

RAJASTHAN HIGH COURT

Mohammad Salim

Vs.

Shahin Sah

Civil W.P. No. 9704 of 2005

(Prem Shanker Asopa, J.)

20.01.2006

ORDER

Prem Shanker Asopa, J.

1. By the instant writ petition the petitioner has challenged the order dated 18-10-2005 passed by the Civil Judge (Jr. Div.) (South), Kota whereby the applications for temporary injunction as well as mandatory injunction for restoration of the possession has been accepted. The said order has remained upheld in appeal by the Additional District Judge No. 1, Kota vide his order dated 30-11-2005.

2. Briefly stated the relevant facts of the case are that the plaintiff- respondents filed a civil suit for permanent injunction along with an application for temporary injunction but when the plaintiff-respondents were dispossessed from the shop in question, they filed an application for mandatory injunction with the prayer for restoration of the possession. In both the applications, it has been averred by the plaintiff-respondents that they are tenant of the petitioner and running a beauty parlour in the shop of House No. 4-Cha-5 of Vigyan Nagar, Kota. The shop was taken on rent by Mohd. Siddique, the brother of plaintiff-respondent No. 1 from the petitioner initially at Rs. 800/- per month w.e.f. 1-1-1999, subsequently, the same was increased to Rs. 1,700/- per month. The further case of the plaintiff- respondents is that during the pendency of the civil suit and application for temporary injunction, they were dispossessed forcibly from the shop in question on 23-9-2005 when the plaintiff-respondent No. 1 was out of station.

3. The case of the petitioner before the trial Court was that the shop in question was given to one Mohammed Atique on 4-2-99 and the possession of which has been handed over to him on 1-9-2005 by the alleged tenant Mohammed Atique. Therefore the temporary injunction become in fructuous and mandatory injunction is not maintainable as possession was handed over to him before filing the civil suit.

4. During the course of hearing of the aforesaid both the applications, the plaintiff-respondents submitted many documents, affidavits and photographs in order to show that she was in possession of the shop on the date of filing of the civil suit i.e. 19-9-2005 and thereafter also but on 23-9-2005 she was dispossessed. The learned trial Court after hearing both the parties and considering the documents filed by them, came to the prima-facie conclusion that the plaintiff-respondents were in possession of the shop in question on 19-9-2005 and they have been dispossessed on 23-9-2005 to over-reach the proceedings of the Court and make the applications in fructuous and further in case the possession is not restored then the tendency of taking the law in the hands without following the due process of law will be increased. The relevant portion of the findings of the trial Court is reproduced hereunder for ready reference:-
(Vernacular matter omitted.....Ed.)

5. The trial Court has considered the affidavit of Mohammed Atique, the alleged tenant of the petitioner who said to have vacated the shop on 1-9-2005 but he has not supported the case of the petitioner. There is no worthy prima facie believable evidence of acquisition of peaceful possession of the shop by the petitioner. The trial Court after considering all other aspects of grant of injunction, has passed the following mandatory injunction:-
(Vernacular matter omitted.....Ed.)

6. The petitioner filed an appeal against the said order dated 18-10-2005 before the District Judge, Kota, which was transferred to the Court of Additional District Judge No. 1, Kota. In the said appeal for the first time the petitioner raised the issue of jurisdiction which was not raised before the trial Court. The Additional District Judge No. 1, Kota after considering the 3 judgments of this Court, came to the conclusion that while exercising the power under Order 43, Rule 1 of the Code of Civil Procedure, being the Appellate Court, he cannot consider the issue of jurisdiction first time and the same would be considered by the trial Court at the appropriate stage. The relevant paras Nos. 13 to 16 on this issue of jurisdiction are as under:-
(Vernacular matter omitted.....Ed.)

7. The Additional District Judge No. 1, Kota has also considered the other aspects of the matter and came to the conclusion that there is no prima facie solid evidence in favor of the petitioner to show that the alleged tenant Mohammed Atique has handed over the possession of the shop in question to the appellant-petitioner on 1-9-2005. The Additional District Judge has further considered the fact that in case the landlord is allowed to evict the tenant without following the due process of law then the same would result in possible increase of anarchy. The relevant paragraph Nos. 19 to 22 of the said judgment are reproduced hereunder for ready reference :-
(Vernacular matter omitted.....Ed.)

8. The submission of the counsel for the petitioner is that as per Section 11 of the Rajasthan Rent Control Act, 2001 (herein after referred to as 'the Act of 2001'), the relief of restoration of possession of illegally dispossessed tenant is to be granted by the Rent Tribunal and not by the Civil Court.

9. In support of his submission the counsel for the petitioner has relied on a Full Bench judgement of Punjab and Haryana High Court in the case of *Savan Ram v. Gobinda Ram*, reported ¹in

10. The counsel for the respondents has submitted that no issue of jurisdiction was raised before the trial Court. Although the same has been raised in a written statement filed subsequent to the order of the trial Court dated 18-10-2005. He further submits that the Appellate Court in para Nos. 13 to 16 has considered the said aspect of the matter and came to the conclusion that while hearing the appeal under Order 43, Rule 1 of the CPC, the issue of jurisdiction cannot be considered first time and the same would be considered by the trial Court at the appropriate stage as held by this Hon'ble Court in 3 judgements i.e. in *Hemraj v. Executive Officer Nagar Palika, Indragarh*, ² *District Club Bundi v. Madhukar Gupta*, ³ and *M/s. Lakhara and Co. v. M/s. Shivakaran Bhanwar Lal Kila*, ⁴

11. I have gone through the contents of the writ petition and the documents annexed thereto as well as record of the trial Court of Civil suit as well as temporary injunction and mandatory injunction. I have further considered the rival submissions made by both the parties.

12. The present writ proceedings are arising out of the proceedings of interim nature i.e. grant of temporary injunction and mandatory injunction as affirmed by the Appellate Court, wherein the issue of the jurisdiction was raised for the first time before the Appellate Court which was not adjudicated by the Appellate Court on the ground that the same was not raised before the trial Court and the Appellate Court under Order 43, Rule 1 has no authority to adjudicate the same as held by this Court in *Hemraj v. Executive Officer Nagar Palika, Indragarh* (supra) and *District Club Bundi v. Madhukar Gupta* (supra) in the proceedings of temporary injunction and mandatory injunction applications. Subsequent to the passing of the order of temporary injunction and mandatory injunction application on 18-10-2005, the written statement was filed wherein the issue of jurisdiction was raised in written statement, which is pending for final adjudication before the trial Court.

13. I am also not inclined to adjudicate the issue of jurisdiction but since the record was called, reliance was placed by the petitioner on Section 11 of the Act of 2001 and further the Full Bench judgment of Punjab and Haryana High Court in the case of *Savan Ram v. Gobinda Ram* (AIR 1980 P and H 106) (supra) has been cited in support

of the only argument of jurisdiction raised by the petitioner, therefore, I am dealing with the same on its face value of averments of plaint and prima facie case make out before the Court below.

14. The jurisdiction as to the nature of the suit while deciding the interim application is to be determined on the basis of the averments in the plaint and not on the basis of any defense or the result of the suit or the merits of the claim.

15. From the averments of the plaint and prayer clause of the same, it is clear that the respondents-plaintiffs were in possession of the shop on 15-9-2005 when attempt was made by the petitioner to dispossess but could not succeed and they were in possession on the date of filing of the civil suit i.e. 19-9-2005. Therefore, it was prayed that the permanent injunction be issued in their favour restraining the petitioner without following the due process of law either by himself or through his agents. The prima facie finding of both the Courts below is that the respondent-plaintiff was dispossessed on 23-9-2005 during the pendency of the proceedings for permanent injunction as well as temporary injunction. Thus, from the averment of the plaint it is also prima facie that the civil suit for permanent injunction was maintainable.

16. The averments of plaint are if considered with Section 11 of the Act of 2001, which is reproduced hereunder for ready reference:-

"11. Restoration of possession of illegally dispossessed tenant.- If any tenant is dispossessed by landlord from the rented premises without his consent otherwise than by due process of law, he may within thirty days from the date of knowledge of such dispossession, file a petition before the Rent Tribunal for restoration of possession thereof."

17. Then also prima facie, it appears that under Section 11 of the Act of 2001, remedy of civil suit for restoration of possession is available to the tenant who has been illegally dispossessed before filing of the civil suit but here in the instant case the civil suit was not for restoration of possession but was for temporary injunction during pendency of which the respondents- plaintiffs were dispossessed and the Court has invoked its inherent powers while granting mandatory injunction to restore the respondent-plaintiff in possession on account of the aforesaid findings of dispossession on 23-9-2005 with a view to make the proceedings in fructuous.

18. In *Sawan Ram v. Gobinda Ram (AIR 1980 Pand H 106)* (supra), cited by the counsel for the petitioner, the issue was whether the ejectment decree can be passed by the Civil Court after amendment of Haryana Urban (Control of Rent and Eviction) Act, 1973 whereby all non-residential buildings constructed after March, 1962 would also come within the ambit of the Act. As a necessary consequence the ground on

which the ejectment of the tenant was sought from the shop in dispute in Civil Court disappeared and in the aforesaid facts and circumstances, it was held that plainly it excludes on the substantive aspect the general law of the tenant-landlord relationship and on the procedural aspect bars the forum of the ordinary run of the civil Courts. Para No. 2 of facts, 8 and 19 are reproduced hereunder:-

"2. The relevant facts would pale into relative insignificance in view of the primarily legal nature of the issue aforesaid. Nevertheless, the matrix of facts giving rise to controversy has inevitably to be noticed in the first instance. Gobind Ram respondent-landlord had on May 31, 1975 preferred a suit for possession of a shop claiming that the construction thereof had been completed in the month of August, 1969, during the pendency of the suit, the Haryana Urban (Control of Rent and Eviction) Act, 1973 (hereinafter called the Act) was amended with the result that all the non-residential buildings constructed after March, 1962 would also come within the ambit of the Act. As a necessary consequence the ground on which the ejectment of the tenant was sought from the shop in dispute disappeared and the petitioner-tenant preferred an application that the suit may be dismissed at least *qua* the relief of ejectment. The trial Court, however, rejected the application holding apparently that despite the virtual barring of the relief of ejectment by a decree of the civil Court, the suit was nevertheless maintainable. The petitioner-tenant has come up by way of this Revision Petition.

8. It appears to be plain from the aforesaid discussion that the history of the legislation, the larger scheme of the Act and the construction of the specific statutory provisions are all pointers to the only conclusion that the intent of the legislature writ large over the provisions was to exclude both the jurisdiction of the civil Courts as also the application of the general law of landlord and tenant.

19. The answer to the question formulated at the very outset is, therefore, returned in the affirmative."

19. The said judgment is distinguished as here in the instant case the civil suit was for permanent injunction restraining the petitioner from evicting the tenant without following the due process of law, which is *prima facie* maintainable and the subsequent act of the petitioner of dispossessing the respondent-plaintiff cannot be equated with the act of the legislature of amendment as in the aforesaid case of Punjab and Haryana High Court resulting ousting the jurisdiction of even pending civil suits. Therefore, the said judgment is distinguished.

20. The Appellate Court has affirmed the findings of the trial Court rightly on all ingredients of injunctions i.e. prima facie case, balance of convenience and irreparable loss and has also not committed any error in not deciding the issue of jurisdiction raised first time while deciding the appeal against the injunction order by observing that the same would be decided by the trial Court at appropriate stage on the strength of judgments' of this Court. The relevant paragraphs of the aforementioned 3 judgments' of this Court, out of which two are on the issue that the Appellate Court cannot adjudicate upon the issue of jurisdiction, are reproduced hereunder for ready reference :-

In *Hemraj v. Executive Officer Nagar Palika, Indragarh* (supra), this Court held in para No. 3 as under :-

(Vernacular matter omitted.....Ed.)

In para No. 2 of *District Club Bundi v. Madhukar Gupta* (supra), this Court held as under :-

"2. It appears that Shri Madhukar Gupta who at the relevant time had been the District Collector Bundi did not choose to appear before the learned civil Judge (Junior Division) Bundi and the learned civil Judge heard and decided the application *ex parte* and issue temporary injunction. Instead of availing remedy under Order 39, Rule 4, CPC Shri Madhukar Gupta was advised to file appeal against the said order. The appeal was undoubtedly competent but the learned appellate Court could not have entered into technicalities of maintainability or mis-joinder of the party in the suit. Such controversies can be adjudicated upon only in the main suit as is held in Peer Gulam Nasser's case (1988 (2) RLR 871) by this Court."

Even if issue of jurisdiction is raised in the trial Court, then also, it being a mixed question of fact and law could not be decided while deciding the temporary injunction application, only averments in the plaint could be seen as held by this Court in *M/s. Lakhara and Co. v. M/s. Shivakaran Bhanwar Lal Kila* (AIR 1995 Rajasthan 17) (supra), it was held

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"12. In *John Richard Brady v. Chemical Process Equipments P. Ltd.* ⁵ a suit for permanent injunction to restrain the defendants from infringing copyrights of plaintiff and an application for interim injunction against the defendants restraining them from manufacturing, selling their products and dealing in machines that were substantial limitation of design of plaintiff's unit were filed.

The defendants denied and disputed the jurisdiction of the Court. It was held that it was mixed question of law and fact and could not be decided at the stage of deciding the application for temporary injunction and for that, only the averments in the plaint could be seen. In view of this proposition of law, a bare perusal of the plaint discloses that the respondent firm has pleaded that the cause of action accrued in the town of Churu. Therefore, the contention of Mr. Bhansali that the District Judge, Churu had no jurisdiction to try the suit is not tenable at this stage, because this is a mixed question of fact and law and that can only be decided after the parties have adduced their evidence."

21. Section 151, CPC is an addition in the Code of 1908, which is based on many earlier decisions which clearly reveal that what was implicit has been made explicit. The Section merely furnishes legislative recognition of an age-old and well established principle that every Court has inherent power to act *ex debito justitiae* to do the real and substantial justice for the administration of which alone it exists or to prevent abuse of process of the Court. In 1868, Peacock, CJ. in case of *Hurro v. Shoorodhonee*,⁶ said "Since laws are general rules, they cannot regulate for all time to come so as to make express provisions against all the cases that may possibly happen..... It is the duty of the judges to apply the laws, not only to what appears to be regulated by their express dispositions but to all the cases to which a just application of them may be made, and which appear to be comprehended either within the express sense of the law or within the consequences that may be gathered from it." (The aforesaid observation of Peacock, CJ. has been taken from page 697 of Sarkar's C.P.C., Xth reprint Edition, 2004, Vol. I). The identical observations were made by the Supreme Court in *Manohar v. Hiralal*, in paragraph Nos. 18 and 23 of the aforesaid judgment of the Supreme Court, which are as follows :-

"18..... It is well settled that the provisions of the Code are not exhaustive for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them....."

23..... The section itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it."

22. This Court in *Pushap Raj v. Kuldeep Singh*,⁸ at page 3683, in a reverse case where the defendant was dispossessed after filing the civil suit forcibly, held that invoking of inherent powers by the Court to restore the position as it stood on the date of filing of the suit and the trial Court has rightly granted mandatory injunction with the aid of invoking inherent powers and the same has been rightly upheld by the Appellate Court.

23. In view of the discussions made hereinabove, I approve the findings of both the Courts below on the issue of prima facie case, balance of convenience and irreparable loss and further agree with the specific observations in case where a person has been dispossessed to overreach the proceedings of the Court and make application in fructuous and further in case the possession is not restored, then the tendency of taking the law in hands without following the due process of law will be increased. The aforesaid act of the party will also result in possible increase of anarchy in the society. I would also further like to add that in such type of cases, restoration of the possession will not only do substantial justice to the respondent-plaintiff but also restore the confidence of the public in Courts. Thus, both the Courts below have rightly invoke the inherent powers of the civil Court while passing the order of restoration of possession.

24. The contention of the counsel for the petitioner has no merit and the contention of the counsel for the respondents-plaintiffs are accepted.

25. In this view of the matters, the mandatory injunction order of the trial Court dated 18-10-2005 and the order of the Appellate Court dated 30-11-2005 are upheld and the writ petition is hereby dismissed with cost of Rs. 1,000/-. Record of the trial Court be sent back.

26. Considering the controversy raised in the writ petition pending before the trial Court, I deem it proper that the civil suit be decided finally within a period of three months from the date of production of certified copy of this order.
Petition dismissed.

Cases Referred.

1. AIR 1980 Punjab and Haryana 106
2. 1999 WLC (Raj) UC 319
3. RLW 1997 (3) Raj 1825
4. AIR 1995 Raj 17
5. AIR 1987 Delhi 372
6. 9 WR 402 at page 406
7. AIR 1962 SC 527

8. 1997 AIHC 3681 (Raj)