

Durga Prashad Vs. Premwati and ors.

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Court : Delhi

Decided On : Nov-01-2010

Judge : Mr. Mool Chand Garg. J.

Acts : Code Of Criminal Procedure (CRPC) - Order 40 Rule 1 ; Order 39 Rules 1 ,
2

Appeal No. : FAO 163/2010

Appellant : Durga Prashad

Respondent : Premwati and ors.

Advocate for Def. : Mr.Parvendra Kumar Sharma, Adv.

Advocate for Pet/Ap. : Mr. Bharat Gupta, Adv.

Judgement :

1. Whether the Reporters of local papers may be allowed to see the judgment?
No.
2. To be referred to Reporter or not? No.
3. Whether the judgment should be reported in the Digest? No.

ORDER

Exemptions allowed subject to all just exceptions. FAO 163/2010

1. This order shall dispose of an appeal filed by the appellant against the order dated 15.12.2009 whereby while allowing his application under Order 39 Rules 1 and 2 of the CPC, the Additional District Judge has dismissed the application filed by the appellant under Order 40 Rule 1 CPC. The appellant who filed a suit in the Court of Additional District Judge as plaintiff claims that he was a tenant in shop bearing No.246, Katra Peran, Tilak Bazar, Delhi-6 (hereinafter called as the suit shop) measuring 5x6ft. under one Shri Phool Chand who has since expired. Respondent No.1 is the wife of late Shri Phool Chand and the respondents No. 2 to 6 are his sons. The appellant has sought possession of the suit property from the respondents who found the appellant sitting in the suit shop on 25.5.09 when he visited the same. It was urged by the appellant that the respondent had taken unauthorized possession of the suit shop by breaking open the locks. He complained to the police to whom the appellant showed the rent receipt dated 22.03.1994 qua which it was stated by the respondent that it was forged and fabricated and accordingly, no action was taken by the police. Thereafter, he filed a complaint and then filed the present suit along with applications under Order 39 Rules 1 and 2 of the CPC and Order 40 Rule 1 of the CPC.

2. During the course of hearing, I enquired from the appellant as to whether he was having rent receipts after 1994 till 2009 to which he answered in the negative. It was stated by him that the respondents were not accepting rent. No explanation, however, was given as to why the appellant has not taken recourse to Section 27 of the DRC Act for deposit of rent. On the other hand, learned counsel for the respondents submits that the suit property was, in fact, vacated by the appellant suo motto in the year 1994 after accepting huge amount from the respondent since then it is the respondent who is in possession of the suit property. It has been denied that the respondents took over the forcible possession of the property or that the appellant has any prima facie case or balance of convenience for the purpose of seeking relief in the form of appointment of a receiver.

3. I have gone through the record and have also perused the impugned order. It would be appropriate to take note of the certain observations made by the ADJ which goes to show that the learned ADJ has taken note of the story of both the side and has rightly come to a conclusion and while the appellant may be entitled

to any injunction order under Order 39 Rules 1 and 2 CPC but he was not entitled. To the relief of appointing a receiver. The observation made by the learned ADJ are reproduced hereunder:

"I have heard the Id. Counsel for the parties and have perused the record of the case file carefully. The Id. Counsel for the plaintiff referred to several documents including the electricity bill of June, 2009, postal receipt of the money order dated 12.2.09 and 21.2.09, copy of the local sales tax registration, central sales tax and sales invoices dated 11.12.01 as well as copy of the deposit challan of the sales tax dated 1.4.95, 1.7.95, 1.10.95 and local sales tax and central sales tax for the period 1995 to 1996, Central sales tax assessment order dated 1995-96, receipt of deposit of local sales tax and central tax dated 30.9.01 and 31.12.01 respectively and ST form, and submitted that rent stands paid upto March, 1994 and thereafter the rent was not accepted as was sent by money order dated 12.2.09 and 21.2.09.

There is no sufficient explanation as to why the rent was not paid for such a long period by the plaintiff which prima facie demolish the case of the plaintiff as also the documents relied upon as referred to above so as to plead land show the possession during the relevant period are not the documents of possession prima facie which documents can be easily procured by the plaintiff specially keeping in view the admitted pleadings regarding the dispute with Shri Phool Chand starting from 1992-93 when he, plaintiff was not allowed even to perform pooja in the suit shop and had to return back without performing the pooja. There is no document on record so as to substantiate the plea prima facie that there was some interaction between the parties to the suit and the police station concerned with regard to the opening of the shop because of foul smell by the beat constable on the complaint by the defendants. Rather the story/ pleadings by the plaintiff as put forward by the plaintiff in itself shows that the plaintiff was not at all visiting the shop regularly and as such the story of irregular visit by the plaintiff is neither substantive on facts as pleaded nor does it appeal to the reason in the given facts. On the other hand, the plea taken by the defendants with regard to the possession of the suit shop taken over from the plaintiff by the deceased Phool Chand, prima facie looks to be substantial defence in response to the the plea of the plaintiff and admission of the dispute in the year 1992-93 as above and subsequent event as

per the admission of the plaintiff itself in the plaint. Although the defendants have not placed any documents with regard to the possession whereas the possession of the suit shop till the plaintiff was dispossessed as pleaded in the plaint without any supporting documents of incident of foul smell as well as facts of possession by the plaintiff as pleaded is also not beyond doubt and as such no prima facie view can be taken in favour of the plaintiff in the given facts and circumstances that either he was regularly visiting the shop or was in possession of the shop as tenant before the date when he found himself dispossessed and defendants in possession of the suit shop, who has admittedly not paid rent since 1994 and approached this court on the basis of complaint only and not on the basis of any evidence in respect of the story of beat officer which story looks to be a concocted story prima facie. However, in the facts and circumstances of the case where defendants is also lacking support to their possession of the shop so their deceased father Shri Phool Chand prima facie view is taken on the basis of the pleadings and documents on record and the plea of the plaintiff which need to be proved by way of evidence. Accordingly, it would be in the interest of justice and fair trial of the case that till pendency of the suit the defendants are restrained from alienating or transferring the possession of the suit shop to third person and to keep status quo in respect of the suit shop till the decision of the suit as in the given facts balance of convenience lies in favour of the plaintiff who shall suffer irreparable loss in case no such orders are passed on the application filed under Order 39 Rules 1 & 2 CPC. Accordingly, the application under Order 39 Rules 1 & 2 CPC is partly allowed with direction to the defendants as above whereas the application filed under Order 40 CPC in the given facts would be against the interest of the defendants who pleaded themselves to be in possession of the suit shop since 1994 as per pleadings taken in defence of the suit which plea is probable and is plausible defence which need to be belied by the plaintiff during evidence while proving the case of dispossession in the year 2005 as per pleadings of the plaintiff. As such there is no case for appointment of the receiver prima facie in favour of the plaintiff in the given facts as discussed above. The application under Order 40 CPC as such is dismissed although in support of the same the plaintiff relied upon the case law in case of *Batliboi & Co. v. N.K. Verma* reported in 49(1993) DLT 310 and *Meghji Jeth Shah v. Kalyanji Najik Shah*

reported in AIR 1987 Bombay 273 of which facts are distinguishable from the facts in hand as in case of Batliboi & Co. (Supra) there was evidence in the form of local commissioner for passing the order on the misc. applications whereas in the case of Meghji Jeth Shah (Supra) there was prima facie view of Hon'ble Apex Court that the plaintiff was running the business till he was wrongly dispossessed whereas in the present case no prima facie view is taken of the plea of the plaintiff and as such the application filed by the plaintiff under Order 40 CPC needs to be dismissed."

4. I concur with the reasoning given by the learned ADJ taking into consideration the facts and circumstances of the case. I am unable to agree with the learned counsel for the appellant that it was a case where a receiver also ought to have been appointed as prayed for.

5. The Appeal is accordingly dismissed.

6. No costs.

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