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

% *Date of Judgment : 07.01.2011*

+ **RSA No.1/2011 & CM No.90-91/2011**

SHRI BHUPINDER SINGH Appellant
Through: Mr.Vinay Kumar Garg, Mr.Fazal
Ahmad, Mrs.Namrata Singh and
Mr.Nilansh Gaur, Advocates.

Versus

SHRI MAHAVIR SINGH & ORS Respondents
Through: Mr.Sanjay Jain Sr.Advocate with
Ms.Mamta Jha, Mr.Sumit Rajputm
Ms.Prabhsay Kaur, Ashok Sethi and
Mr.S.K.Jain, 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. (Oral)

CM No.92/2011 (for exemption)

Allowed subject to just exceptions.

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1. This appeal has been directed against the impugned judgment and decree dated 24.11.2010 which had endorsed the finding of the trial judge dated 01.3.2008 whereby the suit of the plaintiffs seeking possession of the suit property as also mesne profits was decreed.

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

i. Plaintiffs/respondents were the legal heirs of Munil Lal Singh. A family partition was entered into between the parties by virtue of which the plaintiff became the owner of the suit property i.e. land measuring 114 sq. yards in Khasra No.31, Abadi Khampur, Delhi.

ii. The predecessor of the plaintiff had executed a lease deed dated 31.3.1971 in favour of Harpal Singh. This was a registered document. The lease was for a period of 20 years. Pursuant to this lease deed a construction was raised on this vacant land by Harpal Singh.

iii. After the death of Harpal Singh the appellant/ defendant Bhupinder Singh continued to retain the possession of the suit property.

iv. Vide legal notice dated 14.12.1997, the defendant was asked to vacate the suit property and to pay damages.

Request was not acceded to. Present suit was filed.

v. Defendant contested the suit. It was stated that the registered document dated 31.3.1971 had created a licence in favour of Harpal Singh; by virtue of this document Harpal Singh had got executed a work of permanent character and incurred heavy expenses on the suit property and got constructed three rooms, kitchen, latrine, bathroom on the ground floor and one room on the first floor in the year 1971-72 itself with the consent and knowledge of the predecessor of the plaintiff. This licence was coupled with a grant; it was permanent and irrevocable. Suit was liable to be dismissed.

vi. Trial judge framed eight issues. Oral and documentary evidence was led by the respective parties. The plaintiff produced three witnesses in his support. The lease deed dated 31.3.1971 was proved as Ex.PW-1/2. Defendant in spite of opportunities did not produce any evidence. Defendant evidence was closed on 22.02.2007. The suit was decreed for possession and mesne profits vide impugned judgment and decree dated 01.3.2008.

vii. First appeal was filed against the judgment and decree of trial court; it was accompanied by an application under

Section 5 of Limitation Act. The application under Section 5 of Limitation Act was dismissed on 12.11.2008; the appeal also stood dismissed being barred by limitation.

viii. A revision was filed against the said order which was allowed by the High Court. Matter was remanded back to be heard afresh on merits. The judgment of the trial judge was reaffirmed in the impugned judgment dated 24.11.2010. The appeal was dismissed. The court held that the document dated 31.3.1971 was a lease which has been executed between the parties which had expired by efflux of time on 31.3.1991. The contention of the appellant that it was a licence was repelled. The court had re-appreciated the testimony of the witnesses of the plaintiff. It was observed that no suggestion has been given to any of the witnesses of the plaintiff i.e. either PW-1, PW-2 or PW-3 that the document in dispute (dated 31.3.1971) was a licence and not a lease; in fact, the cross-examination of the witnesses of the plaintiff had suggested that lease money was being collected; there being no reference to any licence.

ix. On the same date i.e. 24.11.2010 the application of the appellant under Section 41 Rule 27 of the Code of Civil

Procedure (hereinafter referred to as 'the Code') had also

been dismissed by speaking order. The relevant extract of this order reads herein as under:

“By this application, the appellant is seeking to place on record the documents which were not filed before the ld.trial court. Order 41 Rule 27 CPC makes a provisions for production of additional evidence before the appellate court when the appellant is able to establish that despite the exercise of due diligence such evidence was not within his or her knowledge or after the exercise of due diligence could not be able to produce at the time when the decree was passed. There is no such averment in this application though it is stated in the application under Order 41 Rule 27 CPC filed on 20.7.2009 that the attorney of the appellant did not pursue the interest of the appellant in the suit. No specific date or incident has been mentioned by the appellant when the appellant came to know about the alleged negligence of the attorney of the appellant before the ld. trial court. It is not stated when the appellant came to know that unattentiveness of the attorney caused prejudice to the case of the appellant. Trial court record is perused. On 20.12.2005, PE was closed in the presence of counsels for the parties. Thereafter, the case was adjourned for DE. On 31.8.2006, an application under Order 8 Rule 1 CPC was filed. Affidavit of one DW Sh.Kulwant Singh was also filed. The ld.trial court by order dated 21.2.2007 dismissed the application under Order 8 Rule 1 CPC. Thereafter, the case was adjourned for 07.7.2007 for DE. After that the case was adjourned for 27.10.2007 for DE and when none appeared on behalf of the defendant despite calls then ld. trial court at 2.00 p.m. closed DE. Moreoever, before the ld.trial court, counsel for the appellant was Sh. P.K.Malik, Advocate. The memorandum of appeal before this court has also filed by

the same counsel. In this memorandum of appeal, it is not a ground that due to inaction or negligence of the attorney, the appellant could not examine the witness. An application earlier under Order 41 Rule 27 CPC was moved by Sh.P.K.Malik wherein it was not the ground that due to inaction or unattentiveness of the attorney of the appellant, the appellant could not lead evidence. Thereafter, another application on 19.3.2009 was moved by the appellant wherein ground for inaction on behalf of the attorney has been stated. Thus, the appellant for the same relief had moved applications with different grounds. Thereafter, the application dated 19.3.2009 was dismissed as withdrawn. On 20.7.2009, another application under Order 41 Rule 27 CPC was moved. It was observed by this court on 20.10.2009 that in application dated 19.3.2009, nothing was disclosed about the previous application. Counsel for the appellant sought time to convince this court that during pendency of application under the same provision of law, another application could be moved. However, for the same relief and under the same provisions of law, different applications have been filed mentioning different grounds. Thus, it appears that the appellant has not applied due diligence in this case and has only come before this court to delay the disposal of the case. Even otherwise, during the pendency of the case before the ld. trial court, it was not the case of the appellant that the appellant had taken care of proceedings of each and every date from the attorney of the appellant. Even otherwise if it is assumed that the attorney of the appellant was not taking care of the case then also memorandum of appeal was filed by the same counsel before this court. Earlier application under order 41 Rule 27 CPC was also moved by the same counsel. Thus, till the stage of filing of memorandum of appeal and the application, the appellant had no grievance against the

said attorney. Thus, it appears that the appellant has made the ground of the attorney as an afterthought and only with a view to delay the disposal of this case. Therefore, the appellant has made malafide submissions before this court and the submission made by the appellant before this court do not inspire confidence. Moreover, an application under Order 41 Rule 27 CPC has already been dismissed as withdrawn moved on 19.3.2009. I do not find any merit in the application.”

x. Record shows that in fact three applications under Order 41 Rule 27 of the Code had been filed; the first of which was dated 21.8.2008; the second was dated 19.3.2009. Both these applications were dismissed as withdrawn. The third application dated 27.2.2009 met the fate of dismissal. This was vide speaking order dated 24.11.2010 and reproduced hereinabove.

3. This is a second appeal. It is yet at its initial stage. On behalf of the appellant, it has been urged that the appellant had exercised all “due diligence”. But in spite of the exercise of the said “due diligence” he could not produce his evidence in defence before the trial judge. Contention is that the appellant/defendant was a resident of Canada. He had given a power of attorney to his friend Kulwant Singh who had appeared in Court but thereafter because of strained relations between the parties he did not choose to contest the case. A fresh power of attorney in

favour of the daughter of the appellant/defendant was executed on 21.8.2008 and on the same day she had moved an application under Order 41 Rule 27 of the Code seeking permission to file additional evidence. Bonafide and due diligence on the part of the appellant are made out. Appellant had suffered because of the negligence and indifference of his friend Kulwant Singh over whom he had complete trust but this trust was betrayed by him. This is a fit case where permission should have been granted to adduce additional evidence. It is pointed out that an application of similar nature is pending before this Court also. Reliance has been placed upon a judgment reported in 2010 VI Akhtari Khatoon (since deceased) (Mst.) Vs. Smt. Rajeshwari Devi to support his submission that the provisions of 41 Rule 27 of the Code are attracted and the additional evidence can be led even at this stage. On merits, it is contended that the document in question i.e. the document dated 31.3.1971 had to be read not from its nomenclature but from the contents of the document; attention has been drawn to para 5 of the said document. It is pointed out that what was intended between the parties was the creation of a licence and not a lease. Admittedly, after the execution of this document, the defendant had created a super structure of permanent character on the vacant land. In terms of

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Section 60 of the Indian Easement Act, the licence was an irrevocable licence and the defendant could not have been evicted from the suit property. Counsel for the appellant has placed reliance upon a judgment of the Apex court reported in (1987) 2 SCC 555 Ram Sarup Gupta Vs. Bishun Narain Inter Collected and Ors. as also placed upon AIR 1929 All.494 Mohammad Sher Khan Vs. Amjad Husain to substantiate these submissions.

4. Arguments have been countered.

5. Reliance has been placed upon a judgment of the Supreme Court reported in 2006 (1)ALD 106(SC) C. Albert Morris Vs. K.Chandrasekaran and Ors.

6. Record shows that the appellant/defendant was pursuing the said proceedings through power of attorney holder Kulwant Singh. Kulwant Singh has filed his affidavit by way of evidence but thereafter he had chosen not to appear before the Court below; this was in spite of several opportunities having been granted to him. On 20.12.2005, the plaintiff evidence was closed and the matter was adjourned for defence evidence. On 07.7.2007 the matter was again adjourned for defendant evidence for 27.10.2007 when in spite of calls the defendant did not appear, at 2.00 P.M.; defendant evidence stood closed. Counsel

appearing for the defendant was Mr.P.K.Malik. He was same
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counsel who had filed the first appeal before the first appellate Court. It was not contended in the grounds of the appeal in the first appellate court that because of the negligence or inaction of the attorney holder evidence could not be led in defence. The record shows that in fact three applications under Order 41 Rule 27 of the Code had been filed. The first of which is dated 21.8.2008. The second is dated 19.3.2009. Both the said applications had been withdrawn as they were lacking in material particulars. Contention of the appellant that he had exercised "due diligence" is not inspiring. The suit was decreed on 01.3.2008. Even presuming for the sake of argument that the appellant became aware of the decree only on 01.3.2008; his contention is that he has given a fresh power of attorney in favour of his daughter on 21.8.2008 which is after five months. Perusal of this power of attorney in favour of his daughter shows that this power of attorney is in fact dated 01.7.2008 and not 21.8.2008. There is no explanation for having filed application under Order 41 Rule 27 of the Code on 21.8.2008 as the Power of Attorney was admittedly executed in favour of his daughter on 01.7.2008 itself. These lapses in this intervening period have not been explained. The fresh power of attorney dated 01.7.2008 in favour of the daughter of the appellant also does not state that the earlier

power of attorney in favour of Kulwant Singh (his friend) has been revoked as has now been vehemently urged orally before this Court. Contention of the appellant that Kulwant Singh had malafidely not deposed in the trial court because of strained relations for which reason he had withdrawn the earlier power of attorney is not borne out from the record.

7. There was also no evidence before the trial judge to establish the locus of the plaintiff. The contention of the appellant is that he is deriving his title from Harpal Singh and Har Pal Singh had executed a will in his favour allowing him to retain the suit property. This will has not seen the light of the day.

8. The first appellate Court had rightly rejected the application of the appellant under Order 41 Rule 27 of the Code. The successive applications filed by the appellant were deliberate attempts on his part to delay the proceedings as far as possible. The appellant is sitting in the suit property which had admittedly not been leased out to him. Document was in favour of Har Pal Singh. How he is deriving his title or right from Har Pal Singh is not made out or established. Appellant was clearly an unauthorized occupant.

9. This is a second appellate Court and unless the findings of the two fact finding Courts are perverse this court is not inclined

to re-examine a document as to whether this is a lease or licence. The document has been perused. The nomenclature describes it as a lease deed. Be that at it may, it is not always the nomenclature which is binding; the contents of the document have to be seen to appreciate the intention of the parties. Whether it is a lease or licence has to be construed from its essential features. Does it create an interest in the property or is it a permissive user which has been granted to the second party; in this context the trial court after examining the law in the case reported in AIR 1959 SC 1262 Associated Hotels of India Vs. R.N.Kapur had inter alia in this context observed as follows:

“If the substance of document Ext.PW-1/2 is given its true construction it emerge out that the intention of parties was to create a lease only and not licence. The exclusive possession has been given to Sh.Harpal. Not only this, he was permitted to raise certain construction. The terms used in the document should be given their plain meaning until contrary is proved.

10. This finding of the trial judge was reaffirmed by the appellate court. Findings in the impugned judgment qua this observation are inter alia extracted as follows:

“During the course of arguments before this court, the appellant’s main contention is that there was no relationship of lessor or lessee but in fact it was the relationship of licensor and licensee. Cross-examination of PW1 and PW2 is again perused. During cross-examination, no suggestion has been put by the defendant

either to PW1 or to PW2 that the relationship between the parties was not of lessor or lessee but it was of licensor and licensee. No suggestion was given by the defendant to the witnesses of the plaintiff that Ex.PW-12 was infact a licence not a lease deed. During cross examination, a suggestion was given by counsel for the defendant to PW1 regarding the rent used to be received from the defendant. A question was also put how much rent was collected. A suggestion was also given for the lease money used to be collectively after every two years and the said suggestion was denied. In the entire cross examination phrases were used 'lease deed' or 'lease money' but nowhere phrase either of licence or licence deed is used. Thus, in the entire cross examination of PW1 and PW2 the defence of the defendant was that Ex.PW-1/2 was a lease deed but not a licence. During cross examination of PW3, it was the defence of the defendant that the property was let out for commercial purpose but again there was no defence that it was a licence. In the written statement, the defence of the defendant is that the same was licence deed but during cross examination of any of the witnesses of the plaintiff, defendant did not challenge any of the witnesses of the plaintiff and put a case that Ex.PW-1/2 was infact a licence deed."

11. The judgments relied upon by the learned counsel for the appellant are distinct. In the case of Ram Sarup Gupta (supra) the question before the Supreme court was as to whether an oral agreement between the parties had created an irrevocable licence or not. The judgment of the Allahabad High Court in the case of Mohammad Sher Khan (supra) also proceeded on the assumption that a licence deed had been executed between the parties. The judgment of Akhtari Khatoon (supra) is also inapplicable as it is

not a case where the two Courts below have ignored the evidence; this is a case where no evidence has been led by the appellant/defendant.

12. There is no merit in the appeal. Suit for possession was rightly decreed in favour of the respondent/appellant. Appeal as also the pending applications are dismissed.

INDERMEET KAUR, J.

JANUARY 07, 2011
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