
(2019) 02 CHH CK 0288

Chhattisgarh High Court

Case No: Second Appeal No. 551 Of 2003

Phoolchand Asara And Ors

APPELLANT

Vs

Komalchand Asara And Ors

RESPONDENT

Date of Decision: Feb. 19, 2019

Acts Referred:

- Code Of Civil Procedure 1908 - Section 100
- Provincial Insolvency Act, 1920 - Section 26, 27(2), 28(1)
- Indian Partnership Act, 1932 - Section 42(d)

Hon'ble Judges: Sanjay K. Agrawal, J

Bench: Single Bench

Advocate: S.S. Rajput, Sharad Mishra, Manoj Paranjape

Final Decision: Dismissed

Judgement

Sanjay K. Agrawal, J

1. The substantial questions of law involved, formulated and to be answered in this second appeal preferred by defendant No.4 are as under:-

1. Whether the suit itself of the Plaintiff was maintainable in the light of admission of the Plaintiff that when the suit was filed, the Plaintiff had

already filed a review petition before the Appeal Committee which had passed the impugned order dated 10.7.1981

2. Whether the finding of the Court below to the extent that the Plaintiff is a tenant in the suit property is correct or not in the light of the fact that the

Plaintiff as well as the witness of Municipal Corporation have admitted the fact that the suit property was originally rented out by the Municipal

Corporation in the name of Firm M/s Javer Chand Thakarsi of which the Plaintiff's father happened to be one of the partners along with the deceased

Appellant-Defendant No.4 ?

[For the sake of convenience, the parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court].

2. Original plaintiff-Komalchand Asra filed a suit against defendants-Municipal Corporation, Raipur and defendant No.4 stating inter-alia that he is

tenant of suit shops No.306 and 307 belonging to Municipal Corporation, Raipur, in which he is running cloth business and has obtained permission

from defendant-Municipal Corporation for reconstruction. The defendant-Municipal Corporation issued notice dated 18.6.80 to the plaintiff explaining

his nature of possession over the suit shops and passed an order on 10.7.81 directing mutation in the name of firm M/s. Javerchand Thakarsi leading to

filing of suit for declaration of title and permanent injunction.

3. Defendants No.1 to 3 filed their written statement and admitted that the plaintiff was their tenant w.e.f. 17.11.71 and further stated that the suit

shops were given on rent to Javerchand Thakarsi on 24.5.42. In the year 1962, the suit shops were recorded in the name of Amrit Lal Thakarsi though

it was registered in the name of the plaintiff and on 17.11.1971 it was settled in the name of the plaintiff. Defendant No.4 filed his written statement

stating inter-alia that the suit shops are let-out to Firm M/s Javer Chand Thakarsi by the Municipal Corporation, as such, the said firm is tenant of

defendant-Municipal Corporation and the suit be dismissed.

4. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 14.10.96, came to the

conclusion that the suit shops were let out to Javerchand Thakarsi in his individual capacity on 24.5.42 and thereafter the suit shops were settled in

favour of the plaintiff on 17.11.71 as tenant, the order passed by the Appeal Committee dated 10.7.81 is null & void and pendency of review petition

filed by the plaintiff against the order dated 10.7.81 would not bar the plaintiff to file instant suit for declaration of title and permanent injunction and

decreed the suit. On appeal being preferred by defendant No.4, the First Appellate Court dismissed the same, against which, this second appeal under

Section 100 of the CPC has been preferred by the appellants/defendant No.4, in which substantial questions of law have been framed and set-out in the opening paragraph of this judgment.

5. Mr.S.S.Rajput, learned counsel for the appellants/defendant No.4, would submit that concurrent finding recorded by two Courts below holding the plaintiff to be tenant and the order of the Appeal Committee to be null and void is perverse and contrary to record, therefore, the second appeal deserves to be allowed by setting aside the judgment and decree of the Courts below.

6. Mr.Manoj Paranjape, learned counsel for the respondent No.1/plaintiff, would submit that the second appeal deserves to be dismissed.

7. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

Answer to substantial question of law No.1:-

8. In a suit filed by the plaintiff claiming himself to be tenant he has also questioned the order of Appeal Committee of the defendant-Municipal Corporation passed on 10.7.81, against that, the plaintiff had preferred review petition, but during pendency of review petition, suit was filed by plaintiff-Komalchand Asra, which has been held to be maintainable by the trial Court holding that pendency of review petition would not bar the civil Court to consider the claim of declaration of title and permanent injunction. There is no legal bar that during pendency of review petition, suit for declaration of title and permanent injunction would not be maintainable. Even otherwise, now the review petition has been dismissed. The substantial question of law is answered accordingly.

Answer to substantial question of law No.2:-

9. Defendants No.1 to 3 in their written statement admitted that the plaintiff is their tenant with effect from 17.11.71 and the trial Court also held that the plaintiff is tenant of defendant-Municipal Corporation, Raipur with effect from 17.11.71. That finding of the trial Court has become final as defendants No.1 to 3 did not challenge that finding by filing cross-objection or by filing cross- appeal before the First Appellate Court, as such, finding

to that extent has become final. Therefore, the finding recorded by two Courts below that the plaintiff is tenant of defendant-Municipal Corporation,

Raipur is a finding of fact based on evidence available on record and binding to this Court.

10. It is admitted position on record that on 24.5.42 the suit shops were let-out to Javer Chand Thakarsi in his individual capacity and it was never let-

out to Firm M/s Javer Chand Thakarsi. The trial Court has also recorded a finding that by order dated 25.3.74 (Ex.P/41) the Civil Judge Class-I,

Raipur in the matter of Ramkishan Sharma and another v. Firm M/s Javarchand Thakarsi and others declared Firm M/s Javer Chand Thakarsi and

their partners to be insolvent under Section 26 of the Provincial Insolvency Act, 1920 (hereinafter called as ""the Act of 1920"") and further held that by

virtue of the provisions contained in Section 42(d) of the Indian Partnership Act, 1932 (hereinafter called as ""the Act of 1932, a partnership firm is

dissolved by the adjudication of a partner as an insolvent.

11. Section 28 (1) of the Act of 1920 provides that on the making of an order of adjudication, the insolvent shall aid to the utmost of his power in the

realisation of his property and the distribution of the proceeds among his creditors. Section 27 (2) of the Act of 1920 provides that the Court may, if

sufficient cause is shown, extent the period within which the debtor shall apply for his discharge, and in that case shall publish notice of the order in

such manner as it thinks fit, as such, it has not been shown that even the firm was discharge after the order dated 25.3.74 (Ex.P/41) was passed.

12. Apart from this, both the Courts below have concurrently recorded a finding that defendant No.4, who is appellant herein, has not filed any

counter-claim in the suit that he is tenant of the suit shops or he did not seek any relief in his favour, as such, both the Courts below have concurrently

held that the plaintiff is tenant of the suit shops belonging to defendant-Municipal Corporation and order passed by the Appeal Committee on 10.7.81 is

null and void. It has clearly been recorded that the suit shops were not reconstructed by the said firm and firm is not running cloth business, as such, I

do not find any illegality or perversity in the said finding.

13. Accordingly, the second appeal deserves to be and is hereby dismissed leaving the parties to bear their own cost(s). A decree be drawn up

accordingly.