

The High Court of Madhya Pradesh

S.A. No.664 of 2012

(Mahesh Kumar Modi Vs. Mahendra Kumar Jain)

Jabalpur, Dated: 27.02.2020

Shri Sanjay K. Agrawal, learned counsel for the appellant.

Shri R.P. Agrawal, learned Sr. Adv. assisted by Shri V. R. Tiwari,
learned counsel for respondents.

This appeal by tenant under Section 100 CPC is directed against the reversing judgment and decree dated 15.5.2012 in Civil Appeal No. 02/2012 decreeing the suit on the ground of bona fide need under Section 12 (1) (f) of the Accommodation Control Act 1961, judgment and decree of the trial court dated 19.12.2011 in RCS No. 125-A/2010 has been set aside.

This court while admitting the appeal on 24.9.2012 has framed the following substantial question of law :-

“(i) Whether lower appellate Court was justified to decree the suit filed by the plaintiff on the ground of bona fide need without recording the finding to that effect and also without considering the cross objection filed in this regard by the defendant, however, the judgment and decree passed by lower appellate Court is vitiated on this ground ?”

Shri Sanjay K. Agrawal, learned counsel for the appellant has made the following submissions :-

(a) The impugned judgment and decree is vitiated by error of law

as the first appellate court without adverting to cross objection filed under Order 41, Rule 22 of CPC has decreed the suit. He relies upon the judgments of the Supreme Court in **Jitendra Prasad Nayak Vs. Anant Kumar Sah and another reported in (1998) 9 SCC 383** and **Badru (since deceased), Through L.R. Hari Ram etc. Vs. NTPC Limited (formerly National Thermal Power Corporation Limited) and others** reported in **2019 SCC On Line SC 859** to bolster his submissions.

Learned counsel for appellant further submits that the impugned judgment and decree suffers from perversity of approach while it sets aside the findings of the trial court on the ground of bona fide need. The relevant evidence on record has been ignored and findings in fact are de hors the record.

Per contra, Shri R.P. Agrawal, learned senior counsel assisted by Shri V.R. Tiwari contends as under :-

(a) the first appellate court has considered the cross objection in para 30 of the judgment, hence, the complaint of non consideration of cross-objection is factually incorrect.

(b) the first appellate court from paras 11 to 29 has threadbare discussed the entire evidence placed on record and has reached right conclusion that the suit premise is bona fide required for the expansion of business of son of the plaintiff. The decree so passed, therefore, does not give rise to any question of law, much less substantial question of law warranting interference, therefore, the appeal deserves to be dismissed.

Heard.

The cross-objection filed under Order 41, Rule 22 of CPC is primarily against the findings of the trial court that earlier Civil Suit No. 274-A/1984 decided on 02.11.1985 shall not operate as res judicata and, therefore, the instant suit was held to be maintainable. The trial court while addressing on the said objection in para 21 of the judgment has observed that the earlier suit was filed for the bona fide need of the plaintiff himself in contrast to the present suit filed for bona fide need of the son for expansion of business. Hence, the subject -matter and issues involved in both the suits are substantially different. Therefore, the earlier suit shall not operate as res judicata against the maintainability of the instant suit. The trial court also observed that aforesaid plea of res judicata was taken without filing copy of the plaint, written statement, issues and judgment in the earlier suit, (supra). The first appellate court has considered this objection raised in cross objection in para 30 of its judgment and has confirmed the finding of the trial court in that behalf with further observation that fresh suit at a subsequent stage in changed circumstances for the need of the son can always be filed and, therefore, no exception to its maintainability can be taken. Accordingly, dismissed the objection raised in that behalf, in the application under Order 41, Rule 22 CPC.

There was another objection that one Prakash Agrawal, alleged prospective tenant had advanced Rs.50,000/- to the respondents – plaintiffs towards rent, therefore, the projection of bona fide need is sham in nature and to achieve collateral purpose to rent out the suit premises on higher rent to a different tenant.

The trial court in para 18 and 19 of the judgment has dealt with this objection. It has been found that DW-3 Prakash Agrawal, though has deposed that he had entered into an agreement with the plaintiff for letting out the suit shop on a monthly rent of Rs.7000/- on shop being vacated, but such deposition is of no consequence for more than one reasons. Firstly, the aforesaid facts do not find place in the written statement. Therefore, evidence in absence of pleadings can not be looked into. Secondly the demeanour of DW-3, Prakash Agrawal was suspicious and doubtful. He did not even know the location of the suit shop for which he is alleged to have entered an agreement of tenancy on rent of Rs.7000/- per month. It was also astonishing to note that though he is doing the job of Accountant with the Chartered Accountant, but while making payment of Rs.50,000/- as advance, he has not obtained receipt thereof knowing pretty well that under Income Tax Act, no transaction beyond Rs.20,000/- is permissible unless an exceptional circumstances, which did not exist. Even demeanour, DW-2, Brij Kishore, in para 4 is found to be doubtful as he did not know the facts of the case and has come to the court only to sign the papers.

In view of aforesaid, this court is of the view that the said objection neither has any bearing nor relevance to the controversy involved. Therefore, the alleged claim rightly held to be frivolous without factual foundation.

The judgments relied upon by learned counsel for the appellant reported in **Jitendra Prasad Nayak Vs. Anant Kumar Sah and another and Badru (since deceased), Through L.R. Hari Ram etc. Vs. NTPC Limited (formerly National Thermal Power Corporation Limited) and**

others, (supra), the principle underlying the judgments relied upon by learned counsel for the appellant no doubt are beyond the cavil of doubt. Nevertheless, both the judgments are distinguishable on facts and, therefore, are of no assistance to the appellant. As in both the cases appeal was decided without deciding the cross objection, whereas in the instant case, the cross objection has been dealt with on merits, (para 30).

Now, as regards to bona fide need, this court has carefully perused the discussions from para 12 to para 29 of the findings and has found that the first appellate court has well discussed the testimonies of plaintiff Mahendra Kumar, (PW-1) and his son, Pradumn Kumar, (PW-2) critically and has found that the trial court while relying upon part of the testimonies of these two witnesses to non-suit the plaintiffs is contrary to entire evidence placed on record and unmindful concept of reasonable alternate suitable accommodation required to be proved by the plaintiffs.

The appellate court while referring the plaintiff evidence of Pradumn Kumar, (PW-2), son of the plaintiff and Sunil Jain, (PW-3) has recorded the clear and impeccable finding that the plaintiff needs adjacent suit shop for further expansion of the shop run by his son, (PW-2). The frontage of the shop is 7 feet. After reducing the space used for counter in front of the shop the remaining space 3 feet for customers to enter and come out of the shop. That apart, due to scarcity of space, the goods could not be displayed conveniently and maintenance of sufficient stock of various variety of articles. Due to such scarcity, Pradumn Kumar, (PW-2) also suffers business loss as customers avoid to enter congested shop. If the suit shop remains with Pradumn Kumar, (PW-2), he shall be

able to expand his business with sufficient stock of variety of articles and sufficient numbers of customers. Hence need was held to be bona fide.

The appellate court has also discussed the evidence relied upon by the trial court. In para 16 to 19 and thereafter recorded the conclusion in para 20 to para 27. So, merely for the reasons that there is vacant shop at a distance of the existing shop of PW -2, it can not be said that Pradumn Kumar, (PW-2) had other suitable accommodation. The appellate court has relied upon judgment of the Supreme Court in 22 of its judgment in the case of **Shiv Sarup Gupta Vs. Dr. Mahesh Chand Gupta, 1999 AIR, SCW 2666** to fortify its conclusion that reasonably suitable accommodation must be understood in the context of requirement of the plaintiff and not on the selection either of defendant or of the court. It is not the court's business to advise the plaintiff to use his space for running his business. **(AIR 2000, SC, 2534).**

Accordingly, the appellate court has recorded a finding of bona fide need in favour of the plaintiff.

This court has carefully perused the impugned judgment and decree of the appellate court. The findings of facts on the question of bona fide need discussed above is found to be based upon critically evaluated evidence on correct application of law.

In view of the foregoing discussions on facts and law with due advertence to the findings of the courts below, in the considered opinion of this court, the first appellate court did not commit any error of facts or law while decreeing the suit on the ground of bona fide need under Section 12 (1)

(f) of the Accommodation Control Act 1961. The entire gamut of the matter is in the realm of facts. However, the question of law so framed is accordingly decided against the appellant – defendant and in favour of the respondent – plaintiff.

The appeal fails and is hereby dismissed. No order as to cost.

**(ROHIT ARYA)
JUDGE**

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