

Devi Prasad Vs. Smt. Vidyawati Alias Biddo and ors.

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Court : Uttaranchal

Decided On : Aug-24-2005

Reported in : AIR2005Utr85; 2006(1)AWC722

Judge : Prafulla C. Pant, J.

Acts : Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Sections 3; [Transfer of Property Act, 1882](#) - Sections 106; Tamil Nadu Buildings (Lease and Rent Control) Act, 1960; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 96, 100 - Order 41, Rules 22 and 33

Appeal No. : Second Appeal No. 1297 of 2001

Appellant : Devi Prasad

Respondent : Smt. Vidyawati Alias Biddo and ors.

Advocate for Def. : Alok Singh, Sr. Counsel assisted by assisted by Lalit Tewari and; D. Barthwal, Adv.

Advocate for Pet/Ap. : Nagesh Agrawal, Adv.

Disposition : Appeal allowed

Judgement :

Prafulla C. Pant, J.

1. This appeal, preferred under Section 100 of Code of Civil Procedure, 1908, is directed against the judgment and decree dated 14-10-1991, passed by learned Additional Civil Judge, Rorkee, in Civil Appeal No. 22 of 1984, whereby the said appeal has been dismissed and judgment and decree passed on 15-2-1984 in Original Suit No. 143 of 1979 by the trial Court is upheld.

2. Brief facts of the case are that the plaintiff (appellant instituted original suit No. 143 of 1979, against Sri Bhagwat Prasad (since deceased) pleading that plaintiff got constructed his shop in the year 1965. Said shop has two doors one opening towards east and another towards the north. Over each of these doors towards outside, there is separate shed to protect from rain and sun. Under the north side door there is a Chabutara (a platform). About two and half years before the institution of suit in 1979, Shri Bhagwat Prasad requested and sought licence to do his business of selling 'Paan' (betel) over 'Chabutara' to which plaintiff agreed on payment of licence fee at the rate of Rupees two per day. The defendant started his business over 'Chabutara', by keeping wooden Almirah measuring 6 ft. x 11 inches x 5 ft. 1 inch. It is further pleaded in the plaint that the defendant Stopped paying licence fee since 1-3-1977. Meanwhile plaintiffs son who completed graduation in Medical Science by doing his B.A.M.S. started his practice in the plaintiffs shop, and there was inconvenience to him due to defendant's 'Paan' shop at northern door. When asked to leave, defendant started claiming himself to be tenant, on which plain tiff served notice dated 1-5-1979 on the defendant terminating his license and in alternative tenancy on completion of thirty days from service of notice, and thereafter filed the suit for possession and mesne profits at the rate of Rs. 2/- per day.

3. The defendant Bhagwat Prasad (since deceased) filed his written statement denying the contents of the plaint, as stated and pleaded that the 'Paan' shop in question is not 'Chabutara' but a shop bearing municipal number 65(2). It is further pleaded by the defendant that U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 is applicable to the disputed shop. Disputing the allegation of being licensee, the defendant pleaded that he is tenant on rent at the rate of Rs. 30/- per month. Lastly, it is pleaded that the suit is barred by provisions of U.P. Act 13 of 1972 and also that the notice served under Section 106 of [Transfer of](#)

[Property Act, 1882](#), is illegal. During pendency of suit, Sri Bhagwat Prasad died and his legal representatives were substituted.

4. Learned trial Court, after perusing the pleadings framed as many as eleven issues and after recording evidence and hearing the parties, it dismissed the suit on the ground that there exists relationship of landlord and tenant between the parties and the lease does not get, terminated by the notice in question. However, it held that since the 'Paan' shop in the 'Chabutara' is not 'building' as such, the suit is not barred by U.P. Act 13 of 1972, Aggrieved by said judgment and decree passed on 15-2-1984, the plaintiff preferred appeal under Section 96 of the Code of Civil Procedure, 1908 which was registered as Civil Appeal No. 22 of 1984. But after hearing the parties the same was also dismissed on 14-10-1991. Agreeing with the orders of the trial Court, appellate Court further held that disputed shop is building and the suit is barred by U.P. Act No. 13 of 1972.

5. Following substantial question of law were formulated and involved in this appeal ---

(1) Whether the cross-objection on a specific finding having been dismissed by the appellate Court and the controversy having attained finality, is it open to the appellate Court to revive the question and to give a finding thereon while deciding the appeal ?

(2) Whether construction in question, being merely of temporary in nature, that is kept wooden kiosk on the platform, and it amounts to an accommodation within the meaning of U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 ?

(3) Whether on mere plea, in the alternative, a notice can be said to amount to abandonment of the substantive plea and thereafter invest the noticee with the character of a tenant of the so called premises ?

6. I heard learned Counsel for the parties and perused the record.

7. Answer to Substantive Question No. 1 :

From the record it appears that cross-objections, filed by the defendants before lower appellate Court, were dismissed for non-payment of court-fee. Learned Counsel for the plaintiff/appellant argued that in the said circumstance, it was not open for the lower appellate Court to reverse the finding of trial Court holding that kiosk of 'Paan' shop is building and U.P, Act. 13 of 1972, is applicable to the 'building' and the suit is barred by said Act. In this connection my attention was drawn to the provisions of Rule 22 of Order XLI of the Code of Civil Procedure, 1908 and reliance is placed in the principle of law contained in Tummalla Atchiaiah v. Venka Narsingarao, MANU/SC/0028/1978 : AIR 1978 SC725 and Banarsi v. Ramphal, MANU/SC/0147/2003 : [2003]2SCR22 . I have gone through said provision and also the referred case laws. In both these cases suit was decreed by the trial Court partly and only defendant preferred the appeal and appellate Court granted remaining relief also though no cross-appeal nor cross objection was filed by the plaintiff. In such circumstance what learned Counsel for plaintiff/appellant is arguing could be appreciated as in said cases plaintiff could not have been granted relief more than what has been decreed. In the present case suit was dismissed by the trial Court, and even after two findings reversed by the appellate Court in favour of defendant, the suit remained dismissed on the more grounds. As such this situation is covered under Rule 33 of Order XLI of the aforesaid Code which empowers the appellate Court to do so even in the absence of the cross-objections. Accordingly substantial question of law No. 1 is answered in favour of the defendant/respondent. (However whether findings of lower appellate Court are erroneous in law or not is being dealt ahead).

8. Answer of Substantial Question No, 2.

Definition of word 'building' is given in Section 3(i) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 Which reads as under :--

`(1) 'building' means a residential or non-residential roofed structure and includes --

(i) any land (including any garden), garages and outhouses, appurtenant to such building;

(ii) and furniture supplied by the landlord for use of such building;

(iii) any fittings and fixtures affixed to such building for the more beneficial enjoyment thereof.'

Shri Nagesh Agrawal, learned Counsel for the plaintiff/appellant drew my attention to the principles of law contained in State of U. P. v. VII Addl. District Judge, MANU/SC/0534/1992 : AIR 1993 SC1232 , Batasa Devi v. Tara Devi, 1979 All LJ 176 and Mahabir Prasad v. Madho Prasad, 1980 All WC 626 : (1980 All LJ NOC 147). I have gone through said case laws. In the State of U. P. v. VII Addl. District Judge (supra) only this much has been held that 'building' not only means superstructure but also land beneath it. In fact it has been observed so with regard to valuation of building which is not the case here. In Batasa Devi case (supra) what has been explained is this that If kachcha roofed structure is raised by the tenant it would not be a 'building' for the purposes of U.P. Act 13 of 1972. However, in Mahabir Prasad Chhatri case (supra), of course, it has been held by Allahabad High Court that Kothari built temporarily of pucca bricks cannot be said to be a 'building'. But this opinion is contrary to the view expressed by Hon'ble the Apex Court in Surya Kumar Govind Jee v. Krishnammal, 1990 SCFBRC 293. In that case, Supreme Court has interpreted the word 'building' with regard to T. N. Buildings (Lease and Rent Control) Act, 1960. The definition of 'building' given under said Act and one that is given in U.P. Act 13 of 1972 are to some extent similar. In Surya Kumar case (supra) the Apex Court has held that even a shed, hut, enclosures made of mud, by poles supporting tin or asbestos roof are 'buildings'. But in the present case spot inspection report of the learned trial Court is on record, in which learned Munsif has observed that on a northern side platform (of plaintiffs building) a seven feet high wooden kiosk is found kept. It's left, right and upper sides were wooden. And over it there was small tin shed lurking from plaintiff's shop. It has also come on record that said Almirah/kiosk was not provided by the plaintiff. From the evidence on record it is clear that what has been provided by the plaintiff is 'Chabutara' with tin shed (which was not standing on poles) but appears to be resting on the wall of plaintiffs shop. Therefore, the record reveals since the kept kiosk in fact belongs to Use defendant and cannot be said to be 'building' let out by plaintiff to the defendant. A roofed structure

belonging to licensee or lessee which can be moved from one place to other can not be said to be a 'building' for the purposes of U. P. Act 13 of 1972. That being so, there is no question of applicability of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 to it. There-fore, this Court is of the opinion that learned lower Appellate Court has erred in law in holding the disputed kiosk to be building and as such the findings of lower appellate Court are liable to be set aside. Substantial question of law No. 2 is accordingly answered in favour of plaintiff/appellant.

9. Answer to substantial Question No. 3.

Learned trial Court as well as the learned lower appellate Court have given finding that there exists relationship of landlord and tenant between the parties. The finding of trial Court in this regard is based on the assumed ground that to save from clutches of rent control law, some people make theory of licence and secondly that in the plaint and notice the plaintiff has taken alternative plea of termination of tenancy. But the learned trial Court has erred in law in treating the alternative plea as admission of plaintiff and another ground that some people to save from clutches of the rent control law taken plea of licence is based on conjectures and surmises as such, the finding on said point is perverse. Learned lower appellate Court has erred in law by affirming said perverse finding. It has not given any reason how it found relationship of landlord and tenant proved. In the opinion of this Court from the oral evidence adduced by the plaintiff factum relating to licence is proved on the record. And there is no illegality in the notice in question by which the licence of the defendant is terminated. Had there been no notice, even filing of suit for possession amounts to termination of the licence. In *Firm Srinivas Ram v. Mahabir Prasad*, MANU/SC/0021/1951 : [1951]2SCR277 , the Apex Court has held that the plaintiff can rely upon, different rights alternatively and Code of Civil Procedure, 1908, does not prevent him from doing so. Also in *Arundhati Mishra v. Ram Charitra Paude*, MANU/SC/0610/1994 : (1994)2SCC29 , Supreme Court further says it is open for the parties to raise mutually inconsistent pleas, and if the relief could be founded on the alternative plea it can be granted. In the present case from the evidence on record there appears no intention to create interest improperly, which is distinguishing feature of lease as against the

licence. The acid test is the 'exclusive possession' which is required for lease. Applying these tests, in view of principle of law contained in *Sohan Lal Narain Das v. Laxmi Das Raghunath*, MANU/SC/0593/1971 : [1971]3SCR319 , this Court has no hesitation in holding that in the present case the relationship between the parties was not of landlord and tenant but that of licensor and licensee. And both the Courts below not only committed error of fact but also of law by giving the finding otherwise. Assumption like that people, to avoid rent control law, raise plea of licence (as observed by trial court; and said finding confirmed by lower appellate Court), can be said to be based on mere conjectures and surmises as the same is against the record. Therefore, accordingly, the substantial question of law No. 3 is also answered in favour of plaintiff/appellant and it is held that both the Courts below have erred in law in holding notice terminating the licence to be illegal and thereby refusing the relief to the plaintiff.

10. In view of the reasons as discussed above plaintiff's suit deserves to be decreed as Courts below have erred in law in dismissing the suit and confirming it. Accordingly this Second Appeal is allowed and impugned judgment and decree passed by learned trial Court: and lower appellate Court are set aside, and original suit. No. 143 of 1979 between the parties is decreed for possession and mesne profits as prayed, with costs throughout. However, in the interest of justice the defendants-respondents are allowed one month time to remove their wooden Almirah/kiosk and hand over possession of 'Chabutara' in question to the plaintiff-appellant.