

% 13.07.2010

Present : Mr.Ankur Mittal, Advocate for the appellant.

+ C.M.Appl.11840/2010 (for filing extended list of dates) in R.S.A.No.132/2010

*

Counsel for the appellant has not pressed this application.

Dismissed as withdrawn.

+ R.S.A.No.132/2010 and C.M.Appl.11839/2010 (for stay)

*

1. Copy of the legal notice sent by the plaintiff to the defendant in terms of the last order has been placed on record. However, the evidence of DW-1 in spite of directions has not been filed. Service report of the respondent is that he has refused service.

2. On the last date i.e. 9.7.2010 the operation of the impugned judgment and decree dated 10.2.2010 and impugned judgment and decree dated 20.5.2010 had been stayed only till today as the counsel for the appellant had pointed out an urgency that the execution petition had been fixed for the said date.

3. Arguments have been heard on the maintainability of the present petition. The appellant before this court is the tenant/defendant. Plaintiff Phool Singh had filed a suit for possession and recovery of arrears of rent amounting to Rs.65000/- in respect of suit property i.e. property no.C-212, Gali no.5, Chauhan Bangar, Brahampuri Road, Delhi-53. It was stated to be R.S.A.No.132/2010

the ancestral property of the plaintiff. Defendant was a tenant in respect of two big halls on the ground floor at a monthly rent of Rs.5000/-. In para 4 of the plaint it has been stated that prior to 1.12.2005 the defendant had paid rent through an account payee cheque dated 1.8.2005 for a sum of Rs.5000/-; another cheque dated 13.6.2005 for a sum of Rs.5000/- and third cheque dated 30.11.2005 for another sum of Rs.9600/-. Legal notice dated 19.8.2006 had been served upon the defendants asking him to pay the arrears of rent at the rate of Rs.5000/- per month. In the written statement the defendant had denied that the rate of rent was Rs.5000/- per month. His contention was that the suit property was rented out at a monthly rental of Rs.2400/-. He had also denied the receipt of the legal notice dated 19.8.2006. A preliminary objection had been taken that since the rent is below Rs.3500/- per month the suit for possession is not maintainable and the provisions of the Delhi Rent Control Act are attracted.

4. On the pleadings of the parties three issues had been framed by the trial judge. They read as follows:

- (i) Whether the plaintiff is entitled to a decree of possession, as prayed for? OPP
- (ii) Whether the plaintiff is entitled to arrears of rent if so at what rate and for what period? OPP
- (iii) Whether the present suit is not maintainable in view of the provisions of DRC Act, as alleged? OPD

(u)

5. Onus to discharge issue no.3 was on defendant. Contention of the defendant was that the rent of the tenanted premises was Rs.2400/- per month. Plaintiff had averred that the rent was Rs.5000/- per month. Three witnesses had been examined by the plaintiff; on behalf of the defendant only one witnesses i.e. defendant himself had come into the witness box; testimony of all the witnesses had been appreciated in detail by the trial judge. PW-1 was the plaintiff himself. He had reiterated the averments made in the plaint. It was an admitted case between the parties that there was no rent agreement between the parties and no rent receipt had ever been issued to the defendant by the landlord. In his cross-examination PW-1 has stated that defendant used to pay rent sometimes for two months and sometimes for three months, sometimes by cash and sometimes by cheque. The sum of Rs.9600/- received vide cheque dated 30.11.2005 was rent for two months as Rs.400/- had already been taken; further that he is illiterate. PW-3 was the son of PW-1 and his deposition was also by and large to the same effect. PW-2 was another tenant in the adjoining suit property which was also owned by the plaintiff; in his cross-examination PW-2 has categorically stated that the defendant had paid Rs.5000/- in cash on 4.9.2005 in his presence which was the rent for the month of August. DW-1 has admitted the tenancy; he has stated that he does not remember the exact date when he

had made the last payment of rent. He has admitted that on earlier occasions also he had given many cheques of Rs.5000/-; he has no document to show that he was paying rent at the rate of Rs.2400/- per month; further he has not reflected this Rs.2400/- in his income tax or sales tax return. DW-1 has further admitted that the acknowledgment card Ex.PW-1/5 bears the signatures of his employee Iqbal. PW-1/5 was the acknowledgement card of the legal notice which had been served upon the defendant. This admission of DW-1 in his cross-examination tarnishes the credibility of the witness who had all-along taken a stand was that he had not received the legal notice. Trial judge had weighed the probability of the evidence adduced before the court; there was admittedly no documentary evidence; reliance had been placed upon the oral versions of the witnesses. The trial judge had also taken judicial notice of the fact that PW 2 was a tenant of one shop at a rental of Rs.3000/- whereas the defendant was in occupation of two halls; as such the rental for two halls at the rate of Rs.5000/- per month appeared to be probable keeping in view the rental for one shop in the adjoining area which was admittedly Rs.3000/-. Suit of the plaintiff had accordingly been decreed. These findings of the trial judge had been endorsed by the first appellate court on 20.5.2010.

6. The counsel for the appellant has urged that the findings of

6

the courts below are erroneous.

7. The questions of law as formulated in the memo of appeal are contained in page 2 of the appeal. It is submitted that the burden of proof was upon the plaintiff to establish his case that the rental was Rs.5000/- per month which the courts below had not appreciated in the correct perspective and had erroneously caste the burden upon the defendant. These findings were perverse.

8. The submissions advanced by the learned counsel for the appellant have been noted.

9. Scrutiny of the record does not support these submissions. A preliminary objection had been taken by the defendant in his written statement that the suit is not maintainable in view of the bar of the Delhi Rent Control Act and the rental of the property being Rs.2400/- per month; the jurisdiction of the civil court was ousted. On this preliminary objection issue no.3 had been framed which had cast the burden of proving this issue on the defendant and rightly so; burden of proof of the first two issues which related to the right of the plaintiff to claim possession of the suit property with arrears of rent and period wherefrom were to be discharged by the plaintiff which he had discharged. This is clear from the discussion aforementioned and the perusal of the judgments of both the fact finding courts below.

10. Counsel for the appellant has placed reliance upon a

judgment reported in 1972 RLR (N) 215 H.K. Berry vs. Wazir Chand to support his submission that the burden of proof to discharge issue no.3 had wrongly been put upon the plaintiff. This judgment does not in any manner help the appellant. In this case in a eviction petition under Section 14 (1) (a) of the Delhi Rent Control Act the contention of the landlord was that the rate of rent was Rs.75/- whereas tenant has contended that it is Rs.40.12. Rent Controller had fixed a interim rent at Rs.75/- which had been upheld in appeal. Application under Order 14 Rule 5 of the Code and under Rule 23 of the Rent Control Rules had been filed which had been rejected; Rent Tribunal had endorsed the finding of the Rent Controller; writ petition under Article 227 of the Constitution had been preferred. The High Court had held that a litigant who approaches the Court for relief has to prove his case; this proposition is not in dispute; the plaintiff had proved his claim before the Trial Court; both the concurrent findings of fact given by the courts below did not call for any interference. This court sitting in second appeal cannot re-appreciate the evidence or make a roving or fact finding enquiry. This is beyond the parameters as contained in Section 100 of the Code.

11. At this stage, learned counsel for the petitioner states that he may be granted six months time to vacate the property. He has placed reliance upon judgment of the Supreme Court reported in

8

Special Leave to Appeal (Civil) No.15201/2010 Punjab National Bank vs. Nirmal Singh where on an undertaking furnished by the petitioner therein the court had extended time for vacation of the property by a period of 1 ½ years. The petitioner before the Supreme Court was the Punjab National Bank.

12. Submission of the counsel for the petitioner that this was an order which was passed ex-parte is not borne out from the record file. Even otherwise facts of each case are distinct and the order placed before this court does not decipher or depict the facts.

13. No interference is called for in the findings of the courts below. No question of law, much less any substantial question of law, has arisen. Appeal is dismissed.

14. File be consigned to record room.


INDERMEET KAUR, J.

JULY 13, 2010

15