

**(2011) 06 JH CK 0039****Jharkhand High Court****Case No:** Appeal From Appellate Decree No. 198 of 2004

Shiv Shankar Agarwal

APPELLANT

Vs

Smt. Lila Devi and Others

RESPONDENT

**Date of Decision:** June 16, 2011**Citation:** (2011) 3 JCR 396**Hon'ble Judges:** Prashant Kumar, J**Bench:** Single Bench**Final Decision:** Dismissed**Judgement**

Prashant Kumar, J.

This Second Appeal is directed against the judgment dated 19.01.2004 passed by 1st Additional District Judge, Jamshedpur in Eviction Appeal No. 14 of 1990 whereby he reversed the findings of the court below and dismissed the suit and directed that the present appellant/defendant be evicted from the suit premises.

2. This appeal has been admitted on the following two substantial question of law:

(1) When the issue of default having not been pressed before the trial court then whether any finding given on that issue by the appellate court will be treated as the finding of the court below and can it be looked into by this court as a first appellate court ?

(2) Whether the death of the plaintiff and one of his son during the pendency of the suit and the appeal will have any affect in the finding recorded by the appellate court

3. So far first question of law is concerned, apart from the finding of learned trial court that the learned counsel for the plaintiffs has not pressed issue Nos. (iii) & (iv), there is no other materials on record to show that said issues were not pressed by plaintiffs. From perusal of record, it appears that there is specific pleading by the plaintiffs that the appellant/defendant defaulted in making payment of rent for two

months. It further appears from the record that in support of the aforesaid pleading plaintiffs also adduced evidences both oral and documentary. It then appears that in the trial court plaintiffs had not filed any petition that they are not pressing issue nos. (iii) & (iv). Aforesaid findings given by the trial court has been specifically challenged by the plaintiffs in their memo of appeal.

Ground No. (iv) reads as under

For that the learned lower court has erroneously held that learned lawyer for the plaintiff did not press the issue.

It further appears from the record that in the trial court Sri S.B. Satpathy was the lawyer on behalf of plaintiffs and he himself filed appeal on behalf of plaintiffs and the memo of appeal has been signed by him. This shows that lawyer of plaintiffs disputed the aforesaid findings given by the court below that issue Nos. (iii) & (iv) have not been pressed.

4. Under the said circumstance, in my view, the learned appellate court had rightly decided issue Nos. (iii) & (iv) and given a finding on the point of default. Thus, it appears that no substantial question of law arose as formulated in this appeal.

5. So far second question of law is concerned, it relates to eviction of appellant/defendant on the ground of personal necessity. It is submitted that during the pendency of the suit, original plaintiff had died whereas his two sons died during the pendency of appeals.

6. It is submitted by Sri Manju Prasad, learned counsel appearing on behalf of appellant that due to death of plaintiff and his two sons, personal necessity shown by original plaintiff in the plaint no more exist, therefore, suit cannot be decreed on the ground of personal necessity.

7. In view of the judgment of Hon"ble Supreme Court in Kamleshwar Prasad Vs. Pradumanju Agarwal (dead) by LR"s., the aforesaid submission of Sri Manju Prasad cannot be accepted. It has been held by their Lordships that the crucial date for existence of landlord"s requirement is the date of filing of eviction application. Subsequent death of landlord during pendency of writ petition before High Court filed by tenant is inconsequential. Thus, the second substantial question of law formulated in this case is answered in negative.

8. Accordingly, this second appeal is dismissed.