

Bahirumal Basdev Vs. Lalit Kishore

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Court : Rajasthan

Decided On : Mar-09-1976

Reported in : AIR1976Raj244

Judge : S.N. Modi, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 151 - Order 41, Rule 25;
Rent (Amendment) Act

Appeal No. : Second Appeal No. 214 of 1975

Appellant : Bahirumal Basdev

Respondent : Lalit Kishore

Advocate for Def. : R.M. Parekh, Adv.

Advocate for Pet/Ap. : N.M. Singhvi, Adv.

Disposition : Appeal dismissed

Judgement :

S.N. Modi, J.

1. This is a second appeal by defendant-tenant against the judgment and decree of the District Judge, Kota, dated May 2, 1975, in a suit for eviction and arrears of rent.

2. The dispute relates to a shop situate at Kota and fully described in paragraph No. 1 of the plaint. The plaintiff-respondent, who is a practising lawyer at Kota, sought eviction of the defendant on the ground that the disputed shop was required by him bona fide and reasonably for his office. Both the courts below decreed the suit against the defendant holding that the bona fide and reasonable requirement of the suit premises by the plaintiff under Section 13(1) (h) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (hereinafter referred to as 'the Act') was proved. Dissatisfied with the decree passed by the lower appellate court, the defendant has preferred this second appeal.

3. On September 29, 1975, Section 14 of the Act was amended by the Rajasthan Premises (Control of Rent and Eviction) (Amendment) Ordinance, 1975. Section 10 of the Ordinance, which amends Section 14 of the Act, runs as under:

'10. Amendment of Section 14, Rajasthan Act 17 of 1950.-- In Section 14 of the principal Act,--

(i) the existing Sub-section (2) shall be renumbered as Sub-section (1) thereof; and

(ii) after Sub-section (1) as so renumbered, the following sub-sections shall be added, namely:

2. No decree for eviction on the ground set forth in Clause (h) of Sub-section (1) of Section 13 shall be passed if the court is satisfied that, having regard to all the circumstances of the case including the question whether other reasonable accommodation is available to the landlord or the tenant, greater hardship would be caused by passing the decree than by refusing to pass it. Where the court is satisfied that no hardship would be caused either to the tenant or to the landlord by passing the decree in respect of a part of the premises, the court shall pass the decree in respect of such part only.

3. Notwithstanding anything contained in any law or contract, no suit for eviction from the premises let out for commercial or business purposes shall lie against a tenant on the ground set forth in Clause (h) of Sub-section (1) of Section 13 before

the expiry of five years from the date the premises were let out to the tenant.'

4. In *Prabhashanker v. Smt Rukmani*, AIR 1976 Raj 17 (19), I considered the effect of the amendment on the pending cases including the appeals and observed that, --

'The words 'no decree for eviction...shall be passed' used in Section 14

(2) are clearly suggestive of unmistakable indication of the legislative intention to make this sub-section retrospective, the reason being that it prohibits the passing of a decree for eviction on the ground mentioned in Section 13

(1) (h) unless the question of comparative hardship has been examined by the court. In other words Section 14

(2) as amended by the Amendment Ordinance of 1975 must inevitably come into play for the benefit of the tenant in the pending suits as also in the pending appeals since it is well settled that an appeal is a continuation of the suit. If the legislature had intended that the provisions of Section 14

(2) should operate prospectively, it would not have used the words 'no decree.....shall be passed', but instead used the language 'no suit for evictionshall be passed against the tenant' as used in Sub-section

(3) of Section 14 of the Act as amended by the Amendment Ordinance of 1975. I am, therefore, of the opinion that no prospective operation to Section 14

(2) can be given without doing violence to its language. I, therefore, hold that the provisions of Section 14

(2) as amended by the Amendment Ordinance of 1975 have retrospective effect and pending suits as also the pending appeals based on the ground under Section 13

(1) (h) would be governed by Section 14

(2) of the Act as amended by the Amendment Ordinance of 1975. Since Section 14

(2) prohibits only passing of a decree for eviction, the provisions of Section 14

(2) as amended by the Amendment Ordinance of 1975 shall have no effect to execution proceedings pending in the executing courts wherein the decrees have been passed against the tenants on the ground under Section 13

(1) (h) of the Act.

It is common ground between the parties that none of the courts below has gone into the question of comparative hardship as envisaged under Section 14 (2) of the Act as amended by the Amendment Ordinance of 1975. The case will have to be remanded to the trial court for framing an appropriate issue in the light of the amendment and disposing it of on merits in accordance with law.

In the result, the appeal is allowed, the decrees of the courts below are set aside and the case is remanded back to the trial court as indicated above.'

5. A similar point came up for decision before my learned brother Hon'ble Shrimal J. in Bhanwarlal v. Nathmal, 1976 Raj LW 59 = (AIR 1976 Raj 137), Shrimal J. observed as follows,--

'In Prabhashanker v. Smt. Rukamani, (AIR 1976 Raj 17), a similar point was raised and Hon'ble Mr. Justice Modi has held that no prospective operation to Section 14 (2) can be given without doing violence to its language. He further held that the provisions of Section 14 (2) as amended by the Amendment Ordinance No. 26 of 1975 have retrospective effect and pending suits, as also pending appeals, based on the ground under Section 13 (1) (h) would be governed by Section 14 (2) of the Act. I respectfully agree to the reasonings given in the said decision.

There is no dispute between the parties that either of the courts below has not gone into the question of comparative hardship between the landlord and the tenant as envisaged by Section 14 (2) of the Act No. XVII of 1950 as amended by the Ordinance No. 26 of 1975. It is, therefore, fair that both the parties should be

given an opportunity to amend their pleadings so as to incorporate the grounds mentioned in Section 14 (2) of the Act.

In the result, the appeal is allowed, the decrees and judgments of the courts below are set aside, and the case is remanded to the trial court for framing an appropriate issue in light of amendment. The parties will be free to amend their respective pleadings and they will be free to lead fresh evidence, if they so desire, on the newly framed issue. The evidence recorded during the original trial shall also, subject to just exceptions, be the evidence during the trial after remand. The trial court shall decide the case afresh.'

On the basis of the above decisions of this Court, it is argued by Mr. N. M. Singhvi, learned counsel for the appellant, that the case ought to be remanded back to the trial court for fresh decision as has been done in the aforesaid cases. On the other hand, it is argued by Mr. R. M. Parekh, learned counsel for the respondent, that the facts of the present case fall within the purview of Order 41 Rule 25 C.P.C. and the appropriate order in the circumstances, would be to frame an issue and remit the same for trial to the first appellate court. Mr. Singhvi, learned counsel for the appellant, contends firstly, that the case does not fall within the purview of Order 41 Rule 25 C.P.C. and secondly, that in any case this court is bound by its own previous decision in Prabhashankar's case, and in case this Court is inclined to take a view that its own earlier decision and the decision in Bhanwarlal's case wherein the case was remanded for trial to the trial court under Section 151 C.P.C., are erroneous and need to be reconsidered then in that case, the only course open to this Court is to refer the matter to a Division Bench. Mr. Singhvi, in support of his above contention places reliance on *Lala Shri Bhagwan v. Ram Chand*, AIR 1965 SC 1767, *Tribhovandas Pur-shottamdas Thakkar v. Ratilal Motilal Patel* AIR 1968 SC 372, *Budhan Singh v. Babi Bux*, AIR 1970 SC 1880 and *Sri Venkateswara Rice. Ginning and Groundnut Oil Mill Contractors Co. v. State of Andhra Pradesh*, AIR 1972 SC 51.

6. I have heard learned counsel for the parties and gone through the authorities cited by them. It is not in dispute before me that in view of the Amending Ordinance of 1975 which has now become the Act, and in view of the decisions of this Court

in Prabhashanker's case, AIR 1976 Raj 17 and Bhanwar-lal's case, (AIR 1976 Raj 137), no decree can be passed on the basis of reasonable and bona fide requirement unless the question of comparative hardship is gone into, as envisaged under the amended Section 14 (2) of the Act. Undoubtedly, therefore, the case will have to be sent back either under Section 151, Code of Civil Procedure or under Order 41 Rule 25 C.P.C. for dealing with the question of comparative hardship. Again there is no quarrel as to the law laid down in the Supreme Court cases cited by Mr. Singhvi. Both the parties are in agreement that so far as the precedents are concerned, judicial propriety requires that if a Bench of a High Court is unable to agree with the decision already rendered by other co-ordinate Bench, or the same Bench of the same High Court, the question should be referred to a larger Bench. Otherwise the decisions of the High Court will not only lose respect in the eyes of the public, but will also make the task of subordinate courts difficult. It was laid in *Tribhovandas Purshoitam Das Thakkar v. Ratilal Motilal Patel*, AIR 1968 SC 372.

'Precedents which enunciate rules of law form the foundation of administration of justice under our system. It has been held time and again that a single Judge of a High Court is ordinarily bound to accept as correct judgments of Courts of co-ordinate jurisdiction and of Division Benches and of the Full Benches of his Court and of this Court. The reason of the rule which makes a precedent binding lies in the desire to secure uniformity and certainty in the law.' Now what is meant by a 'precedent'? Salmond on Jurisprudence, at page 223 of the eleventh edition, says,-- 'A precedent, therefore, is a judicial decision which contains in itself, a principle. The underlying principle which thus forms its authoritative element is often termed the ratio decidendi. The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large, The only use of authorities or decided cases says Sir George Jessel, 'is the establishment of some principle, which the Judge can follow out in deciding the case before him.' 'The only thing' says the same distinguished judge in another case, 'in a Judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided.'The only judicial principles which are authoritative are those which are thus relevant in their subject-matter and limited in their scope. All others, at the best,

are of merely persuasive efficacy. They are not true ratios decidendi, and are distinguished from them under the name of dicta or obiter dicta, things said by the way. The prerogative of judges is not to make law by formulating and declaring it--this pertains to the legislature but to make law by applying it. Judicial declaration, unaccompanied by judicial application, is not of binding authority.'

Can it be said that I, while remanding the case under Section 151 Code of Civil Procedure in Prabhashanker's case or Shrimal J. while remanding the case in Bhanwarlal's case decided any question of principle. A bare reading of those decisions will reveal that the order of remand under Section 151 C.P.C. in both the cases was not a considered pronouncement on the matter, after taking into consideration the relevant provisions of law. In other words, neither in Prabhashanker's case nor in Bhanwarlal's case this Court gave considered opinion on the question whether the case ought to be remanded under Section 151 C.P.C. or an issue should be referred for trial under the provisions of Order 41 Rule 25 C.P.C. In absence of considered pronouncement, I am of the opinion that there is no binding precedent which makes it obligatory on this Court to refer the question to a Division Bench.

7. The question now arises which is the appropriate provision of law under which the case ought to be remanded? An appellate court has the power under Section 107 of the Code of Civil Procedure to remand a case or to frame issues and refer them for trial or to have additional evidence or require such evidence to be taken, but the exercise of this power is regulated by the provisions of Order 41 Rules 23 to 25 and 27 C. P. C. Under Rule 23, an appellate court has the power to remand the case where the suit has been disposed of by the trial court upon a preliminary point and its decision is reversed by the appellate court. Rule 24 provides that where the evidence upon the record is sufficient to enable the appellate court to pronounce judgment, it may do so and may proceed wholly upon the ground other than that on which the appellate court proceeds, (sic) For this purpose, it can also resettle the issues if it finds it necessary so to do. A power to frame additional issues is conferred by Rule 25, which reads as under:--

'Rule 25. Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred and in such case direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor.'

Rule 27 deals with production of additional evidence in the appellate court and prescribes the conditions upon which the additional evidence can be allowed to be adduced in the appellate court. Rule 25 circumscribes the powers of the appellate court to frame an issue and refer the same for trial to the court below if need be by taking additional evidence and proceed to adopt this course only if (a) the trial court had omitted to frame an issue, (b) try an issue or (c) to determine any question of fact which appears to the appellate court essential to the right decision of the suit upon the merits. In my opinion, the case in hand squarely falls within the ambit of the category (c). The question of comparative hardship was not at all relevant on the date of the suit or even at the date of filing the present appeal in this Court. Its determination became essential to the right decision of the suit or appeal on account of amendment of Section 14 by the new Amending Ordinance of 1975, during the pendency of the present appeal. After coming into force of the new Amending Ordinance of 1975, a decree for eviction on the ground of reasonable and bona fide necessity under Section 13 (1) (h) can only be passed if the Court is satisfied that greater hardship would be caused to the landlord by refusing to pass the decree. I may add that in view of the express provision contained in Order 41 Rule 25 C.P.C., this Court cannot have recourse to inherent powers under Section 151 C.P.C. It is well settled that inherent powers can be availed of *ex debito justitiae* only in the absence of the express provision in the Code. I am, therefore, of the opinion that the present case squarely falls within the purview of Order 41 Rule 25 C.P.C.

8. In view of the fact that the change in law has occurred during the pendency of the second appeal, I do not consider it necessary to afford an opportunity to the

parties to amend their pleadings so as to incorporate the question of comparative hardship in the plaint.

9. For the reasons stated above, I refer, for trial, to the lower appellate court, the following issue, --

'Whether having regard to all circumstances of the case including the question whether any other reasonable accommodation is available to the landlord or the tenant greater hardship would be caused by passing the decree than by refusing to pass it?'

The lower appellate court shall record additional evidence of the parties on the above issue and shall return the evidence to this court together with its finding thereon and the reasons therefor within three months.

10. The parties are directed to appear before the lower appellate court on March 29, 1976. They are further directed to submit their lists of witnesses to be examined by them on or before March 29, 1976. The record of the case shall be sent to the lower appellate court immediately.

11. Leave to appeal prayed for is refused.