

JAMMU AND KASHMIR HIGH COURT

Kanwar Singh

Vs.

Om Kant

Second Appeal No. 8 of 1976

(Adarsh Sein Anand, J.)

26.11.1977

JUDGMENT

Dr. Adarsh Sein Anand, J.

1. Asjit for ejectment of the defendant-appellant from the suit shop situate at Udhampur was bought three person namely S/Shri Om Kant, Suraj Parkash and Ram Rattan. The principle ground on which the ejectment of the defendant-appellant was sought was that the suit shop was required for the personal necessity of Om Kant to whose share the shop had fallen in a family partition. The suit was dismissed by the learned Sub-Judge, Udhampur, on 22.1.1975 but the decree and judgment of the learned Sub Judge was set aside in appeal by the learned District Judge, Udhampur, on 1.5.1976. Aggrieved against the decree of reversal, the defendant-appellant filed the civil second appeal which is the subject-matter of decision by this Court. During the Pendency of the appeal in this Court, Shri Om Kant died and his legal representatives were brought on the record.

2. Mr. R.P. Bakshi, learned counsel for the defendant-appellant appearing in support of the civil second appeal, has submitted that since the sole ground for ejectment of the appellant was that the suit shop was required by Om Kant for his personal necessity and since Shri Om Kant had died, the ground of personal necessity had perished with him and as such, it is contended, the appeal be allowed and the suit filed against the appellant be dismissed. It is maintained that the premises in dispute was a commercial shop and the ground for eviction was that Om Kant needed the same to start his own Karyana shop and, therefore, on his death that ground was no longer available. Mr. Bakshi urges that the position in case of a residential house would be different as the family members might be allowed to say that since they were living with the landlord before his death, his personal necessity included their personal necessity, also. No other ground has been urged by Mr. R.P. Bakshi in support of the civil second appeal.

3. Mr. T.S. Thakur, learned counsel for the legal representatives of Shri Om Kant and that other respondents, has contended that the ground of eviction was also available to the heirs of Om Kant as they would have continued with the running of the shop after Om Kant and that since a decree for possession had been passed in favour of Om Kant, the landlord the decree could be

defended by his legal representatives for the benefit of his estate and that the decree was not liable to be upset only on the ground that the landlord for whose personal necessity the order was passed, had died. It is urged that the benefit by way of a decree is an incorporeal right and that right having vested in Om Kant in that a decree for eviction having been passed against the appellant, the legal representatives of Om Kant cannot be divested of that benefit on the death of Om Kant.

4. Mr. Thakur has, in support of his sub-missions, placed strong reliance on *Smt. Phool Rani v. Sh. Naubat Rai Ahluwalia*¹. In that case the plaintiff, in a Rent Act application against his tenant, sought possession of certain premises on the ground of personal requirement but died during the pendency of the appeal before the Appellate Authority. The legal representatives of the deceased made an application which was opposed by the tenant. The Appellate Authority, however, allowed the legal representatives to be brought on the record. The contention of the tenant that the right to sue (including the right to continue the appeal) did not survive to the heirs of the plaintiff was negated by the appellate authority. In an appeal before the High Court at Delhi, their Lordships of the Delhi High Court took the view that the right to sue did not survive to the heirs of the plaintiff and on that ground the application for ejection was dismissed, leaving it open to the heirs to bring fresh proceedings founded on their own requirements. The correctness of that decision was challenged by the plaintiff's heirs in the appeal before the Supreme Court. Their Lordships of the Division Bench of the Supreme Court considered various aspects of the case and came to the conclusion that the cases in which the death of the plaintiff occurred after a decree for possession was passed in his favour say, for example, during the pendency of an appeal filed by the unsuccessful tenant, the estate is entitled to the benefit which, under a decree, had accrued in favour of the plaintiff and, therefore, the legal representatives in such cases are entitled to defend all such proceedings which constitute a challenge to that benefit. The plea of the tenant was therefore rejected.

5. Reliance has also been placed on *Vijayaraghavan v. Mohammed Yakub*², by Mr. Thakur, wherein it was observed as required follow (at P. 207):

"The benefit by way of a decree which a predecessor-in-interest has secured being an incorporeal right and that right having vested in a landlord or landlady in that a decree for eviction has already been passed cannot be divested by his or her death, as it could pass on to the heirs as it becomes part and parcel of the property owned by the landlord or landlady. Thus viewed, the respondents (legal representatives of deceased landlord) in the revision filed by tenant are entitled in law and in equity to take advantage of the favourable decision obtained by the deceased landlord before the Rent Controller and which gained acceptance before the appellate authority as well. There cannot be a divesting of such a right by reason of the death of the landlord in the course of the revision proceedings."

6. Mr. Thakur has then relied upon *Smt. Dhan Devi v. Bakhshi Ram*³,

¹ AIR 1973 SC 2110 1973 RCR 364

³ AIR 1969 Puni and Har 270

² AIR 1976 Mad 205

In para 7 of the judgment their Lordships observed (at p. 277):

"Moreover, it cannot be held as a matter of law that the ground of ejectment contained in sub-para. (ii) of paragraph (a) of sub-section (3) of Section 13 of the Act is a ground personal to the landlord who originally files the action for ejectment. The ground relates landlord and should in the normal course be available to the landlord who files the application for ejectment as well as to his successors-in-interests."

All the aforesaid authorities undoubtedly support the argument of Mr. Thakur.

7. Mr. R.P. Bakshi, appearing for the defendant-appellant, has on the other hand, contended that since an appeal is a continuation of the suit, the decree passed in the suit against which an appeal is pending cannot be treated to be a final decree and no right can be claimed on the basis of a decree which is not yet final. Mr. Bakshi has in this connection, placed reliance upon a Division Bench Judgment of the Allahabad High Court in *District Board Muzaffarnagar v. Upper India Sugar Mills Ltd.*⁴, wherein it was observed that (at p. 530):

"no doubt there is an element of finality attaching to a decree passed by the trial court. Once, however, an appeal is filed from the decree of the trial court, and the case is heard on merits by the appellate Court, the element of finality disappears and the whole case is reopened before the Court of appeal."

8. On the basis of this authority it is vehemently maintained by Mr. Bakshi that unless the decree had become final, no right can be said to have vested in the decree holder or his estate unless after the decree had become final.

9. While relying to the arguments of Mr. Thakur based on AIR 1973 Supreme Court 2110 (Supra) and AIR 1976 Madras 205 (Supra) Mr. Bakshi submits that in *Shantilal Thakordas v. Chimanlal Maganlal*⁵, a bench of three Judges of the Supreme Court had expressly overruled the judgement in Phool Rani's case (AIR 1973 SC 2110) and that since AIR 1976 Madras 205 (supra) was also based on AIR 1973 Supreme Court 2110, the law laid down by the Madras High Court is no longer good law.

10. In *Shantilal Thakordas v. Chimanlal*, AIR 1976 Supreme Court 2358, their Lordships were called upon to determine whether the decision in AIR 1973 Supreme Court 2110 was correct or not. In para 4 of the judgment their Lordships opined thus (at p. 2359).

"The foremost and the first question urged before us by Mr. Dholakia was that Phool Rani's case (AIR 1973 SC 2110) was not correctly decided. We agree with this contention and say with respect that we do not subscribe to the view expressed by the Bench of this Court in that case."

⁴ AIR 1957 All 527

⁵ AIR 1976 SC 2358: 1976 RCR 828

11. Again, while dealing with the question whether the benefit of a decree obtained by the original landlord could be denied to the legal heirs. Their Lordships observed in para 6 of the judgment as under (at p. 2360):-

"Counsel for the appellant endeavoured to bring their case within one of the exception noted in Phool Rani's case (AIR 1973 SC 2110). He submitted that a decree had already been passed in favour of the original plaintiff by the trial court and that could not be disturbed on his death either in appeal or revision. We do not accept the contention as sound or correct."

This judgment, therefore, is a complete answer to the arguments raised by Mr. Thakur.

12. In the present case it is not disputed that the ground on which the ejection of the appellant was sought was that the suit shop was required by Om Kant for his own benefit to run a Karyana shop P.W. 1, Shiv Ram stated that the shop was required for the personal use of Om Kant who wanted to run a Karyana shop therein. To the same effect is the evidence of Prem Nath, Arun Kumar, brother of the deceased, Amar Nath, P.W.'s and Om Kant, plaintiff, himself. This was in fact the case pleaded by the plaintiff also. It is thus obvious that the ground on which ejection was sought i.e. to run the Karyana shop was a ground personal to Om Kant, only.

13. Section 11 of the Jammu and Kashmir Houses and Shops Rent Control Act, 1966, provides protection to a tenant against his eviction. It is provided in sub-s (h) of the Act that a landlord may seek the ejection of his tenant on the ground that he requires the premises for his own occupation or for the occupation of any person for whose benefit the premises is held. The word, "requirement" implies 'necessity' and therefore, the ground for eviction under Section 11 (h) of the Act, 1966, would be where the premises is required for the 'personal necessity' of the landlord himself or each person for whose benefit the premises is held. In the instant case, the personal necessity was of the landlord, Om Kant himself and of no one else. There is neither any pleading in the original suit nor any averment in the application of the legal representatives of Om Kant while seeking permission to be brought on the record (in place of the deceased) that the suit shop was required for the benefit of the legal representatives also. Since, the premises in dispute is commercial shop it was necessary for the legal representatives to urge that they or any one of them was going to run the shop and that they or any one of them had the 'capacity' and the 'capability' to run the shop to negate the contention of the tenant that the suit shop was not *bonafide* by the landlord for his personal necessity. It was open to the legal representatives of Om Kant to come forward and say that they also required the suit shop for their personal necessity and seek amendment of pleadings. If amendment was allowed the case might have to be remanded but they have not made any such application before this Court and it would be conjectural to hold that the suit for ejection was for their benefit also. As noticed earlier, the requirement of 'personal necessity' was personal to Om Kant and in my opinion it perished with the death of Om Kant. A personal action, of the type we have in the facts and circumstances of the present case, must die with the person.

14. Since, an appeal is a continuation of the suit it cannot be said that there was any final decree in favour of the landlord and, therefore, the question of divesting the estate of the benefits of any final decree does not arise. I am in respectful agreement with AIR 1957 Allahabad 527 (supra). In view of the clear law laid down in AIR 1976 Supreme Court 2358 (supra). I am unable to follow the law laid down in AIR 1976 Madras 205 or AIR 1969 Punjab and Har. 270, which no longer can be regarded as good law.

15. As a result of the above discussion, the appeal of the appellant is allowed, the suit filed by

Om Kant and others is dismissed. There shall be no orders as to costs.

16. Before parting, I must make it clear that it shall be open to the legal representatives of the deceased, if so advised, to bring in fresh proceedings against the defendant-appellant for his ejection on the ground of their personal necessity and the dismissal of the suit for the aforesaid reasons shall not stand in their way.

17. After the judgment was announced, Mr. Thakur, the learned counsel for the respondent, has prayed that leave be granted to him to file an appeal before the Letters Patent Bench under Section 12 of the Letters Patent.

18. The question decided in this appeal has been concluded by the Supreme Court in AIR 1976 Supreme Court 2358 and I, therefore, do not find any valid ground for granting leave. The prayer is rejected.

Appeal allowed.