2025:PHHC:050163

124 **IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH**

RSA-586-2018 (O&M)
Decided on:-05.04.2025

Ram Chand ..Appellant...

vs.

Mangat Pal ...Respondent.

CORAM: HON'BLE MR. JUSTICE HARKESH MANUJA

Present: Mr. Raj Kumar Bhatia, Advocate,
for the appellant (thr. V.C.).

Mr.Jagdish Manchanda, Advocate with
Mr. Devyansh, Advocate,
for the respondent.

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HARKESH MANUJA J. (Oral)

1. By way of present appeal challenge has been laid to the judgments and decrees dated 23.09.2016 and 08.12.2017 passed by both the Courts below, whereby suit for possession by way of ejectment, filed at the instance of respondent-plaintiff against the appellant-defendant stands decreed.

2. Briefly stating, claiming himself to be owner of the property in question/house, situated at Village Sanauli, Tehsil Dera Bassi, District SAS Nagar, Mohali, the respondent-plaintiff filed a suit for possession while seeking eviction of the appellant-defendant with the averments that the subject property was rented out in his favour about 15 years back on rent at the rate of Rs.200/- per month, which was later increased to Rs.300/- per

month, however, the arrears of rent were not being paid since November, 2009, despite repeated requests made from the side of respondent-plaintiff. It was also pleaded that the tenanted premises was even required by the respondent-plaintiff for his personal necessity and thus, he be handed over vacant possession of the house in dispute, besides payment of arrears of rent to him. It was further pleaded by the respondent-plaintiff that by taking undue advantage of his old age and also the death of his two sons, the appellant-defendant even encroached upon the remaining portion of the house in question and thus, was in its un-authorized occupation; regarding which though, earlier a suit for immediate restoration of possession under Section 6 of the Specific Relief Act, 1963 *(for brevity, "1963 Act")* was filed, however, it was later withdrawn. The respondent-plaintiff further pleaded that even notice dated 06.03.2013 under Section 106 of the Transfer of Property Act, 1882 (for short, "1982 Act") was also served upon the appellant-defendant with respect to the termination of lease/tenancy besides calling upon him for delivery of vacant possession of the demised premises; the appellant-defendant having failed to do the needful, compelled the plaintiff to file the present suit.

3. Upon notice, the appellant-defendant appeared and filed written statement while submitting that no notice under Section 106 of the 1882 Act was ever served upon him regarding termination of lease. It was also pleaded that the suit was barred under Order 2 Rule 2 CPC; as on earlier occasion, a suit for immediate restoration of possession was filed at the instance of respondent-plaintiff regarding some portion of suit property; which was withdrawn without seeking permission of the Court for filing of fresh suit. Besides it, on merits it was admitted that the appellant-defendant was in

occupation of the property in question being tenant under respondent-plaintiff and was making payment of rent regularly. It was denied that the appellant-defendant had encroached upon any additional portion of the house owned by respondent-plaintiff. Even the personal necessity pleaded by the respondent-plaintiff was also denied and thus, it was pleaded that the suit be dismissed.

4. On the basis of the pleadings of the parties, the learned trial Court framed the following issues:-

> *"1. Whether the respondent is liable to be evicted from the house and compound shown with letters ABCDEFGH in the site plan u/s 106 of Transfer of Property Act? OPP*
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> *2. Whether the petitioner is stopped from filing the present suit due to his own act and conduct? OPR*
>
> *3. Whether the suit of the petitioner is not maintainable? OPR*
>
> *4. Whether no notice u/s 106 of TPA was ever served upon the respondent?OPR*
>
> *5. Whether the present petition is barred u/o 2 Rule 2 CPC? OPR*
>
> *6. Relief."*

5. The trial Court vide its judgment and decree dated 23.09.2016 decreed the suit in favour of respondent-plaintiff. Aggrieved thereof, first appeal came to be filed at the instance of appellant-defendant, which was dismissed by the Court of learned Additional District Judge, SAS Nagar (Mohali) vide judgment and decree dated 08.12.2017.

6. Impugning the aforesaid judgments and decrees passed by the Courts below, learned counsel for the appellant-defendant submits that the suit filed at the instance of respondent-plaintiff was not maintainable as the

provision of Section 106 of the 1882 Act regarding termination of tenancy was not applicable to the case in hand; the property in question being a residential premises, whereas, the said provision was to apply only, in case, the property under lease being either commercial or agricultural in nature. He also submits that even if, for the sake of arguments, it was presumed that notice under Section 106 of the 1882 Act was valid in law, the same related only to small portion of suit property, whereas, the possession in the suit being prayed for was the entire build up portion of house and also the open compound and thus, the suit was liable to be dismissed. Further, even the receipt of notice dated 06.03.2013 was also denied. A plea was also raised that the suit in hand was not maintainable as on an earlier occasion, a suit for possession qua some portion of suit property was filed, though, later withdrawn and thus, the present suit was hit by Order 2 Rule 2 CPC.

7. On the other hand, learned counsel for the respondent-plaintiff submits that though initially, appellant-defendant was rented out only one room with some open space but later while taking advantage of old age of the respondent-plaintiff, besides, the untimely demise of his two sons; remaining constructed area including two rooms as well as the open compound was encroached upon by the appellant-defendant and thus, the possession was prayed for qua the entire house. Learned counsel also submits that once the appellant-defendant was served with a notice qua termination of his lease besides been called upon to hand over the possession of suit property unauthorisedly occupied by him, the suit was rightly decreed by the Courts below and the present appeal was therefore, liable to be dismissed.

8. I have heard learned counsel for the parties and gone through

the paper-book.

9. A perusal of record shows that the argument raised on behalf of the appellant-defendant with respect to his tenancy been pleaded by the respondent-plaintiff only qua one room in comparison to the possession been sought from him in relation to three rooms, inner court-yard, kitchen, bathroom, water-pump and open space, has been rightly dealt with in detail by the Courts below while recording that the suit for possession based on ownership-being lessor was filed by the respondent-plaintiff qua the entire portion of house which was admittedly under the occupation of appellant-defendant at the time of filing of the suit. Furthermore, no illegality can even be found with the said concurrent finding which was based on admission made by the appellant-defendant while appearing as DW2 to the effect that when the suit property was rented out to him, it consisted of entire house i.e. three rooms; inner court-yard, kitchen, bathroom, water pump and open space etc. Therefore, once the tenancy over the entire suit property-house was admitted in his written statement as well as in the cross-examination by the appellant-defendant, he was estopped from raising the issue of maintainability of suit qua the entire property, on the basis of his own act and conduct.

10. Also, no merit can be found in the submissions made on behalf of the appellant-defendant that Section 106 of the 1882 Act was not applicable to an eviction qua the residential house. A bare perusal of Section 106 of the 1882 Act, makes it apparent that a distinction has been drawn based on user of the immovable properties such as agricultural or manufacturing purposes in comparison to other properties. As regards the period of statutory notice required to be served upon the lessee by the lessor

and it has nowhere been stipulated that the said provision is not applicable to the immovable properties used other than for agricultural or manufacturing purposes. Though the factum of notice dated 06.03.2013 issued by respondent/ plaintiff to appellant/ defendant in terms of Section 106 of the 1882 Act was denied and disputed in the written statement, however, the notice as well as its postal receipts were duly proved on record as Exs. P1 and P2. An effort was also made on behalf of the appellant/ defendant to challenge the validity of the notice Ex.P1, thereby questioning the maintainability of suit for possession filed at the instance of respondent/plaintiff, however, in terms of law laid down by the Hon'ble Apex Court in the case of "***Apollo Zipper India Limited Vs. W. Newman and Co. Ltd.",2018 (1) RCR (Rent) 512***, the same been not done at the first instance i.e. either having filed any reply to the notice or even questioning its validity in the written statement; the appellant/ defendant was estopped to raise any such plea at the later stage. Paragraphs 57 to 59 being relevant are extracted hereunder:-

> *"57. In our view, the respondent ought to have replied to the notice at the first available opportunity, which they failed to do so. It amounts to waiver on their part to challenge the invalidity or infirmity of the quit notice including the ownership issue raised therein.*
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> *58. In the case of Parwati Bai vs. Radhika, 2003 (1)RCR (Rent) 607: AIR 2003 SC 3995, the question arose as to whether the tenancy was terminated in accordance with the provisions of Section 106 of the TP Act. The defendant despite receiving the notice from the plaintiff did not reply to it.*
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> *59. This Court held that if the defendant does not raise any objection to the validity of quit notice at the*

> *first available opportunity, the objection will be deemed to have been waived. The following Para 6 of the decision is apposite which reads as under:*
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> *"6. The singular question to be examined in the present case is whether the tenancy was terminated in accordance with the provisions of Section 106 of the Transfer of Property Act. The receipt of notice by the defendant is admitted in the written statement. The defendant has not raised any specific objection as to the validity of the notice. An objection as to invalidity or infirmity of notice under Section 106 of the TP Act should be raised specifically and at the earliest; else it will be deemed to have been waived even if there exists one. It cannot, therefore, be said that the notice in the present case suffered from any infirmity. A copy of the notice was exhibited and proved by the plaintiff as Ext. P-4."*

11. Besides it, the plea raised on behalf of the appellant-defendant with respect to maintainability of suit on account of same being barred under Order 2 Rule 2 CPC has no merits as admittedly, the previous suit was filed under Section 6 of the 1963 Act, for seeking immediate possession of some part of the property in question within six months of its unauthorised occupation by the appellant-defendant and the same was thus based on a separate and distinct cause of action; whereas the present suit for possession came to be filed by the respondent/ plaintiff while claiming himself to be its owner/lessor; under Section 5 of the 1963 Act. Accordingly, the cause of action in both the suits being separate; the present suit for possession was not hit by Order 2 Rule 2 CPC. At this stage, it may be relevant to examine Sections 5 & 6 of the1963 Act, which are extracted hereunder:-

> *"5.* ***Recovery of specific immovable property****.—A person entitled to the possession of specific immovable property may recover it in the manner provided by the Code of Civil Procedure, 1908 (5 of 1908).*
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> *6.* ***Suit by person dispossessed of immovable property.****—(1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person [through whom he has been in possession or any person] claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.*
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> *(2) No suit under this section shall be brought—*
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> *(a) after the expiry of six months from the date of dispossession; or*
>
> *(b) against the Government.*
>
> *(3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.*
>
> *(4)* ***Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof."***

Upon perusal of Section 6 (4) of the 1963 Act, it is otherwise abundantly clear that any suit filed under Section 6 of the 1963 Act was not to apply as a bar to any person from filing suit for recovery of possession based on title to such property. Thus, in the present case, even though the respondent/plaintiff earlier filed a suit for possession qua a portion of property in question while invoking Section 6 of 1963 Act, the same was not to create any bar for him about filing of a suit for recovery of possession based on his title qua the same property.

12. Furthermore, although a plea regarding present suit being not

maintainable in terms of Order 2 Rule 2 CPC was specifically raised in the written statement and a specific issue was even framed thereupon before the trial Court, however, the appellant/ defendant failed to discharge the primary burden casted upon him to establish the said plea as even the plaint of the first suit for possession filed under Section 6 of the 1963 Act by the respondent/ plaintiff was never produced or proved on record so as to establish any kind of similarity between the cause of action of the two suits. Reference in this regard can be made to the law laid down by the Hon'ble Apex Court in the case of "***S. Nazeer Ahmed Vs. State Bank of Mysore and ors.", 2007 (11) SCC 75.*** For convenience, paras 9 & 13 being relevant, are reproduced hereunder:-

> *"9. Now, we come to the merit of the contention of the appellant that the present suit is hit by Order II Rule 2 of the Code in view of the fact that the plaintiff omitted to claim relief based on the mortgage, in the earlier suit O.S. No. 131 of 1984. Obviously, the burden to establish this plea was on the appellant. The appellant has not even cared to produce the plaint in the earlier suit to show what exactly was the cause of action put in suit by the Bank in that suit. That the production of pleadings is a must is clear from the decisions of this Court in Gurbux Singh Vs. Bhooralal [(1964) 7 S.C.R. 831] and M/s Bengal Waterproof Limited Vs. M/s Bombay Waterproof Manufacturing Co. & Anr. [(1996) Supp. 8 S.C.R. 695]. From the present plaint, especially paragraphs 10 to 12 thereof, it is seen that the Bank had earlier sued for recovery of the loan with interest thereon as a money suit. No relief was claimed for recovery of the money on the foot of the equitable mortgage. In that suit, the Bank appears to have attempted in execution, to bring the mortgaged*

properties to sale. The appellant had objected that the suit not being on the mortgage, the mortgaged properties could not be sold in execution without an attachment. That objection was upheld. The Bank was therefore suing in enforcement of the mortgage by deposit of title deeds by the appellant……..

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13. A Constitution Bench of this Court has explained the scope of the plea based on Order II Rule 2 of the Code in Gurbux Singh Vs. Bhooralal (supra). It will be useful to quote from the Head note of that decision:

"Held: (i) A plea under Order 2 rule 2 of the Code based on the existence of a former pleading cannot be entertained when the pleading on which it rests has not been produced. It is for this reason that a plea of a bar under O.2 r.2 of the Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the court the identity of the cause of action in the two suits. In other words a plea under O.2 r.2 of the Code cannot be made out except on proof of the plaint in the previous suit the filing of which is said to create the bar. Without placing before the court the plaint in which those facts were alleged, the defendant cannot invite the court to speculate or infer by a process of deduction what those facts might be with reference to the reliefs which were then claimed. On the facts of this case it has to be held that the plea of a bar under O.2 r.2 of the Code should not have been entertained at all by the trial court because the pleadings in civil suit No. 28 of 1950 were not filed by the appellant in support of this plea.

(ii) In order that a plea of a bar under O. 2. r. 2(3) of the Code should succeed the defendant who raises the

> *plea must make out (i) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (ii) that in respect of that cause of action the plaintiff was entitled to more than one relief (iii) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed.*
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> *It is not necessary to multiply authorities except to notice that the decisions in Sidramappa Vs. Rajashetty & Ors. [(1970) 3 S.C.R. 319], Deva Ram & Anr. Vs. Ishwar Chand &and Anr. [(1995) Supp. 4 S.C.R. 369] and State of Maharashtra ∧ Anr. Vs. M/s National Construction Company, Bombay and Anr. [(1996) 1 S.C.R. 293] have reiterated and re-emphasized this principle."*

13. Resultantly, in view of the discussion made herein-above, finding no illegality of perversity in the concurrent findings of facts and law, recorded by the Courts below; there being no misreading or misinterpretation of pleadings and the evidence, the present appeal being devoid of merits is thus, dismissed.

14. Pending application, if any, also stands disposed of.

05.04.2025 **(HARKESH MANUJA)**
sonika **JUDGE**

Whether speaking/reasoned: Yes/No
Whether reportable: Yes/ No