

+ **CS(OS) 516/2002**

BRAHAM PRAKASH Plaintiff

Versus

MAHABIR PARSHAD GOEL Defendant

Through: Ex parte

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? Not necessary
2. To be referred to the reporter or not? Not necessary
3. Whether the judgment should be reported in the Digest? Not necessary

RAJIV SAHAI ENDLAW, J.

1. The plaintiff has sued for recovery of possession of a shop admeasuring 14'x20' on the basement floor and 14'x15' on the ground floor of property No. 1047 Gurdwara Road, Kotla Mubarakpur, New Delhi and for recovery of arrears of mesne profits/damages for use and occupation of Rs 15 lacs and for pendente lite and future mesne profits @ Rs 40,000/- per month and for permanent injunction restraining the defendant from parting with possession of the property.
2. The plaintiff, as the owner of the aforesaid premises, claims to have entered into a partnership deed of 1997 with the defendant, proved as exhibit PW1/1 whereunder the parties agreed to carry on a business in the aforesaid premises of general merchandise in the name and style of Shri Shyam Store. The plaintiff claims to have

allowed the defendant into the premises in pursuance to the said partnership. The said partnership is stated to have been continued vide another partnership deed of 1998 which has been proved as exhibit PW1/2. It is further the case of the plaintiff that on 16th February, 1999 the said partnership was dissolved and a dissolution deed dated 16th February, 1999 signed. The said dissolution deed has been proved as exhibit PW1/3. The case of the plaintiff is that the defendant, however, notwithstanding the dissolution of the partnership, as agreed, failed to remove himself from the aforesaid premises.

3. It is further the case of the plaintiff that the defendant instead filed a suit for permanent injunction claiming that the plaintiff had agreed to sell the aforesaid premises to him and that he was in possession thereof under Section 53A of the Transfer of Property Act and for restraining the plaintiff herein from dispossessing the defendant from the premises. The plaint in the said suit of the defendant was rejected by the court of the Civil Judge Delhi vide order dated 6th May, 1999 proved as Exhibit PW1/4. It was inter alia held by the Civil Judge that the remedy, if any, of the defendant was for specific performance and the suit for injunction simplicitor did not lie. It was further found that since the plea of the defendant was of an oral agreement to sell, the plea of Section 53A to the Transfer of Property Act also was not available to the defendant. The defendant is proved to have preferred an appeal to the court of the Additional District Judge against the aforesaid rejection of plaint. The said appeal was also dismissed by the court of the Additional District Judge, Delhi vide judgment dated 8th November, 2000 proved as exhibit PW1/5.

4. The defendant is next stated to have preferred a suit in this court being CS(OS) 2643/2000 for the relief of declaration, specific performance and injunction. Though the said suit was stated to be pending at the time of institution of this suit, but the plaintiff in his affidavit by way of examination in chief in his ex parte evidence has stated that the said suit was dismissed in default vide order dated 19th November, 2004 of the court of the Additional District Judge, Delhi where CS(OS) No. 2643/2000 appears to have been transferred on change of pecuniary jurisdiction of this court. Order dated 19th November, 2004 has been proved as Exhibit PW1/10.

5. The defendant initially contested the suit and filed a written statement. The defendant disputed the ownership of the plaintiff and pleaded that legal proceedings where the ownership of the plaintiff himself was not disputed qua Shri Naresh Kumar Gupta were pending. The defendant did not dispute the partnership deed and the dissolution deed aforesaid. The defendant, however, pleaded that the same were a camouflage for the transaction of sale of the premises aforesaid by the plaintiff to the defendant. The defendant thus claimed that he was in possession of the premises pursuant to the agreement of the plaintiff to sell the property to the defendant.

6. At this stage I may note that there are pleadings also with respect to the proceedings under Section 145 of the CrPC qua the said premises. It is borne out that though the SDM had appointed the SHO as the receiver of the said premises but the said order of the SDM was set aside by the Additional Sessions Judge in revision.

7. That though the issues were not framed but the plaintiff in his evidence has also proved the certified copy of the judgment dated 20th July, 2007 of this court in RFA 432/2002 as exhibit PW1/6. The

said RFA was filed by Shri Naresh Kumar Gupta against the order of dismissal of his suit for possession against the plaintiff herein. The said RFA has been dismissed. The plaintiff has also proved as Exhibit PW1/7 the order dated 9th January, 2008 of the Apex Court in SLP No.24329/2007 preferred by the said Shri Naresh Kumar Gupta against the order of this court of dismissal of the RFA. The Special Leave Petition was dismissed.

8. The plaintiff has deposed of premises aforesaid being capable of fetching Rs 40,000/- per month. The plaintiff besides himself has also examined PW2 a property broker, namely, Mr Ajay Pal Singh who has deposed that the aforesaid premises can fetch Rs 80 per sq feet per month exclusive of electricity and other charges.

9. On the basis of the aforesaid material, it stands proved that it is the plaintiff who had inducted the defendant into possession of the premises aforesaid. The plea of the defendant of being in possession in pursuance of an agreement to sell the said premises by the plaintiff in favour of the defendant has not only been not established by the defendant in this suit but the substantive suit filed by the defendant in that regard has also been dismissed. The plaintiff would thus be entitled to a decree for recovery of possession. The defendant though ex parte had pleaded that the plaintiff to be able to get a decree for possession is entitled to prove his ownership. That is not the correct position in law. The defendant having admitted to have come into possession of the premises from the plaintiff and having not established any right to continue in possession is liable to deliver back possession to the plaintiff, and the plaintiff is not required to prove his ownership. Be that as it may, from the judgments in the legal proceedings between the plaintiff and Mr Naresh Kumar Gupta and on the basis whereof it was contended that

the plaintiff has no titled to the premises, the challenge by Naresh Kumar Gupa to the ownership of the plaintiff has come to an end. The plaintiff for this reason also is entitled to a decree for possession.

10. As far as the claim of the plaintiff for a mesne profit is concerned, this court had, vide interim order dated 6th December, 2004, even though the defendant was ex parte, directed the defendant to pay Rs 15,000/- per month to the plaintiff. The said order was made on the admission of the defendant of earlier paying monthly instalment of Rs 15,000/- per month to the plaintiff. The defendant has not complied with the said order. However, I find no reason to change the rate of mesne profits from that in the said order. Though the plaintiff as his own witness has deposed that the letting value of the premises is Rs 40,000/- p.m. and the witness of the plaintiff has also deposed that the premises are capable of being let @ Rs 80 per sq feet per month but no instance of any premises in the neighbourhood having been let out at the said rate has been proved. In the circumstances I deem it appropriate to award mesne profits on the basis of admission of the defendant only of Rs 15,000/- per month.

11. That though the decree for possession is being passed in favour of the plaintiff but since the defendant has not proved any right and to avoid any delays in execution owing to the defendant after the passing of the decree, inducting any other person into possession, a decree for permanent injunction restraining the defendant from inducting any other person into possession of the premises is also passed.

12. The suit of the plaintiff is thus decreed for the relief of possession of basement floor measuring 14'x20' and ground floor

admeasuring 14'x15' as shown in the site plan Exhibit PW1/8 of property No. 1047 Gurdwara Road, Kotla Mubarakpur, New Delh. A decree for mesne profit @ 15,000/- per month from 16th February, 1999 till the date of recovery of possession is also passed in favour of the plaintiff and against the defendant. The plaintiff shall also be entitled to interest at 10% per annum on arrears of mesne profit upto the date of institution of the suit, from the end of the month for which the mesne profits fell due and till the date of payment. A decree for permanent injunction is also passed in favour of the plaintiff and against the defendant restraining the defendant from parting with possession of the aforesaid premises in favour of any other person. The plaintiff shall also be entitled to costs of the suit from the defendant. Counsels fee assessed at Rs 50,000/-.

Decree sheet be drawn up.

**RAJIV SAHAI ENDLAW
(JUDGE)**

May 28, 2009
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