do not arise between the appellant and decree holder and without there being any sound reason was not justified and therefore, the trial court was right in dismissing the application. The decisions relied on by learned Counsel for the appellant turn on their own facts and are of no help to the appellant in the facts and circumstances of the present case. It is settled law of precedent that decision which fits in the facts and circumstances of the case can be used as a precedent. In the instant case, the facts are totally different than the facts of the cases relied on by learned Counsel for the appellant. There is concurrent finding of facts recorded by both the courts below. The finding recorded by the courts below at any rate cannot be said to be perverse in any manner and therefore, when there being a concurrent finding of fact, in my view, this appeal does not involve any substantial question of law and therefore, is liable to be dismissed.

24. Consequently, this second appeal fails and is hereby dismissed. Stay petition also stands dismissed. There shall be no order as to costs.