

Sami Yar Khan Vs. Usman Khan

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Court : Delhi

Decided On : May-24-1994

Reported in : 1994IIIAD(Delhi)131; 55(1994)DLT60; 1994(29)DRJ565

Judge : C.M. Nayar, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 100

Appeal No. : Regular Second Appeal No. 9 of 1975

Appellant : Sami Yar Khan

Respondent : Usman Khan

Advocate for Pet/Ap. : I.S. Mathur,; Tarun John,; Mukul Rohatagi and;

Judgement :

C.M. Nayar, J.

(1) The present judgment will dispose of Regular Second Appeal No.9 of 1975 which arises out of the suit of the plaintiff/appellant filed in the trial court for possession of the property, as defined in the amended plaint.

(2) The averments made in the amended plaint are that the appellant is a tenant of House No. 316, Ward No. Xi, situated in Gali Garhiya, Bazar Matia Mahal, Jama Masjid, Delhi, since about 1932 and he has been in possession of the said house

continuously since then. The appellant has been a tenant under the original Muslim owner till partition in 1947 and thereafter he became tenant under the Custodian of Evacuee Property from September, 1947, and when this property was transferred to the Municipal Corporation of Delhi, he has become a tenant of the Corporation.

(3) It is alleged that the respondent is the husband of real niece of the appellant (brother's daughter) and is a resident of Aligarh. The brother of the appellant (Shri Khud Yar Khan) requested the appellant to allow the respondent and his wife to live with the appellant as his guest for a few days on the pretext that he had an inadequate living space and could not accommodate the respondent and his wife and also that the said Khud Yar Khan did not want to keep the respondent in his house. It is further stated that the said brother of the appellant and the respondent 566 assured that they would take some other house on rent within a month or so and then will shift to that place and failing that they will return to their native place. The appellant believing the respondent and the said Khud Yar Khan and in view of their close relationship, allowed the respondent to come and live with him fo

(4) It is further reiterated in the plaint that the respondent has no right, title or authority, whatsoever, to continue to live in the appellant's house and he is a trespasser therein, In this view of the matter, the appellant filed a suit for possession of the premises in dispute in the trial court.

(5) The respondent filed written statement and took several objections. The facts as stated in the amended plaint were denied and the respondent gave his own version of the factum of possession. The same is reiterated in paragraph 1 of the written statement on merits, which reads as under:

'1. In reply to para 1 of the plaint it is submitted that Shri Ahmed Yar Khan was in occupation of the property in suit. Shri Ahmed Yar Khan was the brother of Shri Khudyar Khan. On the 1st floor of the property the 1st wife of Shri Khud yar khan was residing. The plaintiff and the replying defendant, originally come from Aligarh. The defendant is married to the daughter of Shri Khudyar Khan from his 1st wife who was occupying the 1st floor. Soon after the marriage while Shri Ahmed Yar Khan was in occupation of the ground floor the replying defendant also resided

along with his mother-in-law in the 1st floor. Earlier Shri Ahmad Yar Khan used to pay the rent and when the replying defendant came, the replying defendant also contributed the rent. The occupation of the replying defendant is long before the enactment of Delhi Rent Control Act. -Later in the year 1952 Shri Ahmed Yar Khan became mentally unfit and was removed to his Hotel. After shifting of Shri Ahmed Yar Khan from ground floor, Shri Samiyar Khan, the plaintiff with the consent of Shri Ahmed Yar Khan occupied the ground floor. The defendant's occupation is continuous from the date of his marriage till today. It is incorrect to say that the plaintiff was the tenant in the property in question from 1932 or that he was in continuous possession of the property since then. His possession only started after Shri Ahmed Yar Khan had left in the year 1952. The property became evacuee property and there being cohesion and conciliation in the family Shri Khud Yar Khan decided that both the parties i.e. the plaintiff and the defendant should jointly pay the rent to the Custodian but the receipt was taken in his own name because Khud Yar Khan wanted as such, as Shri Samiyar Khan is elder to the defendant in age and also in relation. At any rate even if the plaintiff proves himself to be the tenant of the whole of the property as alleged by him, which fact though denied by the defendant, the defendant is an authorised and legal sub-tenant and as such is not evictable. The plaintiff has never been in possession of the 1st floor nor he has ever been the tenant of 1st floor. The brother-in-law of the defendant died 10/12 years back and since then the defendant is the sole authorised occupant. It may be mentioned here that Shri Khudyar Khan had 2 wives and he had been living in a separate house with his 2nd wife, while the defendant has been living with his first wife (mother-in-law of the defendant) in the 1st floor of the house in question and through out the rent was being paid by the replying defendant.'

The remaining contents of the plaint were also denied.

(6) The appellant filed replication to the written statement and reiterated the averments made in the plaint. On the pleadings of the parties, the following issues were framed:

'1. Whether the suit is not properly valued for purposes of court fee and jurisdiction? Opd 2. Whether the suit is bad for non joinder of necessary party? Opd 3. Whether the defendant is in possession of the suit premises as a lawful occupant under the Delhi Municipal Corporation? If so, to what effect?OPD 4. Whether the court has no jurisdiction to try the suit? Opd 5. Whether the plaintiff is entitled to the injunctions, as prayed for? OPP. 6. Relief.'

The following additional issues were framed on April 6, 1972 and July 17, 1973 respectively:

'HAS the question of tenancy of the plaintiff become final as alleged? If so, to what effect?'

'WHETHER the civil court is not competent to set aside the order passed by Slum Authorities as alleged in para no.1 of preliminary objections of amended written statement?'

(7) 'THE Trial Judge disposed of Issues Nos-2,3 and 4 and held as of fact that on consideration of the entire evidence on record it appeared that the respondent and his wife had been staying along with Zora Begum in the suit premises right from 1953 temporarily on account of mere relationship and under this circumstance, it does not stand to reasons that respondent would have been contributing Rs.4/- per month towards rent to the appellant. The Trial Judge further concluded that had the respondent been paying Rs.4.00 per month towards rent to the appellant, then he would have certainly asked the appellant to issue rent receipts. It need not be emphasised here that all the rent receipts of the house in suit are in the name of the appellant/plaintiff. Under these circumstances the contention advanced by learned counsel for the respondent (defendant) that he was either the sub-tenant or co-tenant was rejected by the learned Judge. The factum of possession of the respondent was, however, established and the trial court did not accept the plea of the appellant about the year when the respondent came in possession. The following finding was recorded in this regard:

'THUS there appears to be no doubt that the defendant is in occupation of the first floor of the house in suit. Although the case set up by the defendant that either he

is a co-tenant or sub tenant, has not been accepted by the court but at the same time it must be held that the defendant has been in possession upon the first floor of the house in suit much prior to 1965-66 as alleged by the plaintiff. However, occupation of the defendant will be deemed to be that of a licensee of the plaintiff in the eye of law.'

(8) The Trial Court also rejected the contention of the respondent that by virtue of rent receipt Exhibit D.2, he has been admitted as a tenant of the Municipal Corporation and, accordingly, he cannot be evicted. The Court came to the conclusion that the respondent has admitted in his own testimony that no order was passed on his application in view of the pendency of the similar cases. The payment of license fee was realised from the respondent tentatively and as no order had been passed regarding regularisation of his occupation of the first floor of the house of the suit property, the respondent could not be said to have been admitted as a tenant by Municipal Corporation of Delhi.

(9) The respondent felt aggrieved by the order of the Trial Judge and filed an appeal, which was disposed of by the Additional District Judge vide order dated September 28, 1974.

(10) The learned Additional District Judge referred to the evidence on record and held that the respondent got proved Exhibits DW1/1 to DW1 /5, which are entries regarding birth of five children to the respondent. These documents show that five children were born to the wife of respondent in the suit property in 1953, 1955, 1957, 1963 and 1966. This evidence is in itself sufficient to demolish the case of the appellant that the respondent and his wife came to reside with him as guests for about a month only about 3 years prior to institution of the suit. The Explanation that the respondent's mother-in-law was residing in the house in dispute and the wife of the respondent used to come there when she was about to deliver the child, was held as an after thought and was, accordingly, rejected.

(11) On further appraisal of evidence and material on record, the First Appellate Court held that the respondent was residing in the house in dispute between 1952 and 1960 and housed to manufacture envelopes and supplied the same to a named firm. The contention of the appellant that respondent came to his house as

a guest was held to be false and accordingly rejected. The Court made further reference to the evidence on record to disprove the version of the appellant and the related findings may be reproduced as below:

'THE suit was instituted in 1968. According to the story set up by the plaintiff the defendant and his wife could have come to reside in the premises in dispute sometime near about the middle of 1965. These passports are, however, of the year 1962 and they thus completely demolish the plaintiff's case. The defendant and his wife was also recorded as voters in the voter-list Ex.DW.6/1 for the year 1956. The trial court came to the conclusion that the case set up by the plaintiff that he had allowed the defendant and his wife to stay with him temporarily in the house in dispute two or three years prior to the institution of the suit i.e. some time in 1965 or 1966 appears to be incorrect. The trial court further felt that the defendant and his wife had been staying along with Johra Begum in the house in dispute right from 1953 but the trial court felt that they had been residing there temporarily on account of mere relationship and that the defendant could not be held to be a co-tenant or sub-tenant. The trial court did not consider the fact as to why the plaintiff had made false allegations if his case was correct.'

(12) The Court also rejected the plea of the appellant that the respondent was a resident of Aligarh and was living in the suit premises only as a guest on the ground that he had performed marriage of his daughter in Aligarh on April 16, 1966 as well as was drawing ration at Aligarh. The respondent was a permanent resident of Aligarh and obviously there was no bar in performing the marriage of his daughter at that place. The mere fact that he committed a crime there and drew ration for some time does not prove that he was not residing in the house in dispute since 1950 onwards. The case of the appellant was further held to be disproved from the very fact that respondent was residing along with his family in the house since 1950 or so (since 1953 according to the trial court) and the plea of the respondent that he was contributing Rs.4.00 per month as rent to the plaintiff/appellant was accepted. The appeal of the respondent as a consequence, was allowed by the First Appellate Court and the decree passed in favor of the appellant was set aside and the suit was dismissed and the present second appeal arises Out of the order dated September 28, 1974.

(13) The learned counsel for the appellant has argued that there is total non application of mind by the First Appellate Court in setting aside the well reasoned judgment of the trial court. He has reiterated that the learned Additional District Judge has accepted the mere oral statement of the respondent that he was contributing Rs.4.00 as rent and treated him as a co-tenant and the Court has misread the pleadings and facts in the case and has adopted an unreasonable approach in arriving at findings and the same cannot be sustained in law. The Custodian has issued receipts in favor of the appellant and all such receipts are in his name. To similar effect are the receipts issued by the Municipal Corporation of Delhi and, admittedly, there is no rent receipts issued in favor of the respondent either by the Authorities or by the appellant. There are material contradictions in the findings, which are recorded in the case and the respondent has taken contradictory stand and the same has been wrongly appreciated by the First Appellate Court. The question of title has not been correctly determined by the First Appellate Court. It is further submitted that the issues have not been correctly reproduced in the case. They were framed in the connected suit between the parties (RSA No.10/1975). There seems to be an inadvertent error as the findings arrived at by the Court are only in respect of the issues relevant to the suit. The counsel did not press this point any further.

(14) The learned counsel has placed strong reliance on the judgment of the Supreme Court in Madan Gopal Kunodin v. Mumraj Maniram others : AIR 1976 SC461 and reference is made to paragraph 19, which reads as under:

'19.ONa consideration of the evidence of the plaintiff and the defendants we are clearly of the opinion that while the evidence of the plaintiff has a ring of truth and consists of persons who have deposed correctly the evidence of the defendants is not worthy of credence. In other words, the evidence of the plaintiff on this question far out-weighs the evidence of the defendants both in quality and credibility and in our opinion the High Court was wrong in accepting the evidence of the defendants on this point. The finding of fact by the High Court on this question is vitiated by non-consideration of material facts and admissions, misreading of evidence, errors of record and a manifestly wrong and unreasonable approach.'

(15) The learned counsel has next contended that the burden of proof to determine whether the respondent is a sub-tenant or a co-tenant has been wrongly placed on the appellant. He has relied upon the judgment of the Supreme Court in *Ladli Parshad Jaiswal v. The Karnal Distillery Co., Ltd. Karnal and others* : [1964]1SCR270 , to reiterate the proposition that a decision of the First Appellate Court reached after placing the onus wrongly or based on no evidence, or where there has been substantial error or defect in the procedure, producing error or defect in the decision of the case on merits, is not conclusive and a second appeal lies against that decision.

(16) To similar effect the judgment of the Bombay High Court in *Chandrabai Pandurang Bidwekar v. Nanji Jaywant* : AIR1971 Bom115 has been cited.

(17) The principles of interference in Second Appeal by the High Court, as referred to in the judgment of the Supreme Court in *Madan Lal v. Mst. Gopi and another* : [1981]1SCR594 have been relied upon by learned counsel for the appellant. It is stated that 'where both courts below ignored the weight of preponderating circumstances and allowed their judgments to be influenced by inconsequential matters, the High Court would be justified in reappreciating the evidence and in coming to its own independent conclusions.'

(18) In *Jagdish Singh v. Natthu Kingh* : AIR 1992 SC1604 it has been held that where the findings by the Court of facts is vitiated by non-consideration of relevant evidence or by an essentially erroneous approach to the matter, the High Court is not precluded from recording proper findings.

(19) The learned counsel appearing for the respondents have reiterated the proposition that this Court has no jurisdiction to interfere in questions of fact in Second Appeal on re-appreciation of evidence. The Second Appeal will only lie on a question of law and merely because the First Appellate Court has erred in appreciating some parts of evidence, the interference cannot be justified. Reference is made to the following judgments to advance this proposition:

1. *Ramji Patel v. Rao Kishore Singh* Air 1929 PC 190; 2. *Madamanchi Ramappa and another v. Muthaluru Bojjappa* : [1964]2SCR673 ; 3. *Afsar Shaikh and another*

v. Soleman Bibi and others : [1976]2SCR327 ; 4. The State of Gujarat etc. v. Vora Salebhai Gulamali and others : AIR 1977 SC1815 ; and 5. Karbalai Begum v. Mohd. Sayeed and another : [1981]1SCR863 .

(20) I have carefully considered the contentions of the parties and appreciate the limited scope of interference in such matters. The evidence on record has established the factum of position of the respondent in the suit premises and the same has been accepted even by the trial court with effect from the year 1953. The respondent's wife gave birth to five children in the house in the years 1953, 1955, 1957, 1963 and 1966 respectively. There is no dispute about this finding and the same has been admitted on record. The address of respondent and his wife in the passports issued in January, 1962 is described as that of the suit property. Respondent and his wife were recorded as voters in the voter's list for the year 1956. There are certain lacunas and contradictions in the evidence which has been correctly pointed out to me by counsel for the appellant but there seems to be no material contradictions, which has resulted in grave error of procedure and this cannot be held to be a case of no evidence. The respondent has been in touch with the Authorities to regularise his claim as a tenant and the mere non-action on the part of the Authorities cannot deprive him of that status when he has uninterruptedly stayed in the suit property along with his family members for such a long time and till date.'It has always been recognised that sufficiency or adequacy of evidence to support a finding of fact is a matter for decision of the court of facts and cannot be agitated in a second appeal.'In this situation and in view of the admitted facts, the First Appellate Court did not err to accept the contention of the respondent that he has been paying rent to the appellant at Rs.4.00 per month and, therefore, his position can be both that of a cotenant as well as a sub-tenant of the appellant.

(21) The law laid down by the Privy Council as far back as 1929 in the case of Ramji Patel v. Rao Kishore Singh (supra) is that 'an erroneous finding of fact is a different thing from an order or defect in procedure. A second appeal cannot be entertained on the ground of an erroneous finding of fact, however, gross or inexcusable the error may seem to be, if the Court had before it evidence proper for its consideration in support of its finding.'To similar effect is the judgment of the

Supreme Court in Afsar Shaikh and another (supra), which has defined the jurisdiction of the High Court to entertain a second appeal. The relevant portion of this judgment reads as follows:

'THE scope of the powers of the High Court to interfere in second appeal with judgments and decrees of courts below is indicated in sections 100,101 and 103 of the Code of Civil Procedure. Broadly, the effect of Sections 100 and 101, read together, is that a second appeal is competent only on the ground of an error in law or procedure and not merely on the ground of an error on a question of fact. The High Court has no jurisdiction to entertain a second appeal on the 'ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be'. (Mst. Durga Choudhrani v. Jawahar Singh), (1890) 17 IA 122. Section 103 enables the High Court in second appeal, where the evidence on the record is sufficient, to determine an issue of fact necessary for the disposal of the appeal only- (a) if the lower appellate Court has not determined that issue of fact, or (b) if it has determined that issue wrongly by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of Section 100.'

(22) The First Appellate Court has clearly arrived at a finding of fact that the respondent has been in the premises since 1950 or so and has believed that the respondent has been paying rent at the rate of Rs.4 per month to the appellant. It will not be open for this Court to arrive at a different and contrary finding to the finding recorded by that Court by reappraising the evidence. There is no jurisdiction vested in this Court to make fresh appraisal of evidence and come to a different conclusion.

(23) In view of the above, there is no force in this appeal and the same is dismissed accordingly. No order as to costs.