

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 08.9.2010*
Judgment Delivered on: 14.9.2010

+ **RSA Nos.424-428/2006**
CM Nos.17221/2006, 2469/2007, 2470/2007

1. UDHAM SINGH JAIN CHARITABLE TRUST THROUGH SH.S.R.JAIN, TRUSTEE,
2. DR. R.N. JAIN (DECEASED), TRUSTEE OF UDHAM SINGH JAIN CHARITABLE TRUST THROUGH
3. SH.J.R.JAIN, TRUSTEE OF UDHAM SINGH JAIN CHARITABLE TRUST THROUGH
4. SH.M.L.JAIN, TRUSTEE OF UDHAM SINGH JAIN CHARITABLE TRUST THROUGH
5. SH.S.R.JAIN, TRUSTEE OF UDHAM SINGH JAIN CHARITABLE TRUST THROUGH

.....Appellants
Through: Mr.G.L.Rawal, Sr. Advocate with Mr.
Kuljeet Rawal, Advocate.

Versus

M/S ATMA RAM BUILDERS PVT. LTD.

.....Respondent
Through: Mr.Amit Sethi, Mr.Mukesh Ranjan
and Mr.Deepak Vidyarthi, Advocates.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J.

1. This appeal has impugned the judgment and decree dated 6.12.2006 which had endorsed the finding in the judgment and decree dated 24.4.2004 passed by the Civil Judge in Suit No.40/2003.

2. The factual matrix of the case is as follows:

(i) Plaintiff Atma Ram Builders Pvt. Ltd. is a company duly incorporated under the Indian Companies Act 1956. Shri

C.M. Chadha was the principal officer and director of the company.

(ii) The plaintiff is the owner of the entire first floor of the premises bearing no.D-18, D-19 and D-20, situated at D-Block, Connaught Place, New Delhi. The erstwhile owner was M/s Prakash Brothers. Plaintiff had purchased this property vide sale deed dated 19.9.1986 Ex.PW-5/1.

(iii) The premises had been let out by the erstwhile owner to the defendant no.1 vide registered lease deed dated 31.12.1982 Ex.PW-3/1 for a period of ten years commencing w.e.f. 1.11.1982 up to 31.10.1992.

(iv) Vide notice dated 5.10.1992 Ex.PW-3/1, the plaintiff requested the defendant to vacate the suit property by 31.10.1992 as the lease had expired by efflux of time, but to no avail. Present suit was filed seeking a decree of possession.

(v) Defendants contested the suit. It was stated that the plaintiff had filed a similar suit for possession and mesne profits which had been withdrawn unconditionally and as such the present suit is liable to be stayed under Section 10 of the Code of Civil Procedure (hereinafter referred to as the 'Code'). The suit was also barred under Order II Rule 2 of the Code. Notice dated 5.10.1992 is not in accordance with the provisions of Section 106 of the Transfer of the Property Act (hereinafter referred to as the 'T.P.Act'). Rate of rent of the first floor of the premises was Rs.2000/-; jurisdiction of the Civil Court is barred; the suit premises is covered under

the provisions of Delhi Rent Control Act (hereinafter referred to as the 'DRC Act'). The suit has not been filed by an authorized person.

(vi) Six issues were framed by the Trial Court, which inter alia reads as follows:

- “ (i) Whether the suit is barred U/S 50 of the DRC Act? OPD
(ii) Whether the plaintiff is the owner of the suit premises as alleged by the plaintiff? OPP
(iii) Whether the suit has been instituted by a duly authorized person? OPP
(iv) Whether the lease has been properly cancelled by notice U/S 106 of Transfer of Property Act? OPP
(v) Whether the plaintiff is entitled for the relief claimed in the suit? OPP
(vi) Relief.”

(vii) Trial Court held that the rent of the premises was Rs.4000/- per month which was evident from the registered lease deed executed between the parties; there was no bar of Section 50 of the DRC Act. The suit had been instituted through a duly authorized person in terms of the resolution Ex.PW-2/2 executed in favour of PW-2 S.M.Chadha. Sale deed of the suit property Ex.PW-5/1 had established the title of the plaintiff. Notice dated 5.10.1992 Ex.PW-1/1 terminating the tenancy w.e.f. 31.10.1992 or 1.11.1992 was a valid notice; even otherwise the tenancy had come to an end by efflux of time. Decree of possession of the suit property was passed in favour of the plaintiff.

(viii) In appeal, the First Appellate Court vide impugned judgment endorsed the findings of the Trial Court.

3. This is a second appeal which has not yet been admitted. It is at its initial stage. During the pendency of the appeal, an application being C.M. No.2469/2007 under Order 41 Rule 5 of the Code has been filed by the respondent seeking a prayer that the appellant be directed to deposit mesne profit @ Rs.197/- per sq. feet per month w.e.f. 1.11.1992 till 30.4.2007 i.e. period from the date of the termination of the tenancy up to the period of the pendency of the appeal. In the course of the arguments addressed before this Court, learned counsel for the applicant/respondent has confined his prayer to the rate of Rs.130/- per sq. feet per month in view of the document relied upon by him in para no.7 of the said application; period of claim has also been reduced; i.e. w.e.f. the date of the decree.

4. Apex Court in terms of its order dated 9.8.2010 had decreed this Court to dispose of the appeal expeditiously; in case it is not possible to dispose of the second appeal, the application under Order 41 Rule 5 CPC be disposed of at the earliest. Pursuant thereto notice had been directed to the parties and the matter has now been taken for hearing.

5. Arguments have been addressed at length by the respective parties. On behalf of the appellant, it is submitted that in case the appellant succeeds and the Court is of the view that a substantial question of law has arisen it may frame substantial questions of law in terms of the substantial questions of law formulated by the appellant in his memo of appeal. Thereafter the Court may dispose of the appeal without listing the matter again for hearing. It has been conceded by learned counsel for the appellant that this is by and large to ward off the jeopardy of liability if any which may arise

on the application filed by the respondent under Order 41 Rule 5 of the Code; for this reason the appellant would not be pressing any further hearing.

6. On behalf of the respondent, it is submitted that in case, this court is of the opinion that no substantial question of law has arisen and the appeal is dismissed in limine, he would not be pressing his application under Order 41 Rule 5 of the Code.

7. The first contention raised by the learned counsel for the appellant is that admittedly an earlier suit i.e. the Suit No.- /1989 (Ex.PW-2/DA) had been filed by the plaintiff Atma Ram Builders Pvt. Ltd on 17.6.1989. This suit was based on a notice dated 21.3.1989 terminating the tenancy of the defendant under the provision of Section 106 of the T.P.Act. Attention has been drawn to para 6 and 7 of the plaint wherein the defendant had been described as a trespasser; the lease deed had stood cancelled in terms of this notice dated 21.3.1989; damages for unauthorized use and occupation had been claimed @ Rs.10,000/- per day.

Admittedly, during the pendency of this suit, the present suit i.e. the suit No.40/03 had been filed; the plaint was presented on 2.1.1993 as is evident from the decree sheet. This was simplicitor a suit for possession. Before filing the present suit notice dated 5.10.1992 had been served upon the defendant terminating his tenancy w.e.f. 31.10.1992 or 1.11.1992 whatever the case may be. It was further stated in this notice that as per the provisions of Section 111(a) of the T.P.Act, the tenancy stood determined by efflux of time and as such notice was even otherwise not necessary. After the institution of the second suit the first suit which was a suit for possession and damages was withdrawn. It was withdrawn

in two parts. On 29.11.1994, the plaintiff gave up his claim for possession of the suit property. On a subsequent date i.e. on 14.10.2003, the plaintiff gave up his claim for damages which he had claimed from the defendant; this order was passed subject to payment of Rs.3,000/- as costs imposed upon the plaintiff as the court was of the view that the plaintiff has unnecessarily dragged on this litigation for more than 13 years. All these facts are admitted.

8. It is submitted that the earlier suit had been withdrawn unconditionally and as such the second suit i.e. the present suit i.e. Suit No.40/03 was not maintainable; the bar of Order XXIII Rule 1 had come into operation. For this proposition learned counsel for the appellant has placed reliance upon a judgment reported in (1987) 1 SCC 5 Sarguja Transport Service Vs. State Transport Appellate Tribunal. Attention has been drawn to para 7.

9. This submission of the learned counsel for the appellant is completely devoid of force. Admittedly, the present suit was instituted on 2.1.1993 on which date the first suit was yet pending. It had not been withdrawn. The operation of Order XXIII Rule 1 of the Code is not attracted and does not come into play. The proposition relied upon and sought to be deduced from the aforementioned judgment is totally misconceived. The bar under Order XXIII Rule 1 of the Code is only on the institution of a fresh suit; it would not apply when the suit already stood instituted and was pending as was so in the instant case. In (2008) SCCR 188 Vimlesh Kumari Kulshrestha Vs. Sambhajirao and Ors., the Supreme Court had reiterated this legal position; the relevant extract is reproduced hereunder as follows:

“Admittedly, the second suit was filed before filing the application of withdrawal of the first suit. The first suit was withdrawn as an objection had been taken by the appellant in regard to payment of proper court-fee. We, therefore, are of opinion that Order XXIII, Rule 1 of the Code was not applicable to the facts and circumstances of the present case.”

This argument of the learned counsel for the appellant is misconceived and accordingly rejected.

10. On behalf of the appellant, it is submitted that the sale deed Ex.PW-5/1 dated 19.9.1986 on the basis of which the plaintiff is claiming ownership of the suit property has not been proved as per law. It has been proved in the version of PW-5 who had not been tendered for his cross-examination; as such this document Ex.PW-5/1 not having been proved in accordance with law the same could not have been read by the Courts below. Reliance has been placed upon AIR 1971 SC 1865 Sait Tarajee Khimchand & Ors. Vs. Yelamarti Satyam & Ors. to substantiate his submission that mere marking of a document as an exhibit would not dispense with its proof.

11. This argument is noted only to be rejected. The registered sale deed Ex.PW-5/1 had been produced by PW-6 Anil Kumar , L.D.C. who had come from the office of the Sub Registrar. He had proved this document on oath. PW-6 had deposed stated that the certified copy of the sale deed Ex.PW-5/1 has been produced from the office of the Sub Registrar; PW-6 had not been cross-examined in spite of opportunity. The sale deed had adequately and duly been proved through this version of PW-6. That apart a sale deed is a public document and a certified copy of such a document is admissible in evidence under Section 74(2) read with Section 76 and 77 of the Indian Evidence Act. In AIR 2001 SC 2532 State of

Haryana Vs. Ram Singh , the Apex Court had, in this context, inter alia held as follows:

“It is not the law that a certified copy of a registered agreement for sale is inadmissible in evidence unless the parties to the document are examined to prove it. That would be contrary to what S.77 read with Ss 74(2) and 76 of the Evidence Act, 1872.....”

This has been reiterated in AIR 2004 SC 4082 Smt.Dayamathi Bai Vs. K.M. Shaffi.

12. Counsel for the appellant has further contended that the resolution Ex.PW-2/2 of the plaintiff company authorizing PW-2 C.M.Chadha to institute the present suit is a defective document. It is submitted that in this document C.M.Chadha has been authorized to institute a suit by or against the company in respect of Plot No.3, B-Block, Connaught Place, Delhi or any part thereof; it is pointed out that no further detail had been mentioned in the resolution; neither the municipal number of the property nor where the property is located has been given. The Courts below having relied upon this resolution had drawn the conclusion that the suit had been instituted through a duly authorized person; this is an erroneous conclusion which raises a substantial question of law.

13. The Trial Court, as already noted, had framed six issues. This contention of the appellant had been dealt with while disposing of issue no.3. The relevant extract of this finding is reproduced hereunder which reads as follows:

“After going through the arguments of the parties, my opinion contention wise is that so far, the first contention of the counsel for defendant that the resolution does not contain the description

of the suit property is concerned, the sale deed has been proved by the plaintiff and the sale deed contains the description of the suit property, the Clause 1 of the Conveyance deed at Page 26 specified that the vendors transferred the right, title and interest in the property known as Plot No.3 in the 'D' Block of Connaught Place, Delhi which contained the shops and kitchen and at Page 29 a list of tenants has been given which contained the name of the defendant counsel at Serial No.7 where the rate of rent also has been shown @ Rs.4000/- and Clause 3 at Page 30 of the Sale Deed also has reference about the lease deed of the defendant which specify that the Ex.PW-2/2 was passed just to recover the present suit properties."

14. This finding of the Trial Judge calls for no interference. The resolution had been proved on record as Ex.PW-2/2. This resolution had been read along with sale deed which had been proved as Ex.PW-5/1; a conjoint reading of the two documents along with the oral testimony of PW-2 had clearly depicted that the authority given to C.M.Chadha to institute the present suit was qua Plot No.3, D-Block of Connaught Place, New Delhi. PW-2 C.M.Chadha was undisputedly the principal officer and the director of the plaintiff company. He had also produced the minute book of the company. These minutes are admissible under Section 194 of the Companies Act. Under this provision of law the minutes of a meeting kept in accordance with the provisions of Section 193 of the Companies Act shall be evidence of the proceedings recorded therein. It is, thus, clear that the resolution Ex.PW-2/2 read with sale deed Ex.PW-5/1 had clearly recited that the company had resolved in terms of its resolution Ex.PW-2/2 authorizing PW-2 C.M.Chadha to institute the present suit for eviction of the tenant from the suit property described as the property bearing Plot No.3, D-Block of Connaught Place, New Delhi. No substantial question of law has arisen on this count. Reliance by the learned counsel for

the appellant on the judgment 41(1990) DLT 633 *Nibro Limited Vs. National Insurance Co. Ltd.* is misplaced. Admittedly in that case there was no resolution of the Board of Directors authorizing the principal officer of the company to file the suit; in this context the Court had held that Order 29(2) of the Code does not entitle the Principal Officer of a company to file a suit on its behalf; this authority has to be found either in the Articles of Association of the Company or in the Resolution of its Board of Directors. In the instant case this resolution has adequately been proved as Ex.PW-2/2.

15. Learned counsel for the appellant has lastly urged that the averments in the plaint clearly show that the plaintiff has filed a suit for recovery of the first floor of the premises only. The defendant was paying rent of Rs.2000/- for the first floor and he was paying an additional sum of Rs.2000/- for the second floor. Suit has been filed by the plaintiff for the possession of the first floor only for which the rental was Rs.2000/- per month. Even otherwise, a suit for possession of part of the premises is not maintainable; the plaintiff could not have filed suit for part possession only.

16. This arguments is also devoid of any merit. This suit i.e. Suit No.40/03 has been premised on the registered lease deed Ex.PW-3/1 which is an admitted document. As per this document the property leased out is the entire first floor with Private No.3,4, and 5 with Municipal No.D-18,19 and 20 previously known as Hotel India situated at D- Block, Connaught Place, New Delhi having a rental of Rs.2000/- per month. The last clause on page one recites that certain improvements, additions, alterations and construction

have been raised on these flats which had been objected to by the lessor as they have been raised without his consent; it had now been agreed and settled between the parties that the 'said premises' have been leased out for a period of ten years w.e.f. 1.11.1982; rent had been enhanced from Rs.2000/- to Rs.4000/- per month. The deed reads as follows:

".....AND WHEREAS it is now settled and agreed upon by the parties that the lessee shall hold the premises for a period of 10 years w.e.f. 1/11/82 AND WHEREAS THE PARTIES HAVE SETTLED their disputes and in lieu of the terms and conditions as referred to hereinafter and agreeing and consenting to all sort of additions, alterations and construction in the said leased property either of permanent character or otherwise on any portion of the said property while enhancing the rate from Rs.2,000/- to Rs.4,000/- since in as much as previously the rent was being paid at the rate of Rs.2,000/- per month. AND WHEREAS the parties have settled their all disputes and the grievances of the lessor regarding the so called construction, additions and altercations or otherwise so called alleged causing damage and exchange of notices between the counsel of the parties, the lessor have agreed to withdraw all such contentions and the controversies as was raised in consideration thereof, the enhancement of rent from Rs.2,000/- to Rs.4,000/- w.e.f. 1/11/82 AND WHEREAS HENCEFORTH IT IS AGREED THAT THE LESSEE SHALL HOLD THE entire premises for a period of 10 years w.e.f. 1/11/82 on paying a sum of Rs.4,000/- per month as rent. WHEREAS the parties have agreed to the covenants of the terms of the lease:"

The said additions, alterations and constructions carried out by the lessee had again been referred to in para 6. It is thus clear that the 'said premises' comprised not only all the three flats bearing Municipal No.D-18,19 and 20 previously known as Hotel India situated at D- Block, Connaught Place, New Delhi but also the improvements, additions, alterations and construction of a permanent character or otherwise raised on these flats.

17. It is pointed out by learned counsel for the respondent that this additional construction form a part of mezzanine floor. The rental of Rs.4000/- raising it from Rs.2000/- to Rs.4000/- was clearly in lieu of this additional construction which had been made by the defendant. The suit for possession had been decreed for these 'said premises'. There is no ambiguity on this score either.

18. The submission of the learned counsel for the appellant that the jurisdiction of the Civil Court is barred; the suit premises are governed by the DRC Act as the rental is below Rs.3500/- per month is again an argument without any merit. Before filing the suit notice dated 5.10.1992 had been served upon the defendant. Plaintiff described himself as the owner and landlord of premises bearing No.D-18,D-19, & D-20, D-Block, Connaught Place, New Delhi. In terms of the registered lease deed dated Ex.PW-3/1 which was for a period of ten years, tenancy had come to an end by efflux of time on 1.11.1992. As per this document Ex.PW-3/1 rate of rent was Rs.4000/- per month for the entire premises which included not only the first floor but also the additions, alterations and construction raised thereupon. Ex.PW-2/3 and Ex.PW-2/4 are letters sent by the defendant to plaintiff which also show that the rent being paid by the defendant was Rs.4000/- per month. In this view of the matter, the contrary oral plea advanced before this Court at this stage that the rent of the premises was Rs.2000/- cannot be entertained; Section 92 of the Evidence Act bars such a plea. The notice dated 31.10.1992 Ex.PW-1/1 was a valid legal notice. It had fulfilled the twin requirements of Section 106 of the T.P.Act. It had terminated the tenancy of the defendant on the last of the tenancy month after giving him a clear 15 days notice

period; this is a fact finding by both the Courts below and which notice has even otherwise not been challenged before this Court.

19. Further submission of the learned counsel for the appellant is that the lease deed already stood cancelled in terms of the first notice dated 21.3.1989 and the said lease deed having been cancelled, the second notice dated 5.10.1992 is of little avail. Presuming this submission of the learned counsel for the appellant to be correct and the lease stood validly cancelled by the first notice dated 21.3.1989, it is an admission of the defendant himself that he had become an unauthorized occupant thereafter; he has no other status and in fact even on query he was not able to answer this question posed by the Court. Tenancy of the defendant having come to an end both by efflux of time and by legal termination in terms of Ex.PW-1/1; status of the defendant has become that of an unauthorized occupant w.e.f. 31.10.1992. The Courts below had correctly decreed the suit for possession.

20. In II (2009) SLT 698 Narayanan Rajendran & Anr. Vs. Lekshmy Sarojini & Ors. the powers of the second Appellate Court to interfere in findings of fact have been detailed. It is only on substantial questions of law that a second appeal is maintainable. It has been reiterated by the Supreme Court that a second appeal is not a "third trial on facts" or "one more dice in gamble". The High Court is not justified in interfering in a second appeal on findings of fact. In the judgment reported in 170(2010) DLT 187 Kishan Chand Saini Vs. Krishan Singh Saini, a Bench of this court had noted that where the questions raised in the memo of appeal are all questions of facts, the appeal should have been dismissed on the very first day when it was presented in the Court and where

the appellant had successfully carried on the appeal for eight long years finding no merit in the appeal, the said appeal had been dismissed with exemplary costs.

21. The general rule is that a second appeal will not be entertained on issues of fact and the High Court will not disturb the findings of fact given by the Courts below; a second appeal shall not be admitted unless a case is made out under Section 100 of the Code raising substantial a question of law as spelt out in the memo of appeal.

22. In para 21 of the impugned judgment the first appellate court had admittedly recorded a wrong fact that the earlier suit had been withdrawn with permission to a file fresh suit. However, this incorrect finding although erroneous has not resulted in any perversity; the ultimate result being that the impugned judgment had also been held that the provisions of Order 23 of the Code are not attracted. In a judgment reported in (2001) 4 SCC 262 Kulwant Kaur & Ors. vs. Gurdyal Singh Mann (Dead) By LRs. & Ors. the Supreme Court while laying down the parameters for interference by the High Court at the second appeal level under Section 100 of the Code had held that if interference is called for, the High Court must categorically in the judgment state the issue of perversity vis-à-vis the concept of justice. Applying this test it is clear that this wrong finding of fact has not resulted in any perversity.

23. Questions of law formulated in the memo of appeal are eight in number (page 16 of the memo of appeal) and are hereunder reproduced as follows:

‘A. It is that on or after 1.5.1989 tenancy of the appellant was in subsistence having been terminated by means of notice of 21.3.1989 giving alleged fresh cause of action?’

B. Is it open for the respondent to allege that tenancy has come to an end by efflux of time on 31.10.92 for the reasons that the tenancy according to the respondent did not survive on or after 1.5.89?

C. Is it not that on withdrawal of the relief of possession, as was sought in earlier suit No.39/2003 was instituted by plaint dt. 17.5.1989 to seek relief for possession in the second suit and that too without having obtained leave of the Court.

D. Is it open for the respondent to maintain the second suit for possession or seeking relief of possession after having been withdrawn the suit unconditionally without seeking leave of the Id. Court for filing fresh suit on the same cause of action?

E. Is it that resolution dt.18.2.1989 pertains to the subject property for the reasons that it does not specify the property and there is no evidence of connecting the plot No.3 B-Block to the subject property resulting suit has not been properly instituted?

F. Is it not that the impugned order is without jurisdiction as the Id. Court below erred in observing against record that the first suit for possession was withdrawn with liberty to file fresh suit for same cause of action.

G. Is it not that dismissal of the appeal by the Id. First Appellate Court is vitiated in law and without jurisdiction as it proceeded that earlier suit was withdrawn with leave to file fresh suit.

H. Is it not that the order under appeal is against record and so the impugned order is without jurisdiction."

24. None of them raises any substantial question of law; they are all fact based submissions. They have even otherwise been answered in the arguments and findings as aforementioned.

25. Since no substantial question of law has arisen, this Court is of the opinion that the appeal should be dismissed in limine. In this view of matter, the application CM No.2469/2010 under Order 41 Rule 5 of the Code i.e. is not pressed (as aforementioned).

26. The appeal is dismissed in limine; the pending applications are also dismissed.

INDERMEET KAUR, J.

SEPTEMBER 14, 2010

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