

Bal Chand Vs. Devi Singh and anr.

Bal Chand Vs. Devi Singh and anr.

SooperKanoon Citation : sooperkanoon.com/760813

Court : Rajasthan

Decided On : Oct-16-1989

Reported in : 1990(1)WLN703

Judge : K.S. Lodha, J.

Appeal No. : S.B. Civil Revision Petition No. 292 of 1989

Appellant : Bal Chand

Respondent : Devi Singh and anr.

Disposition : Petition dismissed

Judgement :

K.S. Lodha, J.

1. This is a plaintiff's revision and arises under the the following circumstances: Respondent No. 1 Devisingh had filed a suit for ejectment against respondent No. 2 Shyamsunder in respect of the property described in para 1 of the plaint, a copy of which is on the record. In that suit, it was, inter-alia, pleaded that defendant Shyam Sunder had sub-let the premises in question to one Mohanlal and Mohanlal in his turn had sub-let a part of the premises to the present petitioner Balchand. Balchand was not impleaded as a party to that suit. Although, no written statement was filed by defendant Shyamsunder in that suit, he appeared before

the court through his counsel Shri Akal Raj and contested the suit. That suit was decreed against Shyamsunder by judgment dated 29-11-78. Plaintiff Devisingh, than, applied for the execution of the decree and in the execution proceedings, Mohanlal and Gangaram resisted the delivery of the possession and Gangaram also filed a civil for permanent injunction against Devi Singh and applied for temporary injunction in Civil Misc. Case No. 443/83, where in, a Commissioner was appointed. The Commissioner filed his report on 3-11-83 and the present petitioner happened to see that report. He thereupon, apprehended that in those execution proceedings, the plaintiff decree holder in that case, was trying to take possession of a part of the premises, which were under the tenancy of the present petitioner. He, therefore, filed the present suit for permanent injunction. In this suit, present-petitioner Balchand alleged that he was a tenant of the premises described in para I of the plaint since 1953-54 having taken them on rent from Shri Rangraj Chand Bhandari, the redecessor-in-title of the respondent Devisingh. Later on, however, on a partition between the heirs of Shri Rangraj Chand Bhandari, the suit premises had fallen to the share of Shri Rajendra Singh Bhandari and on receipt of notice from him through his counsel Shri Kedar Chand Bhandari, he started paying rent to him since 1-4-73. His case, further, was that a part of the premises on which the plaintiff-decree holder Devisingh in the suit filed against Shyamsunder, wanted to take possession, was not the part of the premises said to have been let out to Shyamsunder, but is part of the premises under the tenancy of the present plaintiff-petitioner and, therefore, the decree holder was not entitled to take possession of that part of the land. The exact description of the part of the land, which was in dispute, was not mentioned by the plaintiff in the plaint, but it was stated that that portion was marked 'B' in the report filed by the Commissioner in Misc Case No. 443/83. He prayed for a permanent injunction against respondent No. 1 Devisingh restraining him from dispossessing the plaintiff-petitioner from the land in dispute.

2. Along with the suit, he also filed an application under Order 39, Rule 1 and 2, CFC supported by his affidavit, asking for a temporary injunction. Defendant Devisingh contested that application, although he had not filed his written statement. The case set out by him in the reply to the application for temporary injunction was that plaintiff Balchand was not a tenant of Shri Rangraj Chand

Bhandari or Shri Rajendrasingh. As a matter of fact, the premises in dispute was a part of the premises which were under the tenancy of one Kalu Ram and on the death of Kalu Ram, Shyamsunder became the tenant thereof but he sublet the premises to Mohanlal and Mohanlal sub-let a part of the premises to the plaintiff-petitioner. It appears that in para 1 of the plaint, plaintiff petitioner has referred to the land in dispute as 'VADI KA' and the defendant, taking it to be an appeal of ownership over the land, denied his ownership and pleaded his own and in support of that produced certain pattas. He also filed a site-plan in which the land in dispute has been shown as 'CDFE' and has been marked by blue lining and it is alleged that it was the part of the premises, which were on rent with Shyamsunder and whole of the premises have been marked as 'ABFE'. From the plan, it also appears that there is a dividing wall at FE between the property on rent with Shyamsunder and that which has been claimed to be under the tenancy of the plaintiff. The defendant also filed his affidavit along with that of Shri Rajendra Singh as also of one Shri Chandra Mohan, who had done the pattasetting. After taking into consideration the material on record and hearing the learned counsel for the parties, the trial court dismissed the application for temporary injunction by its order dated 20-7-1987. The court came to the conclusion that the plaintiff has failed to establish prima facie case. The boundaries of the disputed land have not been clearly mentioned and it has not been even prima facie established that the plaintiff was in possession of the disputed land as tenant and in the absence of the prima facie case, the balance of convenience was also not in his favour and he would not suffer any irreparable injury in the absence of temporary injunction. Plaintiff Balchand went up in appeal against this order and the same was dismissed by the learned Addl. District Judge No. 1, Jodhpur by his order dated 2-6-1988. He also was of the opinion that the plaintiff had failed to establish his prima facie case and to show his possession over the land in dispute as a tenant of Rajendra Singh, as alleged by him. On the other hand, from the affidavit of Shri Rajendra Singh, it clearly appears that he was not his tenant. It appears that a contention was also raised before the learned Additional District Judge, Jodhpur that even if the plaintiff was taken to be a trespasser, he could not be dispossessed save in accordance with the process of law and to this he observed that the plaintiff was being dispossessed by due process. Thus, the learned

Additional District Judge held that when the plaintiff had failed to establish his prima facie case, he was not entitled to any protection.

3. Aggrieved of the order of the learned Addl. District Judge No. 1, Jodhpur dated 2-6-1988, the plaintiff-appellant filed a review petition on the ground that the learned Addl. District Judge had disposed of the appeal without fully hearing the parties and had failed to take into account the written arguments which had been filed by the plaintiff before the lower court and that the books cited by the learned counsel could not reach the court in time because when it was enquired from the court as to when the books are to be sent and when the judgment is likely to be pronounced, on 1-6-1988, the date fixed for delivery of the judgment, the learned Judge told the counsel that he has already looked into the citation and would also go through the written arguments filed in the lower court and that the judgment would take two or three days to be delivered. It is also alleged that the learned counsel had requested the learned Judge that he would send the books cited, on 2-6-1988, but the learned Judge did not tell him that the books must reach on 1-6-1988 and in the absence of the books the judgment was pronounced on 2-6-1988. The review petition was registered and notice was issued to the opposite parties, by the same Presiding Officer, who had delivered the order on 2-6-1988. However, later he was transferred and another Presiding Officer, after hearing the parties, dismissed the review petition on 3-6-1989. Thereupon, the present revision was filed on 26-6-1989 stating it as against the order dated 2-6-1988, confirmed by the order dated 3-6-1989 in the review petition.

4. At the time of bearing of the present revision, a preliminary objection was raised by learned counsel for the respondent No. 1 that the revision was barred by time and to this, the learned counsel for the petitioner relied that in the memo of revision itself, in para 4, the fact of review petition being filed has been mentioned. It was claimed that the time taken in pursuing the remedy of review was liable to be excluded Under Section 14 of the Limitation Act or in any case, he was entitled to the benefit of Section 5 of the Limitation Act as he pursued that remedy bonafide under the advice of a legal practitioner in good faith and diligently.

5. I have heard learned counsel for the parties on the question of limitation and since in Collector, Land Acquisition, Anantnag v. Kantlji : (1987)ILLJ500SC , their Lordships of the Supreme Court, while laying down the principles on which the delay in filing the appeal or revision should be condoned, inter alia, observed that a genuine case may be lost solely on account of delay in filing the appeal or revision; I thought it proper to consider the merits of the matter also and, therefore, heard the learned counsel for the parties on the merits as well. In support of his contention of condonation of delay, learned counsel first relied upon Section 14 of the Limitation Act. Learned counsel later on gave up that effort and limited his argument to Section 5 of the Limitation Act only. In this connection, he has placed reliance upon Collector Land Acquisition's case (supra); G. Ramegowda v. Special Land Acquisition Officer, Bangalore : [1988]2SCR1087 , Hasanchand v. H.H. Maharaja Shri Gaj Singh (1961 RLW 295), Ast Bai v. Gomathi : AIR1979 Mad115 , M.T. Charian v. PV. Nair and Co. : AIR1972 Ker116 and India Singh v. Kanai Ram (AIR 1917 PC 156). The sum total of these authorities appears to be that a lenient view is to be taken in the matter and if it is found that the party concerned had been pursuing another remedy by way of review etc. bonafide, in good faith and diligently, the delay should be condoned, but, in the present case, I am not satisfied that the present petitioner had been acting in good faith and bonafide in pursuing the remedy of review, The review lies under Order XLVII, Rule 1, CPC on the ground that the judgment or order, sought to be reviewed, suffers from an error apparent on the face of the record or the review is sought on account of discovery of some new and important matters or evidence, which after exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or on any other sufficient reason. Here, the review had been sought mainly on the ground that the written arguments were not considered and citations could not be taken into account. These grounds apparently do not fall under the first two categories and even if they can be deemed to fall under the term 'any other sufficient reason', both these grounds have been turned down by the learned Additional District Judge himself and on the petitioner's own showing, the learned Additional District Judge, who delivered the order on 2-6-1988, had told the petitioner that he had gone through the citation and would also look into the written arguments and it is not stated that as a matter

of fact, the learned Judge had failed to look into the citations or the written arguments. Further, the term 'any other sufficient reason' envisages a reason analogous to those which precede these words and it cannot be said that there was sufficient reason for review. It may further be added that in the earlier suit, filed by Devisingh against Shyamsunder, the present petitioner was alleged to be a sub-tenant and a decree had been obtained for ejectment against the principal-tenant, which is binding on a sub-tenant. The effort of the present-petitioner, therefore, appears to be for prolonging the matter as long as possible and, therefore, instead of filing an appeal against the order dated 2-6 1988, a doubtful remedy of review was resorted to. It has not been mentioned in the grounds of revision that this review petition was filed under bonafide advice of a legal practitioner nor an affidavit of that legal practitioner has been filed.

6. Learned counsel placed great reliance upon Hasan Chand's case (supra), where in, a Division Bench of this Court had observed:

The broad principle, that is deducible from the discussion made above, by preponderance of judicial opinion in our country is, that where it is open to a litigant to adopt concurrent remedies, and he adopts one of those remedies, and fails on the merits, then when he later chooses to adopt the second remedy, he cannot be held entitled (save in the exceptional case of a review where such an application would properly lie) to the exclusion or condonation of time which has been spent by him on the prosecution of the first remedy, the ratio being that it was perfectly open to him to pursue the second remedy while he was prosecuting the other one, and that any other view would be productive of unnecessary delay in the administration of justice and lead to needless protraction of litigation and on a balance of all the relevant consideration we respectfully agree with that view.

The learned counsel relies upon the underlined portion and urges that review petition has been excepted while making these observations and, therefore, it must be held that when a review petition has been filed and is later or dismissed, the time spent in prosecuting that remedy is liable to be condoned. I am unable to agree with this interpretation of these observations. The words used in the underlined portion clearly intend that a case of review petition can come under this

exception only where the application for review would properly lie here there was no justification for filing the review petition and. as such the time spent in prosecuting that remedy cannot be condoned and the principle enunciated in this authority, as quoted above, would equally apply to a review petitions, which do not properly lie.

7. In Collector, Land Acquisition's case (supra), their Lordships of the Supreme Court enumerated certain principles as it was realised that:

- (1) Ordinarily a litigant does not stand to benefit by lodging an appeal late;
- (2) Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties;
- (3) 'Every day's delay must be explained' doesnot mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner;
- (4) When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay;
- (5) There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of malafides. A litigant does not stand to benefit by resorting to delay. Infact he runs a serious risk;
- (6) It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Applying these principles to the present case, as already pointed out above, the delay has been caused with the purpose of delaying the proceedingsand, it cannot, therefore, be said that the present-petitioner did not stand to benefit by

lodging the appeal late On the merits of the matter also, it cannot be said that the petitioner has a meritorious matter Again, when substantial justice also does not appear to be in favour of the petitioner, it cannot be said that technical consideration of limitation should not be adhered to. Further more, the fact that there is no presumption that delay is occasioned deliberately, is also not available to the petitioner in the present case as that the delay does appear to be deliberate so that the petitioner may continue in possession despite the fact that the non-petitioner decree-holder has a decree for taking over the possession over the land in dispute.

8. In G. Ramegowda's case(supra) the case related to an appeal filed by the Land Acquisition Officer against an award. The cause of delay alleged was the inaction on the part of the Government counsel. The delay was condoned by the High Court and the Hon'ble Supreme Court refused to interfere with the order of the High Court and it was observed:

In litigation to which Government is a party there is yet another aspect which perhaps, cannot be ignored. If appeals brought by Government are lost for such defaults, no person is individually affected, but what, in the ultimate analysis suffers is public interest. The decisions of Government are collective and institutional decisions and do not share the characteristics of decisions of private individuals... But a somewhat different complexion is imparted to the matter where Government makes out a case where public interest was shown to have suffered owing to acts of fraud or bad faith on the part of its officers or agents and where the officers were clearly at cross-purpose with it.

In those circumstances, it appears that the delay was condoned.

9. In Asi Bai's case(supra) the delay in filing the appeal was condoned on the ground that the appellant was prosecuting with due diligence a proper application for review of judgment. The emphasis is on the words 'proper application for review.' In this case, as already stated above, the application for review cannot be said to be a proper one So also is the case in M.T. Cherian's case (supra) because the appellant was acting diligently, bonafide in filing review application. So also again is Inder Singh's case (supra). Thus, all these authorities are clearly

distinguishable and I am clearly of the opinion that the delay is not fit to be condoned.

10. Now, since I have heard the parties on the merits of the matter, I would like to record my finding in that respect also.

11. A perusal of the judgment of the courts below would go to show that they have categorically found that the plaintiff has failed to establish his prima facie case. This being a finding of fact cannot be challenged in revision. However, the contention of the learned Counsel for the petitioner is that the courts-below have failed to take into consideration the relevant documents and have not approached the matter from the correct angle. In other words, they have not considered the real question involved in the matter, viz, whether the plaintiff had a triable suit issue in order to establish that he had a prima facie case. So far as the first round is concerned, he has relied upon *Chhaganlal v. Nanhe Shah* 1982 RLW 519 and *Minerva Shiksha v. Mithlesh Kumari* 1985 RLW 22. These are cases where material documents were not considered by the courts-below and, therefore, it was held that they acted illegally and with material irregularity in the exercise of their jurisdiction. These authorities do not apply to the present case. Here, the case of the petitioner is that the courts-below have not considered the receipts filed by the plaintiff and the trial court has observed that the affidavit filed by Rajendrasingh has not been rebutted by filing a counter affidavit of plaintiff Balchand. So far as the receipts are concerned, they do not throw any light on the question in dispute in as much as the receipts do not contain the description of the lease property and the case of the plaintiff is that he is a tenant of a longer portion of the property including the part in dispute. Therefore, unless the receipts give the description of the property or the dimensions thereof, they are of no avail to the petitioner. So far as the affidavit of Rajendrasingh is concerned, it is true that the trial court has observed that Balchand has not filed any counter affidavit, but the first appellate court has taken into consideration the affidavits of Rajendrasingh as well as of Balchand filed in rebuttal while arriving at the finding that the plaintiff has failed to establish his prima facie case. Therefore, the finding of the first appellate court is proper and cannot be disturbed in revision.

12. So far as the contention that the courts below have not considered the real question whether the plaintiff had a triable issue and, thus, a prima facie case and, therefore, their finding is vitiated, goes, I do not find any substance in it in as much as it has been found that the plaintiff has failed to establish his possession over the disputed part of the lands as a tenant. As stated above, the court-below has clearly stated that the fact of the plaintiff's tenancy has clearly been denied by landlord Rajendrasingh/and it was open to him to prefer the affidavit of Rajendra Singh to that of Balchand. In this connection, it was further urged by the learned Counsel for the petitioner that Rajendrasingh's affidavit was useless because he was not the person who had let the plaintiff in possession and it was his grandfather Shri Rangraj Chand Bhandari who had let out the premises to Balchand and at that time Rangraj Singh was not even born. This contention is also does not appeal to me in the circumstances of the case. It is true that Rajendrasingh may not have been born in 1953-54, but the fact remains that according to the plaintiff-petitioner's own case, Rajendrasingh has been receiving rent from him since 1-4-73. Therefore, he must be deemed to be in a knowledge of the fact as to what premises were in possession of which tenant and, therefore, his affidavit can not be said to be a useless document. The courts-below could therefore, rely upon it. It is important to point out that even in the suit, which Devisingh had filed against Shyamsunder, as far back as on 2-1-78, it was alleged that Shyamsunder had let out the premises to Mohanlal and Mohanlal in turn, had let out the disputed part of the land to Balchand. Therefore, it cannot be said that a new case is sought to be made out now.

13. Lastly, it was contended that admittedly the plaintiff-petitioner is in possession of the land in dispute and his possession should have been protected till the disposal of his suit. According to me, this contention is also devoid of any substance. The petitioner claims his possession as a tenant under Shri Rajendrasingh and in order to obtain temporary injunction in this suit, he had to prima facie establish his possession over the land in dispute as a tenant of Rajendrasingh. According to respondent No. 1, he was only a sub-tenant, deriving his title from Shyamsunder through Mohanlal and was bound by the decree, which was passed against Shyamsunder. Therefore, as to the fact of possession, unless shown to be as a tenant, the plaintiff is not entitled to any injunction. In this

connection also, it was pointed out by the learned Counsel for the petitioner that the plaintiff had obtained a power connection on the land in dispute as far back as in 1961 and this fact has been ignored by the courts-below. In the first place, the document filed in this connection, does not show that the land in dispute was the place where the power connection had been installed and, therefore, this cannot be of any avail to the plaintiff. Secondly, as already stated above, the mere possession, except in the capacity of a tenant, would not entitle the plaintiff to a temporary injunction.

14. During the course of arguments, learned Counsel also pointed out that although Rajendra Singh alleges in his affidavit that the premises claimed by the plaintiff to be in his possession were initially let out to one Shri Kalu Ram and he had executed a rent note, a copy of which has been produced in a later suit filed by Devisingh. Devisingh has denied any rent note being executed by Kalu Ram and, therefore, the plaintiff's case must be taken to be false. This contention cannot be taken note of unless Rajendrasingh and Devisingh are given an opportunity to explain their statements. They have not been cross-examined in this respect.

15. Looking to all these circumstances, I am of the opinion that the orders of the lower court refusing temporary injunction to the plaintiff-petitioner need not be interfered with.

16. The revision is, therefore, dismissed with costs.