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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: March 04, 2010

Date of Order: April 16, 2010

+ CM(M) 459/2008

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Mukesh Seth & Anr.

Through: Mr. Mohit Nayar, Advocate

Versus

A.B. Lal & Sons & Ors.

Through: Mr. C.S. Bhandari, Advocate

16.04.2010

...Petitioners

...Respondents

JUSTICE SHIV NARAYAN DHINGRA

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

JUDGMENT

1. By the present petition under Article 227 of the Constitution of India, the petitioners have assailed an order dated 7th February, 2008 passed by learned ARCT, Delhi whereby he allowed the appeal of the respondents.

2. Brief facts relevant for the purpose of deciding the present petition are that the respondents herein filed an eviction petition against M/s Texind Corporation P. Ltd (as respondent no.1 and against respondents no.2 and 3 before the ARCT), *inter alia* on the ground that the premises was let out to respondent no.1, having its registered office at Bombay for the purpose of maintaining a residence-cum-personal office of the employee of respondent no.1 but respondent no.3 had parted with possession of the premises to respondent no.2 M/s Vrishti Overseas P. Ltd. and respondent no. 3 Shri Mukesh Seth. It was contended that there was fall in business of respondent no.1 and all its employees gradually left and by the year 2000 its operation in Delhi stopped. Respondent no.3 earlier working as Branch Manager of respondent no.1 occupied the premises as branch manager of respondent no.1. After closure of the business of respondent no.1, he ceased to be employee of respondent

no.1 and he along with his family members formed a company under the name and style of M/s Vrishti Overseas P. Ltd. (respondent no.2 before the trial court) with its registered office at the suit premises and this got revealed to the landlord from the record of Registrar of Companies. Respondent no.1 secretly sublet/ assigned or otherwise parted with possession of whole or part of the premises in favour of respondents no.2 and 3 without written consent of the landlord.

3. A common written statement was filed to the eviction petition filed by the landlord. This was signed by respondent no.3 Shri Mukesh Seth as Authorized Representative of respondents no.1 and 2 and verified by Shri Mukesh Seth as authorized representative of respondents no.1 and 2. The written statement was not accompanied by authority letter or resolution of respondent no.1 or power of attorney of respondent no.1 in favour of respondent no.3 showing that respondent no.1 had appointed respondent no.3 as its attorney to contest the case. During trial, respondent no.3 examined himself as the sole witness. None appeared on behalf of respondent no.1 to contest the petition. No evidence was led by respondent no.1 about its business or roll of employees or to counter any of the allegations made by the landlord. It was respondent no.3, the petitioner no.1 herein who contested the petition. The landlord in his testimony categorically stated that the business of respondent no.1 had closed down due to continuous losses and respondent no.3, earlier working as Branch Manager ceased to be an employee of respondent no.1 and he along with his family members constituted a company in the name and style of respondent no.2 at the suit premises and the possession of the premises was parted with in favour of respondents no.2 and 3. Respondent no.3 was the director/managing director of respondent no.2. This parting with possession by respondent no.1 was done without consent of the petitioner herein/landlord. It was also stated that respondent no.3 had constructed his own house in Gurgaon which he had let out on monthly rental of Rs.70,000/- per month instead of vacating the suit premises.

4. This testimony of landlord practically remained unrebutted since no record was produced on behalf of respondent no.1 before the learned ARC to show that its business in Delhi was continuing or respondent no.3 continued to be in its employment.

5. The respondent boldly denied the allegations made by the landlord. Shri Mukesh Jain (respondent no.3) filed his affidavit in evidence wherein he stated that he was still holding residential premises as branch manager of respondent no.1 and the premises was under legal control of respondent no.1 giving an impression as if he was still an employee of respondent no.1. It was admitted that respondent no.2 company was got registered at the address of the suit premises, however, it was submitted that later on its business activities were shifted to 226-27, Udyog Vihar, Gurgaon. During cross examination this witness admitted that when he joined as an employee of respondent no.1, he used to receive salary. He admitted that he stopped receiving salary from 2001. He stated that thereafter he was working on commission basis and used to get commission as and when some machinery of respondent no.1 was installed through him. In his cross examination, he repeatedly stated that he could produce the records of his employment, business of respondent no.1 and shifting of respondent no.2 from the suit premises to Udyog Vihar and in respect of the fact that respondent no.1 was still carrying on its business from the suit premises but he did not produce the record at any point of time. It was admitted by him that he was not being paid salary. It was also admitted by him that he had been carrying on business in the name of style of respondent no.2 of which he was the director. He admitted that respondent no.1 had director Mr. A.N. Munsha and Ms. Heena Munsha and these directors used to live in Mumbai.

6. The learned ARC observed that it was for the landlord to prove by cogent evidence that respondent no.3 has ceased to be an employee of respondent no.1. The landlord should have summoned the record of respondent no.1 to prove this fact and the landlord should have examined the record from Registrar of Companies to

show that respondent no.1 had been wound up or has become non-operational due to losses suffered by it. Since the landlord failed to lead this evidence, the landlord had not discharged his burden of proving that respondent no.3 who was no more an employee of respondent no.1 and he therefore dismissed the eviction petition. Against this order on appeal learned ARCT observed that the learned ARC totally went wrong in shifting the burden of proving that respondent no.3 was an employee of respondent no.1, on the landlord. He came to conclusion that the approach of learned ARC was illegal and appreciation of evidence by him was totally erroneous. He came to conclusion that once the landlord had given evidence that respondent no.3 was doing his own business from the suit premises by constituting a company in the name the burden shifts to respondent /tenant to prove that respondent no.3 was till an employee of respondent no.3 and the burden could not have been put on the landlord. He also observed that parting with possession of the suit premises was clear from the testimony of respondent no.3 and it was for respondent no.3 to show that he continued to be in possession of the suit premises as an employee of respondent no.1 and not as a businessman running an independent company of his own from the suit premises. The learned ARCT observed that the judgment rendered by learned ARC was illegal on the face of it because of wrong interpretation of law and erroneously placing the onus of proving on the landlord and therefore he reversed the order of learned ARC.

7. I agree with the conclusion arrived at by learned ARCT. In an eviction petition filed against the tenant on the ground of parting with possession /subletting where tenant does not even contest the eviction petition and only the sub tenant contests the eviction petition, this fact alone should have been sufficient for learned ARC to hold that the suit premises had already been parted with possession and it was not the tenant who was interested in the litigation but it was the sub tenant /person in occupation, who was interested in protecting the possession. The learned ARC did not bother even to look into the fact that there was no authorization or resolution placed on record from the tenant/ respondent no.1 in favour of

respondent no.3 to sign the written statement on behalf of respondent no.1 and to contest the case on behalf of respondent no.1. The learned ARC also ignored the material evidence that has come on record by way of deposition of respondent no.3 that he was no more receiving salary from respondent no.1. His statement that he was receiving commission in respect of machinery installed by him was not proved by documents. It was for him to prove that he had installed some machinery on respondent no.1 and received some commission through cogent documentary evidence that would have reflected that some business of respondent no.1 was going on and he had some connection with respondent no.1.

8. The learned ARC also totally ignored Section 106 of Indian Evidence Act which provides that a fact in the special knowledge of a person has to be proved by that person. Whether respondent no.1 was continuing with its operation in Delhi was within the special knowledge of respondent no.1 and it was for respondent no.1 to prove by cogent evidence in the Court that its business was continuing in Delhi and respondent no.3 was its employee. No document worth name showing any connection whatsoever between respondent no.1 and respondent no.3 was proved on record by either of the respondents. This burden could not have been shifted upon the landlord because the landlord was not in special knowledge of this fact. The landlord had only learnt this fact either by record of Registrar of Companies or through conduct of respondent no.3. The landlord proved it by producing record from the Registrar of Companies. It was not the case of the landlord that respondent no.1 has been wound up. The case of the respondent no.1 was that respondent no.3 has ceased to be an employee of respondent no.1 and the possession has been parted with by the respondent no.1 to respondent no.3. The learned ARC wrongly observed that the landlord was supposed to prove from record of Registrar of Companies that respondent no.1 had been wound up or its business had suffered losses. I, therefore, consider that the order of learned ARC was totally illegal and the learned ARCT rightly set aside the same. Parting with possession of the suit premises is writ large in the case as respondent no.3 had started his own business in

the premises let out to respondent no.1 for having residence-cum-personal office of its employee.

9. I, therefore, find no force in this petition. The petition is hereby dismissed with no orders to costs.

April 16, 2010
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SHIV NARAYAN DHINGRA J.