

(2011) 01 P&H CK 0452

High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 4333 of 2010

Om Parkash and Another

APPELLANT

Vs

Smt. Kamlesh Mittal through her
Attorney Sewa Ram

RESPONDENT

Date of Decision: Jan. 7, 2011

Acts Referred:

- Transfer of Property Act, 1882 - Section 106

Citation: (2011) 162 PLR 782 : (2011) 5 RCR(Civil) 633

Hon'ble Judges: Mohinder Pal, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Mohinder Pal, J.

The Respondents-Defendants are in second appeal aggrieved against the judgments and decrees passed by the Courts below, whereby the suit filed by the Plaintiff-Respondent for possession and recovery of arrears of rent as well as mesne profits etc. in respect of the shop in dispute was decreed.

2. Plaintiff-Respondent is owner of the shop in dispute, which she had let out to the Defendants-Appellants, who are real brothers, vide rent deed dated 4.7.1992. The Plaintiff filed the instant suit through Sewa Ram, her General Power of Attorney. The registered Power of Attorney dated 18.1.1997 has been placed on record. The relationship of landlady and tenants is admitted between the parties. The case of the Plaintiff is that the Defendants-Appellants did not pay rent and other charges regarding the shop in question since 1.3.2002. A notice dated 2.4.2002 was issued to the Defendants Appellants thereby terminating their tenancy. The said notice was received by the Defendants-Appellants. The Defendants-Appellants were directed to vacate and hand over vacant possession of the shop in question to the Plaintiff-Respondent within fifteen days from the receipt of notice dated 2.4.2002,

but they failed to do so. Since the Defendants-Appellants were in an unauthorized possession after the termination of his tenancy, mesne profits were claimed by the Plaintiff-Respondent. Main case of the Plaintiff-Respondent is that since the shop in question was constructed and completed in the month of June, 1992, the same is exempted from the provisions of the Haryana Urban (Control of Rent & Eviction) Act, 1973 (for short "the Act").

3. The main stand taken by the Defendants-Appellants in the written statement is that the shop in question was constructed and completed much before the year 1992 and, in fact, it was constructed more than ten years prior to the issuance of notice. It was also pleaded that the notice in question was not binding upon the Defendants-Appellants being wrong, vague, illegal and null and void.

4. The trial Court, after framing issues arising out of the pleadings of the parties and recording their evidence decreed the suit filed by the Plaintiff-Respondent. The appeal preferred by the Defendants-Appellants against the judgment and decree passed by the trial Court was dismissed by the lower appellate Court. The findings recorded by both the Courts below are the findings of fact. It could not be pointed out by the learned Counsel for the Appellants that such findings are based on misreading of evidence or that material evidence has not been taken into consideration. The Defendants-Appellants, to show that the shop in question was constructed much before ten years of the issuance of notice and that the provisions of the Act were applicable, relied upon oral testimonies of their witnesses besides the report of Civil Engineer Vaibhav Garg (D.W.5) wherein it has been mentioned that the shop in question was about 25-30 years old. However, in cross-examination, this witness stated that he had not passed any course for determining the age of a building and that he had given this opinion on the basis of experience. He further stated that he did not know whether there are scientific measurements for assessing the age of building or not. On the other hand, the Plaintiff-Respondent produced on record documentary evidence i.e. correspondence between the Municipal Committee, Jagadhri and the Plaintiff-Respondent which shows, in certain terms, that the shop in question was built in June, 1992, whereas the notice terminating the tenancy of the Defendants-Appellants was issued on 2.4.2002 i.e. before ten years of the construction of the shop in question.

5. Learned Counsel for the Defendants-Appellants, during the course of arguments, while relying upon the authorities reported as [Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others](#), and [Raj Kumar Vij Vs. Hem Raj Singla and Others](#), , contended that it was incumbent for the landlady to appear and depose as a witness in Court and that her General Power of Attorney could appear only as a witness in his own capacity to depose with regard to the acts done by him on behalf of the landlady According to the learned Counsel, in view of the non-appearance of the landlady herself in Court, the notice to quit said to have been issued to the Defendants-Appellants u/s 106 of the Transfer of Property Act remained unproved

on record. He further contended that the Defendants-Appellants, therefore, could not be evicted from the tenanted premises on the basis of the statement of the General "Power of Attorney of the landlady. However, I do not find any merit in this argument of the learned Counsel for the Appellants. No doubt, the landlady in this case did not appear in Court to depose in favour of her case and her General Power of Attorney Sewa Ram appeared in Court as P.W.1, but it does not legally weaken the case of the Plaintiff-Respondent because in this case no question of personal knowledge of the Plaintiff is involved. It is well-settled that the holder of a Power of Attorney cannot be allowed to appear and depose as a witness on behalf of the principal in the matter of his/ her (principal's) knowledge. However, in the instant case, as noticed above, no question of personal knowledge of the Plaintiff-Respondent was involved. In this view of the matter, non-appearance of the landlady herself in Court to depose in support of her case cannot be said to be a detracting factor from the merits of the case. Besides, to serve a notice u/s 106 of the Transfer of Property Act was not a prerequisite to file a suit for possession in respect of the tenanted premises and, in fact, filing of a suit by itself was a notice to quit.

6. Under the circumstances, I do not find any patent illegality or irregularity in the findings recorded by the Courts below, which may give rise to any substantial question of law in the present appeal. Resultantly, this appeal is hereby dismissed being without any merit.