

Ravi Kumar - Appellant @HASH Shashi Kumar

Court: Jammu & Kashmir High Court

Date of Decision: March 29, 2016

Acts Referred: Jammu and Kashmir Houses and Shops Rent Control Act, 1966 - Section 11

Citation: (2016) AIRCC 3076 : (2016) 3 JKJ 732 : (2016) 2 RCRRent 618

Hon'ble Judges: Dhiraj Singh Thakur, J.

Bench: Single Bench

Advocate: S.S. Lehar, Sr. Advocate., Sunny Mahajan, Advocate, for the Appellant; L.K. Sharma, Sr. Advocate., G.P. Singh, Advocate, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Dhiraj Singh Thakur, J. - The present Civil 2nd Appeal has been preferred against the judgment and decree dated 30th of October, 2012

passed by the learned District Judge, Udhampur, whereby the appeal filed by the appellant has been dismissed.

2. With a view to deal with the present controversy, it is necessary to give few facts in brief.

3. A suit for eviction came to be filed by the respondent-plaintiff against the defendant-appellant herein in regard to a shop situate at Gole Market,

Dabbar, Udhampur, on the ground that the said shop was required reasonably and bona fide for the use of the plaintiff's son, who wanted to set

up his computer business in the shop in question as he was possessed of the requisite diploma in Computer Science.

4. On the pleadings of the parties, as many as five issues were framed including the issues regarding the reasonableness of the requirement of the

plaintiff in regard to the shop in question, the comparative advantage and disadvantage of the parties in case of ejection as also the issue with

regard to the fact whether the requirement of the plaintiff could be met by partial eviction.

5. On the issue of reasonable and bona fide requirement of the plaintiff, the defendant-appellant herein brought on record evidence to show that the

son of the plaintiff was running a hotel under the name and style of M/s. Hotel Sahil, which was partly situate on the first floor of the suit shop,

which was being run by the son of the plaintiff and that there was no such bona fide requirement as was alleged by the plaintiff.

6. The trial court while dealing with the evidence on record in regard to this issue, came to a conclusion that simply because the son of the plaintiff

was looking after the business of a hotel, did not disentitle the plaintiff's son from stalling a new venture independently. It was held that the plaintiff's

son was not expected to sit idle till such time the suit shop was vacated and in those circumstances, decided the issue in favour of the plaintiff and

against the defendant-appellant herein.

7. While deciding issue No. 2, on the question of comparative advantage and disadvantage to the parties in case of ejection, in terms of

explanation to the proviso of Section 11(h) of the Jammu and Kashmir, Houses and Shops Rent Control Act, 1966, (hereinafter called the Act of

1966), the trial court decided the same in favour of the plaintiff-respondent herein by inter alia holding that the defendant-appellant herein was in

possession of the suit shop since 1977, for more than three decades, and further that it had not been proved by the defendants that the son of the

plaintiff was earning a handsome income from the hotel business.

8. On a question of fact, thus, the trial court on a comparison of the relative advantage and disadvantage decided the issue No.2 in favour of the

plaintiff. Similarly issue No. 3 as regards whether the need of the plaintiff could be met by partial eviction was also decided in favour of the plaintiff.

9. A Civil 1st Appeal was filed against the aforementioned judgment and decree dated 31.3.2011, which came to be decided by the learned

District Judge, Udhampur, by judgment and decree impugned dated 30.10.2012, dismissing the said appeal, which is challenged in the present

Civil 2nd Appeal.

10. Learned counsel for the appellant, challenged the judgment and decree impugned dated 30.10.2012, on the following grounds :

a. That the courts below had failed to appreciate the evidence on record while deciding the issue of reasonable requirement of the landlord in terms

of Section 11(h) of the Act of 1966.

b. That the issue No. 1 could not have been decided in favour of the plaintiff-respondent herein when there was enough evidence on record to

show that the plaintiff's son was running the business of a hotel in a three storied building over the shop in question, thus, belying the ground of

reasonable requirement in terms of Section 11(h) of the Act (supra).

c. That the issue regarding partial eviction was not decided and no finding was returned on the same.

d. That the 1st appellate court had not at all gone through the evidence produced by the parties before the trial court and that non-reproduction of

evidence while passing the judgment is not sustainable in the eyes of law.

e. That the judgment and order passed by the 1st appellate court was without jurisdiction inasmuch as the Jammu and Kashmir (Residential and

Commercial Tenancy) Act, 2012 had already come into force on 16.4.2012, which had the effect of repealing the Act of 1966. Further that in

terms of Section 39 of the Jammu and Kashmir (Residential and Commercial Tenancy) Act, 2012, all cases stood transferred to the Appellate

Rent Tribunal as specified under the Act.

11. Following substantial questions of law were framed by this court vide order dated 31.10.2014:

1. Whether the judgment and decree dated 30.10.2012, passed by learned District Judge, Udhampur, was without jurisdiction in view of the

promulgation of the Jammu and Kashmir (Residential and Commercial Tenancy) Act, 2012, (hereinafter called the Act of 2012) Section 39

whereof envisaged transfer of all cases to the Rent Controller or Appellate Rent Tribunal specified under the Act.

2. Whether the 1st Appellate Court while deciding the Civil 1st Appeal was under an obligation to consider the entire evidence instead of

expressing general agreement with reasons given by the Trial court.

3. Whether the courts below had recorded a finding of fact on issue Nos. 1 and 2, which was perverse being contrary to evidence on record.

Question No. 1:

12. Learned counsel for the appellant urged that the judgment and order dated 30.10.2012, passed by the learned District Judge, Udhampur, was

without jurisdiction in view of the promulgation of the Act of 2012. It was urged that as per Section 39 of the aforementioned Act, all cases or

proceedings in execution of any decree pending in courts under the Act of 1966, would stand transferred to the Rent Controller or Appellate Rent

Tribunal specified under the Act and the concerned Rent Controller or the Appellate Rent Tribunal, as the case may be, shall proceed to hear such

cases either de novo or from the stage it was at the time of such transfer. A perusal of the Act of 2012, shows that the same came into force on

16.4.2012.

13. It was further stated that according to Section 42 of the Act of 2012, the Act of 1966, stood repealed and, therefore, it was urged that the 1st

Appellate Court could not have exercised its jurisdiction to dispose of the appeal.

14. While the argument, on the face of it, might sound attractive, yet both the counsel agreed that the provisions of the new Act of 2012, were

stayed by this court on 12.9.2012. If that be the undisputed position, then, neither Section 39 nor Section 42 of the aforementioned Act would

operate either regarding transfer of the cases or proceedings in execution of any decree pending in courts under the Act of 1966, to the Rent

Controller or Appellate Rent Tribunal or to repeal the provisions of Act of 1966.

15. Another important fact, which requires to be noticed is that whereas, the provisions of the Act of 2012 were stayed on 12.9.2012, the

judgment and decree impugned was passed by the learned District Judge, Udhampur, on 30.10.2012, i.e., after the operation of the Act had been

stayed. Therefore, on the date of the judgment and decree in appeal, there was no legal impediment for the court below to proceed and decide the

appeal on merits. This question is, accordingly, decided against the appellant.

Question No.2 :

16. The second ground on which the judgment and decree was challenged was that the 1st Appellate Court had failed to appreciate the evidence

on record and without discussing the evidence in the minutest detail had proceeded to decide the Civil 1st appeal by generally affirming the

evidence recorded by the trial court below.

17. Order 41, 41 R.31 of the CPC envisages that the judgment of the appellate court shall be in writing and shall state :

a) the points for determination;

b) the decision thereon;

c) the reasons for the decision; and,

d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

18. In *Girijanandini Devi and Ors. v. Bijendra Narain Choudhary*, (1967) 1 SCR 93 : AIR 1967 SC 1124, the view expressed by the

Apex Court was that it was not necessary for the appellate court when it agrees with the view of the trial court either to restate the effect of

evidence or to reiterate the reasons given by the trial court and expression of general agreement with reasons given by the Court decision of which

is under appeal would ordinarily suffice. What was observed by the Apex Court in paragraph 12 of the judgment (supra) is relevant and

reproduced hereunder:

12. The Trial Court, as we have already observed, on a consideration of the entire evidence and the subsequent conduct of the parties came to the

conclusion that there was no severance of Bijendra Narain from his uncle Bidya Narain and with that view the High Court agreed. It is true that the

High Court did not enter upon a reappraisal of the evidence, but it generally approved of the reasons adduced by the Trial Court in support of its

conclusion. We are unable to hold that the learned Judges of the High Court did not, as is contended before us, consider the evidence. It is not the

duty of the appellate court when it agrees with the view of the Trial Court on the evidence either to restate the effect of the evidence or to reiterate

the reasons given by the Trial Court. Express/on of general agreement with reasons given by the Court decision of which is under appeal would

ordinarily suffice.

19. However, in *Madhukar & Ors. v. Sangram & Ors.*, 2001 (3) Supreme 518 : (AIR 2001 SC 2171), the Apex Court highlighted the need

for the appellate court to discuss the oral and documentary evidence as also emphasised the need of the appellate court to deal with all the issues

and the evidence led by the parties before recording its findings. Paragraph 5 of the judgment (*supra*) is relevant and is reproduced below:

5. We have carefully perused the judgment and decree of the High Court in the first appeal. We find that substantial documentary evidence had

been placed before the trial court including certified copies of certain public records besides copy of the judgment and decree of the earlier suit

(OS No. 93/71). Oral evidence had also been led by the parties before the trial Court, which was noticed and appreciated by the trial Court.

However, the impugned judgment in the first appeal, is singularly silent of any discussion either of documentary evidence or oral evidence. Not only

that, we find that though trial court had dismissed the suit on ground of limitation as also on the ground that the decision in, the earlier suit (OS No.

93/71) operated as *res judicata* against defendant No. 1 only the High Court has not even considered, much less discussed, correctness of either

of the two grounds on which the trial Court had dismissed the suit. Sitting as a court of first appeal, it was the duty of the High Court to deal with

all the issues and the evidence led by the parties before recording its findings. It has failed to discharge the obligation placed on a first appellate

court. The judgment under appeal is so cryptic that none of the relevant aspects have even been noticed. The appeal has been decided in a very

unsatisfactory manner. First appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the

judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings.

20. Subsequently, in *B.V. Nagesh & Anr. v. H.V. Sreenivasa Murthy*, 2010 AIR SCW 6184, the Apex Court held as under:

The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless

restricted by law, the whole case therein is open for rehearing both on questions of fact and law. The judgment of the appellate Court must,

therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put

forth and pressed by the parties for decision of the appellate court. Sitting as a court of appeal, it was the duty of the High Court to deal with all the

issues and the evidence led by the parties before recording its findings.

The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal

must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings, (Vide Santosh Hazari v.

Purushottam Tiwari, AIR 2001 SC 965 and Madhukar and others v. Sangram and others, AIR 2001 SC 2171.

21. From a reading of the judgment and decree impugned in present appeal, it becomes clear that, in fact, the 1st appellate court had not discussed

the evidence of any of the witnesses independently but only in general terms proceeded to affirm the findings recorded by the trial court. It appears

that the decision rendered by the 1st appellate court was only on the basis of the facts and law as was reflected in the judgment of the trial court

without at all, going through the actual evidence on record. This clearly runs contrary to the ratio of the judgment of the Apex Court in B.V.

Nagesh's case (2010 AIR SCW 6184) supra.

22. The judgment and decree under appeal is, therefore, liable to be set aside on this ground alone.

23. In view of the findings recorded on Question No.2, there is no need to deal with Question No.3.

24. Be that as it may, the judgment and decree dated 30.10.2012, passed by the 1st Appellate court (District Judge, Udhampur) is set aside. The

matter is remanded to be decided afresh in accordance with the law and keeping in view the principles as laid down by the Apex Court in B.V.

Nagesh's case (2010 AIR SCW 6184) supra.

25. In view of the fact that the litigation is quite old, it would be appropriate if the Civil 1st Appeal is decided on merits preferably within a period

of two months from today.

26. The records shall be remitted to the court below. Parties to appear before the learned District Judge, Udhampur, on 5.4.2016.