

**Sham Dass Vs. Vidya Devi**

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**SooperKanoon Citation :** [sooperkanoon.com/900998](http://sooperkanoon.com/900998)

**Court :** Jammu and Kashmir

**Decided On :** Sep-19-2005

**Reported in :** 2006(1)JKJ143

**Judge :** Y.P. Nargotra, J.

**Acts :** Jammu and Kashmir Houses and Shops Rent Control Act - Sections 11(1), 12(3) and 14; ;Code of Civil Procedure (CPC) , 1977 - Sections 100, 100(4) and 1001 - Order 6, Rule 2

**Appeal No. :** Review (C) 04/2003

**Appellant :** Sham Dass

**Respondent :** Vidya Devi

**Advocate for Def. :** K.R. Gupta, Adv.

**Advocate for Pet/Ap. :** A.V. Gupta, Sr. Adv. and; Yasser Ejaz Tak, Adv.

**Disposition :** Petition dismissed

**Judgement :**

**Y.P. Nargotra, J.**

1. Petitioner herein was plaintiff-landlord in the suit filed by him for ejectment against the tenant (original defendant) predecessor in interest of the respondents.

He sought ejectment of the tenant on two grounds; (a) that the defendant had made three defaults in payment of rent within a period of 18 months; and (b) that the premises was personally required by him for re-building purpose.

2. Learned Ist Additional Munsiff, Forest Magistrate, Jammu tried the suit and dismissed the same by his judgment and decree dated 31-3-2002. The plaintiff went in appeal before the learned District Judge, Jammu, who by his order dated 31-07-1993 reversed the judgment and decree of the trial court and decreed the suit in favour of the plaintiff.

3. The respondents filed Civil Second Appeal against the judgment and decree of the learned District Judge. The appeal of the defendants was allowed and the suit of the plaintiff was dismissed by judgment-dated 10.02.2003. Aggrieved by the dismissal of the suit in Civil Second Appeal NO: 32/1993, the plaintiff-landlord has preferred the present review.

4. Learned Counsel for the petitioner has raised two grounds for seeking review of the judgment and decree passed in the Civil Second Appeal. The first ground urged by Mr. A.V. Gupta, learned senior counsel is that in the judgment impugned substantial questions formulated for hearing the appeal have come to remain unanswered and, therefore, the judgment and decree merits to be reviewed. The second ground urged by him is that the site-plan of the proposed construction to be raised, relied upon by the plaintiff in support of his case for making out the case for re-building, has not been taken into consideration in its true perspective. The Court has committed error in reading the said site-plan while taking the same into consideration.

5. The case of the respondents is that none of the grounds urged by the petitioner are tenable. As according to Mr. K.R. Gupta learned Counsel for the Respondents, all the substantial questions formulated while admitting the appeal to hearing have been answered fully and the site-plan relied upon by the plaintiff has been taken into consideration for judging the need of the plaintiff on the point of re-building. According to Mr. Gupta, assuming if the view taken is not sustainable, even then the remedy of review would not be available to the plaintiff. If he was aggrieved of the judgment, the appeal would have been the proper remedy.

6. I have heard learned Counsel for the parties and perused the record of the case thoroughly.

The Civil Second Appeal, in which judgment sought to be reviewed, was admitted on 19-09-1993 and the following substantial questions of law were formulated:

1- Whether the refusal of the respondent to receive the rent by bank draft and a money order has entitled the plaintiff-appellant to deposit the rent with the Rent Controller within the terms of Section 14 of J&K; Houses & Shops Rent Control Act, 1966 and the same shall be deemed to have been paid to the respondent under law?

2- Whether the defendant committed three legal defaults of two months each within a period of 18 months before 19.12.1981, the date of filing the suit in terms of Section 11(1) proviso (i) read with proviso to Section 12(3) of Rent Control Act?

3- Whether in absence of specific plea in that the appellant did not validly deposit the rent in terms of Section 11(1) proviso (i) of Rent Control Act, the finding of the first Appellate Court stating that the rent was not validly deposited was legal in view of the provisions of Order 6, Rule 2 C.P.C.?

By order dated 16.09.1998, passed in CMP NO: 101/98, the following more substantial questions of law were framed:

4. Whether the reasonable requirement for the purposes of re-building shall have regard to the comparative public benefit or dis-advantage and comparative advantage or dis-advantage for the respondent?

5. Whether the reasonable requirement of the respondent for occupation of the shop can be substantially satisfied by partial eviction?

6. Whether after the proposed re-construction of the shop the appellants are entitled to restoration of possession, if so how?

7. In the judgment in issue, this Court after considering the contentions of the appellant in the light of the evidence led for and against the proof of issues framed by the trial court, came to the following conclusions on the basis of which the

appeal of the appellant has been allowed:

i/ That a valid tender was made by the defendant Chet Ram;

ii/ That mere mention of the fact that litigation regarding ownership is pending would not amount to denial of title. This is only a recital of a fact as non-mentioning of the same would have rendered the defendant in the suit guilty of suppressing facts. Mere mentioning of litigation does not amount to unequivocal denial of ownership. The tender made thereafter should have been accepted. Having not done so, the tenant was left with no option but to tender the same in terms of Section 14 of the Act.

iii/ That the need shown by the respondent to rebuild the property is not bonafide as the area after rebuilding is to decrease and the plea taken that further construction would be in the interest of public as more accommodation would be available for commercial purposes is a plea which cannot be accepted.

8. The contention of Mr. Gupta, learned Senior counsel for the petitioner is that the questions formulated have not been answered specifically one way or the other and that has rendered the judgment erroneous thus calling for a review of the same. In support of his contention, he has relied upon the following judgments:

In Roop Singh v. Ram Singh AIR 2000 SC 1485, para 7, it has been held:

It is to be reiterated that under Section 100 of the CPC jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising its jurisdiction under Section 100 CPC.

In Ramavilasom Grandhasala and Ors. v. N.S.S. Karayogam AIR 2000 SC 2058, it has been held:

This Court on more than one occasion has held that under Sub-section (4) of Section 100 of Code of Civil Procedure, the High Court is required to frame substantial question of law and only then it acquires jurisdiction to decide a second

Appeal on merits. In this case, the High Court without framing any substantial question of law has allowed the appeal and this in itself is a sufficient ground to set aside the judgment under appeal.

In *Dnyanoba Bhaurao Shemade v. Maroti Bhaurao Marnor* : AIR 1999 SC864 , in which it was held:

The High Court can exercise its jurisdiction under Section 100 C.P.C. only on the basis of substantial questions of law which are to be framed at the time of admission of the second appeal and the second appeal has to be heard and decided only on the basis of such duly framed substantial questions of law.

In *Birendera Kumar Dubey and Anr. v. Girja Nandan Dubey and Ors.* (2001) 6 Supreme Court Cases, 767, wherein the Supreme Court has held:

A perusal of the judgment shows that the High Court has not framed any substantial question of law before proceeding to dispose of the second appeal. This Court has in *Panchugopal Barua v. Umesh Chandra Goswami*, *Kshitish Chandra Purkait v. Santosh Kumar Purkait*, *Tehsildar v. G.V. Gopalakrishnappa* and *Dyamappa H. Gondar v. Ganeshappa S. Sudambi* held that having regard to the provisions of Sections 100 and 101 CPC, the High Court can entertain the second appeal only when a substantial question of law arises from the judgment of the first appellate court.

9. The proposition of law, laid down in the aforesaid judgments, cannot be disputed. The law is well settled that High Court can assume jurisdiction to entertain Civil Second Appeal only after framing the substantial question of law arising out of the judgment impugned. In the present case, it may be noticed that while entertaining the second appeal, this Court formulated as many as six substantial questions of law, therefore, it cannot be said that jurisdiction was illegally assumed, while admitting the second appeal of the respondents.

10. The contention of learned Senior Counsel for the petitioner, however, is that the substantial questions framed in the second appeal have not been answered specifically. From the reading of the judgment impugned, I do not find any

substance in this contention of learned Counsel for the petitioner. Though the questions formulated have not been specifically answered one way or the other, yet it is manifest that while deciding the second appeal this Court has addressed to all the questions raised and returned findings thereon. Merely the questions have not been specifically answered it cannot be said that this Court committed error of law. The judgment, for finding the answer to the questions formulated, is required to be read as a whole and reading the same as such it becomes clear that the questions raised have been duly considered and decided. Mr. Gupta learned Counsel for the petitioner refers to question No. 2 relating to commission of three defaults towards payment of rent within a period of 18 months, which according to him has not been decided. This question squarely falls within the ambit of Issue No. 2, framed by the learned trial court in the suit, which reads:

ii/ Whether the defendant has committed more than three defaults in payment of rent within a period of 18 months.

In the judgment impugned, issue No. 2 raised in the suit has been addressed to and for the reasons stated in the judgment, has been decided by reversing the finding recorded by the court below. This being the position, it cannot be allowed to be urged that question No. 2 formulated while admitting the appeal has remained unanswered.

Whether there is error apparent on the face of the record in regard to the decision on the said question? In *Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi* AIR 1080 SC 674, Their Lordships of the Supreme Court have held:..an error exists if two or more views canvassed on the point it is possible to hold that the controversy can be said to admit of only one of them. If the view adopted by the Court in the original judgment is a possible view having regard to what the record states, it is difficult to held that there is an error apparent on the face of the record.

11. It is settled principal of law that a party is not entitled to seek review of the judgment merely for the purpose of re-hearing and fresh decision of the case. Review can be maintained only if error apparent on the face of the record is shown to exist. In the present case, this Court has taken a view on Issue No. 2/Question No. 2 on the basis of the record/evidence of the case. There is nothing on record

to show that view so taken could not be a possible view, therefore, it cannot be said that the court has committed any error apparent on the face of the record in taking that view.

12. From reading of the judgment, it is thus clearly manifest that the questions formulated have been duly addressed and on the basis of the record/evidence, the same have been decided. Thus, there is no error apparent on the face of the record warranting review.

13. It has next been contended by learned Counsel for the petitioner that the site-plan relied upon by the plaintiff to show that the proposed construction was in the interest of public as more accommodation was to become available for commercial purpose, has not been correctly taken into consideration and thus there is an error apparent on the face of the record. In the judgment, while dealing with the site plan, it has been observed as follow:

The site plan was prepared on 11th Nov. 81. This was approved on 1st Dec'82. The suit was filed on 19th Dec.81. The approved site plan shows that the existing shop measures 28', 6' x 11'.9'. In the approved plan the are shall stand reduced to 18'. 3' x 11'.9'. On rebuilding only 70% of the area is to be covered as built up area and the construction is to be raised 25' away from the centre of the road. Concept of set back has to be observed Thus, the accommodation is likely to decrease on rebuilding and therefore, to say that the construction which would be available after rebuilding would be for the benefit of public and that larger space would become available is an argument which cannot be accepted. As indicated above, there is no proposal to construct a multi-storied building; this is not apparent from the site plan. This aspect of the matter been adverted to above. The plea thus taken to re-build is not bonafide.

14. The contention of learned Counsel for the petitioner is that as per the site plan approved the proposed construction was to comprise of three stories and, therefore, it was due to error it has come to be stated that there was no proposal to construct multi-storied building. According to Mr. Gupta, learned Counsel for the petitioner, if the Court had taken into consideration the fact of proposed construction of three stories, comprising of Ground floor, First floor and second

floor on the shop in dispute. It could not have reached at the conclusion that plea of re-building was not bonafide.

15. The contention of Mr. K.R. Gupta, learned Counsel for the respondents is that the Court had taken into notice the sanctioned site plan for proposed construction and interpreted the same in its wisdom and observed that there was no proposal for construction of multi-storied building which was in the context that no sufficient space would have become available after re-construction with the purpose of increasing accommodation for the benefit of the public. There is force in the contention. As on re-building only 70% of the area was to be utilized, the Court repelled the argument that construction which would be available after rebuilding would be for the benefit of the public and large space would become available. The view, if considered wrong by the appellant could only be challenged in appeal by him. On the fact of the record the view expressed cannot be said to be suffering from an error of fact or of law.

16. For the aforesaid reasons, I do not find any ground to review the judgment rendered in the case. Review petition of the petitioner, is accordingly dismissed.