

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

OWP No.231/2012
CMA No.300/2012

Date of Decision: **21.12.2012**

V.

Chander Kanta & ors.

CORAM:

Mr. JUSTICE J. P. SINGH.

Appearing counsel:

For Petitioner(s) : Mr. R.K.Gupta, Sr. Advocate with Mr. Ajay Bakshi,
Advocate.

For Respondent(s) : Mr. Madan Lal, Advocate.

i)	Whether approved for reporting in Press/Media	:	Yes/No
ii)	Whether to be reported in Digest/Journal	:	Yes/No

J U D G M E N T

Respondent No.1-Chander Kanta filed a Civil Suit for Permanent Prohibitory Injunction restraining the petitioner-Satish Chander, her husband and respondent Nos. 2 and 3 from interfering into her peaceful possession over shop situated at Parade Ground near Government Women College, Jammu and forcibly dispossessing her therefrom without adopting due course of law. It was pleaded by her that the shop was obtained by her husband from the father of respondent No.2 and a Rent Deed was executed by him in this

behalf in the year 1978. She is stated in possession of the shop along with her husband since then.

Pleading that the petitioner had become old and being in an unbalanced state of mind because of ill health, it was respondent No.1 who was running the shop carrying therein business of *Fast Food, Cold Drinks and Eatables*. Respondent Nos. 2 & 3 are stated to have entered into conspiracy with the petitioner to take forcible possession of the shop.

Responding to the respondent's Claim in the Suit, the petitioner denied her entitlement to injunction specifically pleading that it was he who was the tenant in possession of the shop and the respondent had no right, title or interest therein to maintain the Suit and seek injunctive directions against him, the lawful occupant thereof.

The Trial Court of learned 3rd Additional Munsiff, Jammu, did not find any *prima facie* case in favour of respondent No.1 and dismissed her Application holding that neither the *balance of convenience* was in her favour nor would it cause *irreparable loss*, in case injunction was not granted to her.

Learned Munsiff's order was, however, set aside in Appeal by the learned District Judge, Jammu and the petitioner and respondent Nos. 2

and 3 were restrained from dispossessing respondent No.1 from the shop during the pendency of the Suit. Status quo too was directed to be maintained by the parties regarding the shop.

The petitioner has questioned the order passed on respondent No.1's Appeal invoking Extra Ordinary Writ Jurisdiction of the Court.

Heard the parties, who had appeared in person, their learned counsel and perused the trial Court records.

Before considering the submissions made by learned counsel for the parties, it becomes necessary to refer to the observations made by the trial Court whereby it did not find any prima facie case in favour of respondent No.1 and those made by the Appellate Court on the basis whereof the petitioner was restrained from interfering into respondent No.1's possession over the shop.

Observations made by the trial Court read thus:-

“.....The case of the plaintiff as projected in the plaint is that she is in possession of the suit shop, jointly with her husband (defendant number 3) in this case, by virtue of a rent deed, registered on 11 May, 1978. The plaintiff/applicant has annexed a photocopy of the same and the perusal of this rent deed reveals that it was made between Sh. Gian Chand (father of defendant No.1 Ashwani Kumar) and Sh. Satish Chander (defendant No.3). By virtue of this rent deed, it is only the defendant no.3, who is in possession of the suit shop and it is nowhere mentioned in the said rent deed that the plaintiff and the defendant no.3 shall be the joint tenants of the suit shop.

The plaintiff/applicant has not placed on record any document to show that the defendant/applicant no.3

is not keeping good health and he is not in a balanced state of mind. On the other hand, the defendant number 3 has specifically stated in reply to the contents of para 2 of the plaint that it is denied that he is not keeping good health and not in a balanced state of mind. He has also stated in reply to para five of the plaint that he has retired as a mechanical engineer from J&K Minerals, Kala Kot. He is a well educated person and is fully conscious of his rights and there is no question of defendants number 1 & 2, befooling him.

The plaintiff/applicant has placed on record photocopy of Forms C, regarding registration certificate issued under J&K Shops and Establishments Act, 1966, registration number JC/SA/10573, in respect of the suit shop M/s Ana Provision Store. This registration certificate is valid upto 31st of March, 2012. The plaintiff/applicant has also placed on record photocopy of Form O. The argument of learned counsel for the plaintiff is that the plaintiff is in possession of the suit shop and therefore Forms C & O have been issued in her name. To counter this argument of the learned counsel for plaintiff, the defendants have placed on record, a photocopy of Form C of the suit shop, which is issued in the name of defendant number 3, Satish Chander, and it is renewed up to 31st of March, 2013. Not only this, the defendants have also placed on record photocopy of order made by a Labour Inspector, Circle I, Jammu, dated 4th of November, 2011, vide which the registration number issued in favour of the plaintiff/applicant i.e. JC/SA/10573 has been cancelled. As such the argument of ld. Counsel for plaintiff/applicant that the plaintiff is in possession of the suit shop and therefore Forms C & O have been issued in her name does not hold any water.

It is pertinent to mention here that the non-applicant no.3 has placed on record a photocopy of the receipt of rent for the period 1st April, 2010 to 31st of March, 2011, which is given by him to Smt. Pushpa Devi, who is wife of original landlord Sh. Gian Chand and mother of defendant no.1 Ashwini Kumar. The defendant number 1 has also stated in para 3 of his written statement that the defendant no.3 is regularly paying the rent of the suit shop to Smt. Pushpa Devi, who is his mother.

On the other hand, the plaintiff/applicant has not placed on record any document, regarding the payment of rent of the suit shop, by her. Again the submission made by the plaintiff in her plaint that she is regularly paying rent to defendant no.1 appears to be not true. Further, the defendant number 3 has placed on record, a photocopy of the phone bill invoice dated 7th of September 2011, issued against his name at the address of the suit shop.

Therefore, we see that the plaintiff has not been able to establish her possession over the suit land by virtue of any document at this stage. On the other hand, the defendants are claiming to be in possession of the suit shop by virtue of a duly notarized rent deed, Form C, rent receipt and phone bill.

At the time of deciding the interim application for grant of injunction, it has to be seen whether the applicant is in possession of the suit property or not and the best way of deciding possession at the time of deciding interim application is by going through the revenue record and other documents produced by the parties, unless rebutted by the other side. This view of mine is fortified by

the decision of their Lordship in **Fareed Ahmed V/s Liat Ali & Ors, SLJ 2000 (86)** wherein it was held that:-

“While granting interim injunction under the provisions of order 39 rule 1 and 2 CPC, firstly the court should determine the possession of immovable property of the party who seeks interim relief.”

As discussed above, the plaintiff has not been able to establish her possession over the suit land at this stage. The plaintiff/applicant has not been able to show her joint tenancy along with her husband (defendant no.3) over the suit shop and the forms C and D issued in her favour, have already been cancelled by Labour Inspector, Circle I, Jammu. As such, she is not entitled to relief of grant of injunction at this stage.

It appears that the relations between wife (plaintiff/applicant) and husband (defendant/ non-applicant NO.3) have gone sour and this court's sympathies are with the plaintiff but she has not been able to show her possession over the suit shop at this stage, and all the rights being claimed by her over the suit shop are because of the fact that she is the wife of the tenant of the suit shop i.e. defendant no.3.”

The Appellate Court's observations made while disposing of respondent No.1's Appeal are as follows:-

“.....Appellant has also produced copy of rent to have been paid to the landlord and respondent/ defendants has nowhere pleaded that he was paying rent through appellant. Though, rent deed may be on the name of defendant No.3, but same cannot be ruled out that appellant was not in possession of the suit shop continuously uninterrupted. Admittedly, record of the entire transaction of Labour department regarding Form-C registration certificate, Form-O regarding close day or an alteration in close day, Form-D for renewal of licence and receipt of payment regarding electricity charges continued in the name of appellant/plaintiff and changing the record from the name of the appellant/plaintiff to the name of Respondent No.3 is an aspect and triable issue, which the trial court has completely overlooked the same. Appellant/Plaintiff has produced copy of telephone bills wherein it is clear that the telephone bills have been issued in her name, without the possession of the appellant/plaintiff how would telephone bills may have delivered to her. The suit of the appellant/plaintiff before the trial court is not between the tenant and the landlord and it is the suit between husband and wife claiming possession of the suit property. The suit of the plaintiff was for permanent prohibitory injunction and not a suit for ejectment. Neither def. No.3 has anywhere pleaded that she (appellant) has not been living with him.

These are all factors the trial court has overlooked and passed totally illegal order ignoring the basic principles of the ad-interim injunctive directions. The observation drawn by the trial court.

“Accordingly, the order dated 1st September 2011, made by this court wherein the parties to this suit were directed to maintain status quo on spot is hereby vacated and the application moved by the applicant for grant of ad-interim injunctions is dismissed.” Without any substance and trial court vacating the ad-interim injunctive directions, should have investigated the kind of possession and legal right of the appellant over the suit shop.....”

Perusal of the Appellate Court’s order and the observations quoted herein above, reveal that it had not recorded any *prima facie* finding as to whether or not respondent No.1 had any enforceable right in her to maintain the Suit against the petitioner, who was admittedly the sole tenant of the shop in question. Without recording any such finding, an ad-interim injunction was ordered to be issued proceeding on the premise that the Trial Court had overlooked basic principles which the law required the Authority empowered to issue injunction, to keep in mind, before issuance of ad-interim directions.

What were those basic principles, which the trial Court was not found to have followed, are, however, not spelt out by the Appellate Court. It is well settled proposition of law that the Court seized of a *lis* must be satisfied about the existence of a *prima facie* case before it proceeds to consider as to whether or not injunction was warranted in a given

case keeping in view the balance of convenience in issuing injunction and irreparable loss, if injunction was not so issued.

Respondent No.1's right to maintain the Suit and seek injunction regarding the Suit shop, which was admittedly in the tenancy of the petitioner, had been specifically questioned by the petitioner in the Written Statement. Whereas the trial Court did not find respondent No.1 to have any enforceable right to maintain the Suit, the Appellate Court did not, however, dwell on the issue. There is no finding by the Appellate Court as to whether or not there was any prima facie case in favour of respondent No.1.

The order passed by the Appellate Court in the absence of its finding about the existence of prima facie case in favour of respondent No.1, cannot, therefore, be justified because before considering issuance of injunctive directions, it was required, under law, to deal with the plea projected by the petitioner that the respondent had no right to maintain the Suit, which plea of his had found favour with the trial Court.

As the Appellate Court has allowed respondent No.1's Appeal without dealing with the question on which it was required so to dwell, so the order passed by it cannot be sustained because it had

failed to follow the procedure contemplated by law for dealing with Appeals.

Orders passed by a subordinate Court may not be substituted by the appellate Court, unless, for good and valid reasons, it not only sets aside the findings of the subordinate Court but also records its own finding(s) justifying allowance of the Appeal and issuance of fresh orders different from the questioned order. In case the order of the subordinate Court was not found valid by the appellate Court, the only course available with it, in case it does not opt to record its own findings, is to remand the case to the subordinate Court for fresh orders thereon.

Respondent's learned counsel's plea that exercise of Extra Ordinary Writ Jurisdiction may not be warranted to interfere with the Appellate Court's order, in that, the jurisdiction can be exercised only in rarest of rare cases, may not be attracted in the case when the learned District Judge is found to have disturbed the *prima facie* finding recorded by the trial Court, without recording its own finding on the existence or otherwise of a *prima facie* case in favour of respondent No.1 and dealing with the plea projected by the petitioner as indicated hereinabove.

For all what has been said above, the order passed by the learned District Judge cannot, therefore, be sustained.

Accordingly, the order passed by the learned District Judge on 30th January, 2012 on respondent No.1's Appeal is, accordingly, set aside and the respondent's Appeal restored for its consideration afresh on merits by the First Appellate Court.

In the facts and circumstances of the case, respondent No.1's Appeal before learned Principal District Judge, Jammu is transferred to the File of learned 3rd Additional District Judge, Jammu for its disposal in accordance with law.

Parties through their learned counsel are directed to appear before the learned 3rd Additional District Judge, Jammu on December 31, 2012.

(J. P. Singh)
Judge

JAMMU:
21.12.2012
Pawan Chopra