

ISHWAR DASS Vs VINAY KUMAR

Court: High Court of Himachal Pradesh

Date of Decision: May 31, 2017

Acts Referred: [Code of Civil Procedure, 1908](#), [Order 41 Rule 27](#), [Order 41 Rule 27\(1\)\(b\)](#) - [Himachal Pradesh Urban Rent Control Act, 1987](#), [Section 14](#), [Section 14\(3\)\(d\)](#)

Hon'ble Judges: Vivek Singh Thakur

Bench: Single Bench

Advocate: Karan Singh Kanwar, B C Verma

Judgement

1. These two Revision Petitions, arising out of a common judgment, passed by Appellate Authority under H.P. Urban Rent Control Act, 1987,

preferred by landlord as well as tenant, are being decided by this common judgment.

2. Landlord filed an eviction petition against tenant on the ground of arrears of rent, change of user of shop, causing damage to wall and floor of the

shop impairing the value and utility of shop materially and bonafide requirement to settle his son during his life time. It is also stated in the petition

that tenant was also running a show room opposite the tenanted shop and was earning his livelihood from the said show room of garments.

3. In reply, claim of landlord was denied and it was stated that show room opposite tenanted shop belonged to son of tenant, with which tenant

had no concern.

4. On the basis of pleadings of parties, following issues were framed:-

(1) Whether the respondent is in arrears of rent, as alleged in the petition? OPP

(2) Whether the respondent without the consent of the petitioner has changed the user of the shop and made himself liable for eviction, as alleged?

OPP

(3) Whether the respondent has caused material alterations and additions in the premises by replacing the floor etc. as alleged in the petition? OPP

(4) Whether the demised premises are required by the petitioner bonafidely for running of his shop, as prayed? OPP

(5) Whether the petition is based on mala fides? OPR

(6) Whether the petition is not maintainable, as similar petition was dismissed in default earlier? OPR

(7) Relief.

5. Issues No. 5 and 6 were technical issues, neither any material for proving these issues was placed on record by tenant nor the issues have been

agitated in present petition. Issue No. 7 will follow the consequences of findings returned against issues No. 1 to 4.

6. Rent Controller, on the basis of pleadings and evidence led by parties, passed order of eviction against tenant for arrears of rent and for

changing the use of shop without consent of the landlord. However, claim of landlord that tenant had caused material alterations and additions in

the premises by replacing the floor etc. and the premises in question was required by landlord bonafidely for running his shop, were rejected.

Order of the Rent Controller was assailed by landlord as well as tenant by filing separate appeals before the Appellate Authority.

7. During pendency of appeal before Appellate Authority, tenant had preferred an application under Section 41 Rule 27 C.P.C. for leading

additional evidence by placing on record various bills indicating sale of electronic goods from his shop being run in the tenanted premises. The

appellate Authority dismissed this application and also both the appeals preferred by tenant and landlord affirming the order passed by Rent

Controller, ordering eviction of tenant for arrears of rent and change of user of the shop.

8. Tenant has assailed the judgment of Appellate Authority by filing Civil Revision No. 99 of 2014, whereas Civil Revision No. 127 of 2014 has

been filed by landlord.

9. I have heard learned counsel for the parties and also gone through the records of the case.

10. Learned counsel for the landlord submits that Courts below have failed to consider the un-rebutted pleadings of landlord that additions and

alterations, made by tenant for changing business, have materially impaired the value and utility of the building causing damage to wall and floor of

the premises despite admissions of these additions and alterations in statement of RW-1 Sharukh Ahmed. He submits that by rejecting the claim of

landlord with respect to damage caused by material alterations and additions in the premises by tenant and also bonafide requirement of landlord,

Courts below have committed a mistake in law and thus impugned judgment/order warrants interference for deciding these issues in favour of

landlord.

11. Learned counsel for tenant though supports finding of Courts below on issues No. 3 and 4, but agitates rest impugned judgment on the ground

that despite having sufficient proof on record with respect to payment of arrears of rent, Courts below have wrongly held tenant in arrears of rent.

He also submits that there is no evidence on record with respect to change of user of shop in question, much less material altercations and

additions in the premises, materially impairing the value and utility of the shop by damaging wall and floor. Therefore, he contended that Courts

below have committed material illegality and irregularity by passing ejection order against tenant. He also submits that Appellate Authority has also

committed a mistake in law by rejecting application of tenant under Order 41 Rule 27 C.P.C. filed for leading additional evidence, despite the fact

that the documents proposed to be led in evidence were necessary for deciding the matter in controversy regarding change of user of the premises

in question.

12. Rule 27 of Order 41 of CPC starts with negative clause that the parties to an appeal shall not be entitled to produce additional evidence,

whether oral or documentary in the Appellate Court and therefore, this provision in fact prohibits leading of additional evidence in appeal, but

subject to exceptions carved out in it and therefore, additional evidence in Appellate Court can be produced if facts and circumstances of the case

fulfils criteria provided in exceptions of Order 41 Rule 27 C.P.C. According to it, additional evidence in Appellate Court may be allowed if Court

below has refused to admit evidence which ought to have been admitted or parties seeking to produce additional evidence establishes that when

such evidence was not within his knowledge or despite of exercise of due diligence the said evidence could not be produced by him at the time of

passing of decree appealed or if Appellate Court considers any document necessary to be produced or any witness to be examined to enable it to

pronounce judgment or for any other substantial cause.

13. In present case, from very beginning, case of landlord is that there is change of user of premises in question and specific issue was also framed

by the trial Court on this point. The documents proposed to be led as additional evidence are not anything else, but bills pertaining to alleged sale

of electronic items by tenant from his shop in question. These bills belong to tenant, therefore, this evidence was within his knowledge. These

documents were neither produced nor ever intended to be produced before the trial Court, despite specific pleadings of petitioner that there is a

change of user of shop in question. For non production or non tender of these documents, there was no question of refusal to admit these

documents in evidence by the trial Court. Perusal of application filed by tenant before Appellate Authority for leading additional evidence reveals

that there was not even a single line stating that despite exercise of due diligence, these documents could not be produced before trial Court. Only

reason appears to have been mentioned in the said application is inadvertent mistake for not producing these documents in the trial Court and by

pleading necessity and importance of these bills to decide the matter in controversy to do complete justice, have been pleaded, with further ground

that production of these documents will not cause any injustice or prejudice to landlord. Therefore, in fact, there is nothing stated in application for

leading additional evidence to bring it in the ambit and scope of provision of Order 41 Rule 27 C.P.C., so as to allow the tenant to lead additional

evidence in Appellate Court. However, Appellate Authority never expressed requirement of production of these documents to enable it to

pronounce judgment or for any other substantial cause.

14. The judgments relied upon by learned counsel for tenant in support of his plea to allow the application under Order 41 Rule 27 C.P.C.,

preferred before Appellate Authority, passed by the Apex Court in cases Shalimar Chemical Works Limited Vs. Surendra Oil and Dal Mills

(Refineries) and others, (2010) 8 SCC 423, Union of India Vs. Ibrahim Uddin and Another (2012) 8 SCC 148, Surjit Singh and others Vs.

Gurwant Kaur and Others (2015) 1 SCC 665 and Wadi Vs Amilal and Others (2015) 1 SCC 677 are of no help to the tenant.

15. In Shalimar Chemical Works case, additional evidence permitted under Order 41 Rule 27(1) (b) of C.P.C. in the interest of justice was upheld

by the Apex Court, by observing that in case the Court considers that in the interest of justice something which remains obscure should be filled up

so that it can pronounce its judgment in more satisfactory manner, then additional evidence should be allowed "for any other substantial cause"

under Rule 27(1) (b) of CPC. Whereas in present case Court has not considered proposed evidence necessary for pronouncing judgment and

tenant has also failed to make out a case for additional evidence proposed to be led by him, necessitated for any other substantial clause including

interest of justice under Rule 27(1) (b) of the Code.

16. In Ibrahim Uddin case (supra), it has been held that additional evidence on record at a belated stage cannot be filed as a matter of right and

Court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the

statutory provision itself. In present case, there is no explanation that for what reason tenant was not capable to lead evidence proposed to be led

during pendency of appeal before Appellate Authority. No sufficient grounds, prerequisite for allowing application for additional evidence, have

been made out in present case.

17. In Surjit Singh's case supra, it has been held by the Apex Court that exercise of power under Order 41 Rule 27 C.P.C. is circumscribed by

limitation specified in the language of the Rule and it is duty of the Court to come to a definite conclusion that it is really necessary to accept the

document as additional evidence to enable it to pronounce the judgment and in case Appellate Authority is able to pronounce the judgment with

material before it without taking in to consideration the additional evidence sought to be adduced, the application for additional evidence is liable to

be rejected.

18. Ratio of law laid down by the Apex Court in Wadi's case is that in case, such additional evidence is necessary to pronounce an effective

judgment, clause (b) of Rule 27 of Order 41 C.P.C. enables that Court to permit additional evidence. However in the given facts and

circumstances, tenant had not made out a case that proposed evidence was/is necessary to pronounce an effective judgment and/or admission of

such evidence is necessary in the interest of justice. Therefore, application of tenant filed under Order 41 Rule 27 C.P.C. has rightly been

dismissed by Appellate Authority.

19. Further there is another aspect of matter, in case the tenant was in possession of documents proposed to be led in evidence, then adverse

inference is also to be drawn against him for withholding the documents, which were even according to him material for adjudication of the case.

20. In reply to petition, tenant had denied arrears of rent. However, while appearing as witness as RW-2, in his cross-examination, he admitted that

he had neither filed an application in the Court to deposit the rent nor had paid any rent since 25.5.2011 till his deposition in the Court i.e.

12.7.2013. Therefore, for his unambiguous admission, plea against finding on arrears of rent is not sustainable.

21. In para 17 and 18 (ii), (iv), landlord pleaded the change of user by tenant, causing damage and materially impairing the value and utility of

shop. In reply to these paras, there is denial simpliciter. There was no specific denial, rebutting claim of landlord specifically on this ground. On this

issue also, in his cross-examination tenant, though claimed that he is running business of electronic goods in shop in question but also admitted that

he is running business of ladies sandal, garments and purse etc. from the shop in question. However, he also admitted that show room of his son is

in front of the shop in question, whereupon sign board of Vinay Vision is there and same sign board of "Vinay Vision" is also displayed on the shop

in question. He also admitted that sign board of his concern has been displayed at two places. He admitted the photographs of his shop, but

expressed his inability to identify something in it. A glance of photographs clearly reflects that there is no electronic item in the shop in question, but

there are racks with shoes in the said shop. In light of admission of tenant, Courts below have not committed any error by deciding that there is

change of user of the shop in question by tenant.

22. Besides taking a ground for eviction in para 18 (ii) regarding damage to wall and floor of the shop by affixing wooden racks and iron angle,

materially impairing the value and utility of shop, landlord in para 4 of his affidavit, filed in evidence, specifically stated that tenant changed the user

of shop rented to him for changing business in shop in issue and materially impaired value and utility of the same by damaging wall and floor for

affixing wooden racks and iron angle.

23. In reply, there is no averment that there was no change of business or no wooden racks or iron angle were affixed or no damage to wall or

floor was caused in such process. In his affidavit filed by tenant in evidence also, not even a single word has been uttered on this issue and further

RW-1 Sharukh Ahmed examined by tenant as a witness, who claimed to be worker of tenant in the shop in question, admitted that tenant had

replaced the floor and made changes in wall of that shop. However, he explained that this exercise was undertaken to remove dampness. Tenant

admitted the photographs of shop in question with racks and shoes in the shop, which again substantiated the plea of landlord which remained un-

rebutted. Tenant has also admitted the photographs of showroom situated in front of shop in question allegedly being run by son of tenant having

the sign board of "Vinay Vision". It is evident from photographs that the said show room is a considerable big shop in size and in business also.

24. Pleadings supported by evidence, not rebutted either in reply or in evidence, are treated to be proved. Therefore, Courts below have

committed mistake in holding that landlord has failed to prove that change of user of shop has caused any injury or damage to the shop in question,

impairing its value and utility. The findings of Courts below on this point are reversed, as discussed above, from material on record, it stands

established that value and utility of shop was materially impaired because of damage to wall and floor in the process of fixing wooden racks and

iron angle and therefore, tenant is liable to be evicted on this ground also.

25. This High Court in its pronouncement in case Jodha Ram Vs. Rahul Chauhan & others reported in Latest HLJ 2008 (HP) 1425, on the basis

of un-rebutted plea of landlord, about the fact of making holes in walls to support the loft, raising brick column and walls and wooden partitions,

was considered to be amounting to materially impairing value and utility of the building. In present case also there is un-rebutted plea and evidence

about damage to wall and flooring for fixing racks. Fixing of racks causing damage to floor and wall is also an activity impairing value and utility of

open shop.

26. So far eviction on the ground of bonafide requirement is concerned, it is not substantiated from evidence on record, rather it stands proved on

record from photographs placed on record by landlord showing that son of landlord is running a Fast Food Corner, though in small shop, next to

the shop in question. In cross-examination a positive suggestion in this regard was put to tenant which was admitted by him that son of landlord is

present there, in these photographs, in his shop.

27. As per Section 14(3) (d) of H.P. Urban Rent Control Act, 1987, in case of any residential or non-residential building a landlord may apply to

Controller for an order of eviction of tenant if he requires it for use as an office, or consulting room by his son or daughter who intends to start

practice as a lawyer, an architect, a dentist, an engineer, a veterinary surgeon or a medical practitioner, including a practitioner of Ayurvedic

Unnani or Homeopathic System of Medicine or for the residence of his son or daughter who is married, if i) his son or daughter as aforesaid is not

occupying in the urban area concerned any other building for use as office consulting room or residence, as the case may be; and ii) his son or

daughter as aforesaid has not vacated such a building without sufficient cause, after the commencement of this Act, in the urban area concerned. In

given facts of the case, there is nothing on record to bring landlord's plea of eviction for bonafide requirement, within scope of provisions of H.P.

Urban Rent Control Act, 1987. Further landlord in his cross-examination himself admitted that his son along with his family is residing separate

from him.

28. There is no necessity to discuss judgment in case Jai Karan Vs. Madan Lal reported in 1997 (2) Sim.L.C. 264, relied upon by tenant against

plea of landlord of bonafide requirement. For his plea for eviction on the basis of bonafide requirement stands rejected by Courts below as well as

this Court.

29. In case Dashrath Baburao Sangale and others Vs. Kashimath Bhaskar Data reported in 1994 Supp (1) SCC 504, the Apex Court upholding

eviction of tenant for using the premises for selling clothes and readymade clothes rented, as per clause 3 of the Rent Note for sugar cane crushing,

has held that change of user of tenanted premises for a purpose other than for which it was rented is a sufficient ground for eviction of tenant. In

present case also, though there is no written rent note or deed, but pleadings supported by evidence establishes that shop in question was rented

for running business of electronic goods as it was neither disputed in reply nor in affidavit of tenant filed in evidence. Rather by proposing to lead

additional evidence of bills in appeal for proving sale of electronic goods only, from rented shop further strengthens the case of landlord that the

shop in question was rented out for running shop of electronic goods only.

30. The judgment of the Apex Court in M. Arul Jothi and another Vs. Lajja Bal (deceased) and another, reported in (2000) 3 SCC 723, may not

be strictly applicable in the present case, as it was decided on the basis of specific prohibition clause contained in the rent deed whereas in the

present case for want of written rent deed/agreement, no such written prohibition clause is there.

31. Learned counsel for the tenant submits that earlier eviction petition filed by landlord was dismissed in default and application for restoration of

the said petition was also dismissed in default and therefore, fresh eviction petition was not maintainable. This plea was neither raised either before

Rent Controller or before Appellate Authority, therefore, right to raise such plea at this stage is not available to the tenant. Moreover, as held by

this Court in case titled Susheela Mohan and others Vs. Lakhbir Singh Sethi, reported in Latest HLJ 2011 (HP) 329, for recurring cause of action,

landlord is entitled to institute fresh petition despite previous petition as well as application for restoration thereof, having been dismissed in default.

Eviction on the ground of arrears of rent is definitely recurring cause of action.

32. In support of plea that change of user from one commercial activity to another is not a ground for eviction of tenant, learned counsel for the

tenant has relied upon Mohan Lal Vs. Jai Bhagwan (1988) 2 SCC 474 and Gurdial Batra Vs. Raj Kumar Jain (1989) 3 SCC 441. There is no

dispute with ratio of law laid down by the Apex Court in these judgments, however, change of user coupled with impairing utility or damage to

tenanted premises is a valid ground for eviction of tenant. In these judgments relied on behalf of tenant, it has been held that change of user, not

causing any mischief or detrimental or impairment of the premises in question, shall not be a ground for eviction of tenant. In present case, there is

un-rebutted plea of landlord regarding impairing value and utility of premises in question, which has been duly supported by statement of landlord

filed in evidence by way of affidavit.

33. Learned counsel for the tenant has also relied upon judgment of this Court passed in Rajinder Kumar Sharma Vs. Smt. Kanta Kumari

reported in Latest HLJ 2007 (HP) 73, wherein change of karyana shop to tea making and selling business, itself was not found sufficient to prove

any injury or prejudice or detrimental to the landlord. Reliance has also put on judgment passed by co-ordinate Bench of this Court in Sain Ram

Jhinga Vs. Surinder Singh, reported in 2016 (1) CCC 743 (HP), wherein it was held that change of user from one commercial activity to another

unless cause or have potential of causing any injury or prejudice or detrimental to the interest of landlord, will not be sufficient for eviction of tenant

from the rented premises. These judgments are also not applicable in present case, because present case is not change of user simpliciter but

change of user coupled with damage to premises, as tenant has not disputed the averments of pleadings as well as affidavit filed in evidence by

landlord with respect to causing damage to wall and floor, material impairing value and utility of the shop.

34. Tenant claimed to have paid Rs.37,600/- to landlord against arrears of rent till 25.5.2011. In cross-examination he stated that he maintained

the accounts of his employees and also filed income tax and sales tax returns, but neither any receipt of Rs.37,600 /- is there nor the said amount

has been accounted for in account books. Therefore, plea of tenant with regard to payment of arrears of rent till 2011 has also rightly been

rejected by the Courts below.

35. In view of above discussion, findings of Courts below on Issues No. 1 and 2 are affirmed and findings on Issue No. 3 are reversed, whereas

findings on Issue No. 4 warrant no interference. Resultantly, Revision Petition No. 99 of 2014 is dismissed and Revision Petition No. 127 of 2014

is partly allowed. Accordingly, tenant is held liable to be in arrears of rent of the premises w.e.f. April, 2001 till date at the rate of Rs.400/- per

month along with interest at the rate of 9% per annum till full and final payment of arrears of rent and the landlord shall also be entitled for

Rs.2000/- as costs awarded by Rent Controller, for nonpayment of which tenant shall be liable to be evicted for arrears of rent and the tenant is

also ordered to be evicted on the ground of change of user of the premises in question, without consent of landlord, for the purpose other than for

which it was rented for materially impairing value and utility of the shop by damaging walls and replacing floor of the premises. Record be sent

back.