

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

+ **RFA No.613/2004 & RFA No.614/2004**

% **19th September, 2011**

1. RFA No.613/2004

SH.RAM AVTAR & ORS Appellants
Through: Mr. Samrat Nigam with
Mr. M.R.Shamshad &
Mr. A.S.Azhar, Advs.

VERSUS

SH.SANJEEV KUMAR Respondent
Through: Mr. Subhash Obray with
Mr. B.K.Singh, Advs.

&

2. RFA No.614/2004

SH. RAM AVTAR Appellant
Through: Mr. Samrat Nigam with
Mr. M.R.Shamshad &
Mr. A.S.Azhar, Advs.

VERSUS

SH.SANJEEV KUMAR Respondent
Through: Mr. Subhash Obray with
Mr. B.K.Singh, Advs.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. These two appeals have been filed challenging the impugned judgment of the Trial court dated 30.10.2004 whereby two suits were disposed of in favour of the respondent-Sh. Sanjeev Kumar. One suit was the suit filed by the respondent, Sh. Sanjeev Kumar against his father Sh. Ram Avtar and Sh. Rajeev Kumar and Sh. Manoj Kumar,-the latter two being his brothers i.e. sons of Sh. Ram Avtar. The second suit was suit filed by the father, Sh. Ram Avtar against Sh.Sanjeev Kumar. In the suit filed by Sh. Sanjeev Kumar, Sh. Sanjeev Kumar claimed that he was the exclusive owner of the business carried on in the name of M/s. Aggarwal Gift Emporium at the tenancy premises 19/1, Yusuf Sarai, New Delhi. This was a suit for an injunction to restrain the father and the other two sons, i.e. brothers of Sh.Sanjeev Kumar, from interfering with the business of the shop because it was a sole proprietorship concern of Sh. Sanjeev Kumar. Sh. Sanjeev Kumar denied that the business was an HUF business as was claimed by the father, Sh. Ram Avtar and the other two brothers. In the suit filed by Sh. Ram Avtar, the relief claimed was of possession and mesne profits of the tenanted shop premises bearing no.19/1, Yusuf Sarai, New Delhi which Sanjeev Kumar was claiming to be in his exclusive tenancy and possession. In this suit, Sh. Ram Avatar claimed that Sh. Sanjeev Kumar was not the exclusive tenant of the shop and that the tenancy was of the co-

parcenary/HUF of Sh. Ram Avatar and all his three sons, i.e. not only Sh.Sanjeev Kumar but also besides of Sh. Ram Avtar also of Sh. Rajeev Kumar and Sh. Manoj Kumar. At this stage, I must note that it is agreed to by counsel for the parties that though the rent receipts with respect to the shop are in the name of "Ram Avtar, Anand Kumar and M/s. Laxmi/Lachmi Narain & sons", no rights in the shop are being claimed by Sh. Anand Kumar and M/s. Laxmi/Lachmi Narain & sons, Anand Kumar and Laxmi Narain being the brothers of Sh.Ram Avtar. I am therefore in this judgment not pronouncing on the issue with respect to any rights of M/s. Laxmi/Lachmi Narain & sons and Sh.Anand Kumar in the suit shop, and am pronouncing on the inter-se rights of Sh. Ram Avtar and all his three sons qua the tenanted shop.

2. Before the Courts below, and before this Court, there were/are two main issues which were/have been urged and argued:

- i) Whether the business of M/s. Aggarwal Gift Emporium was the joint family business of the parties or the business was the sole proprietorship business of Sh. Sanjeev Kumar?
- ii) Whether the shop/tenancy premises 19/1, Yusuf Sarai, New Delhi is exclusively in the tenancy of Sh. Sanjeev Kumar or the tenancy is of the co-parcenary of the HUF of Sh. Ram Avtar?

3. RFA No. 613/2004 challenges the decision in the suit filed by Sh. Sanjeev Kumar against Sh. Ram Avtar and other two brothers Sh. Rajeev Kumar and Sh. Manoj Kumar, and as per the impugned judgment, this suit has been decreed in favour of Sh. Sanjeev Kumar holding that neither Sh. Ram Avtar, nor the other two brothers of Sh. Sanjeev Kumar namely Sh. Rajeev Kumar and Sh. Manoj Kumar, have any right, title and interest in the business. The Trial Court has principally relied upon the two letters dated 9.11.1998, Ex.P1 and Ex.P2, sent by Sh. Ram Avtar to the concerned Sales Tax Officer in which Sh. Sanjeev Kumar was shown as the sole proprietor of M/s Aggarwal Gift Emporium. No documents whatsoever had been filed by Sh. Ram Avtar and the two sons, Sh. Rajeev Kumar and Sh. Manoj Kumar before the Court below to show that the business of M/s. Aggarwal Gift Emporium was an HUF business. Accordingly, the Trial Court has held, and in my opinion rightly, that the business of M/s. Aggarwal Gift Emporium was the sole proprietorship concern of Sh. Sanjeev Kumar. Nothing of any substance was argued before me so as to dislodge this finding of the Trial Court, and in fact, the main stress and argument on behalf of Sh. Ram Avtar and the two sons, Sh. Rajeev Kumar and Sh. Manoj Kumar was basically only to that part of the impugned judgment which dismissed the suit of Sh. Ram Avtar claiming the possession and mesne profits with respect to the suit shop being the tenancy premises at 19/1, Yusuf Sarai, New Delhi.

4. On the aspect of whether the tenancy is exclusively of Sh.Sanjeev Kumar or is of his father-Sh. Ram Avtar and also of all his three sons including Sh.Sanjeev Kumar i.e of the coparceners of the HUF of Ram Avtar, I may at the outset note that actually in the lease deed of the tenancy premises, Ex.DW5/1, proved in the Trial Court, only Sh. Ram Avtar by his individual name was shown as a tenant along with Sh. Anand Kumar and M/s. Laxmi/Lachmi Narain & sons, however, as per the pleadings there is an admission of Sh. Ram Avtar that the shop premises are in fact of the joint family/co-parcenary of Sh. Ram Avtar and his three sons, therefore, it could not be seriously disputed by Ram Avtar before me that at least inter-se the parties, besides Sh. Ram Avtar, all his three sons namely Sh. Rajeev Kumar, Sh. Manoj Kumar and Sh. Sanjeev Kumar will have rights in a suit shop as co-tenants, inter-se themselves at least. What was however very vehemently argued on behalf of Sh. Ram Avtar and the other two sons was that being only a co-tenant Sh. Sanjeev Kumar had no right to oust the other co-tenants namely Sh. Ram Avtar, Sh. Rajeev Kumar and Sh. Manoj Kumar from the tenancy premises and these persons also are equally entitled to joint possession of the shop and which right cannot be denied to them.

5. Before the Trial Court, the rent receipts with respect to the suit shop have been exhibited as Ex.P3 to Ex.P6, and which rent receipts show that they have been issued by the landlord in the name

of the tenant as per the lease deed, Ex. DW5/1, i.e. in the joint names of Sh. Ram Avtar, Sh. Anand Kumar and M/s. Laxmi/Lachmi Narain & sons. I have already noted above that the other co-tenants as per the rent receipts i.e brothers of Ram Avtar namely Sh. Anand Kumar and M/s. Laxmi/Lachmi Narain & sons have given up their rights in the suit shop/tenancy premises and I am therefore now concerned only with the inter-se rights of Sh. Ram Avtar and his three sons in the suit shop. I am again repeating this because without the consent of the landlord, there cannot be any alteration with respect to the constitution of the tenancy, i.e. the surrender of the tenancy by some of the co-tenants can only come into effect if there is a consent to the same by the landlord, inasmuch as tenancy is a contractual matter/a bilateral matter. After all a landlord may feel that he wants all the three persons as co-tenants so as to recover rents jointly or severally from all the co-tenants under the lease deed, Ex.DW5/1, and therefore, unless there is a consent of the landlord, there cannot be alteration in the constitution of the tenancy. I also note that an issue was framed by the Trial Court related to this aspect in the suit filed by the father, Sh. Ram Avtar, and while deciding this issue no.3, the Trial Court has held that the suit is bad for non joinder of the landlord.

6. In view of the admitted fact that there was a lease deed, Ex.DW5/1 in favour of "Sh. Ram Avtar, Sh. Anand Kumar M/s.

Laxmi/Lachmi Narain & sons”, in law only these three brothers would be co-tenants of the suit premises. Even the rent receipts are still continuing to be issued in this very name of “Sh. Ram Avtar, Sh. Anand Kumar and M/s. Laxmi/Lachmi Narain & sons” and therefore it is not possible to accept the argument raised on behalf of Sh. Sanjeev Kumar that he became an exclusive tenant in the shop on account of the surrender in his favour of the tenancy by his father Sh. Ram Avtar and Sanjeev Kumar’s two brothers Sh. Rajeev Kumar and Sh. Manoj Kumar. Also, the stand of Sh. Sanjeev Kumar that there was a surrender of tenancy by Sh. Ram Avtar and other two brothers cannot be accepted because except self-serving statements, there is no documentary evidence with respect to Sh. Ram Avtar or other two brothers, surrendering the tenancy rights in favour of Sh. Sanjeev Kumar.

At this stage, one clarification is required to be noted. In the tenancy receipt only the individual name of Sh. Ram Avtar is mentioned (alongwith Anand Kumar and Laxmi/Lachmi Narain & sons) and therefore ordinarily except with the consent of the landlord, the sons of Sh. Ram Avtar cannot become co-tenants in these premises, and ordinarily, the suit of Sh. Ram Avtar for possession was liable to be decreed for the whole premises – Sh. Ram Avtar being the only person entitled to the rights because no rights have been asserted by Sh. Anand Kumar or Laxmi/Lachmi Narain &

sons, however, since I have already stated above that it was the own case of Sh.Ram Avtar that he was a co-tenant in the shop not in his individual capacity but on behalf of the co-parcenary of himself and all his three sons, therefore only because of such stand there was an entitlement for enjoyment of tenancy rights not only of Sh. Ram Avtar but of all his three sons namely Sh. Sanjeev Kumar, Sh.Rajeev Kumar and Sh. Manoj Kumar. Once again, for the sake of caution and at the risk of repetition, I am clarifying that issues dealt with in the present appeals and the suits only would bind the parties inter se limited to the issue of the enjoyment of possession of the suit shop, and the same would not bind the landlord of the premises, as the landlord of the premises is not a party to these proceedings. Since except bald and vague assertions, nothing has been proved to show that Sh.Ram Avtar and his other two sons, Sh. Rajeev Kumar and Sh. Manoj Kumar ever surrendered their tenancy rights in favour of Sh. Sanjeev Kumar, I hold that the tenancy of the suit shop at 19/1, Yusuf Sarai, New Delhi will be as between these persons a co-tenancy of Sh.Ram Avtar with his three sons in equal shares to the extent of 1/4th each. I agree with the findings and conclusions of the Trial Court which has disbelieved the stand of Sh. Sanjeev Kumar who claimed that there were family settlements for him to be the exclusive tenant inasmuch as the alleged family settlements are admittedly neither in writing and nor there is any mention of the same in any private record or in

any public record. Therefore, on such weak evidence, I cannot extinguish rights of Sh. Ram Avtar and the other two sons in the suit shop. In fact, as already stated above, possibly if the landlord wants, only Sh. Ram Avtar would be a tenant in his individual right and Sh. Sanjeev Kumar may thus have absolutely no right in the tenancy whatsoever as admittedly the tenancy right from commencement and till date continues to be in the name of Sh. Ram Avtar in his individual capacity alongwith Sh. Anand Kumar and M/s. Laxmi/Lachmi Narain & sons.

7. Learned counsel appearing for Sh.Sanjeev Kumar sought to argue that the tenancy should be taken in the exclusive name of Sh. Sanjeev Kumar on the principles of estoppel, implied surrender and equity. All these three arguments of estoppel, implied surrender and equity are in effect the same argument that the tenancy is the exclusive tenancy of Sh. Sanjeev Kumar by virtue of Sh. Sanjeev Kumar being in possession of the shop and was also paying the rent. This argument I refuse to accept inasmuch because not only the rent receipts till date continue to be issued in the name of "Ram Avtar, Andad Kumar and Laxmi/Lachmi Narain & Sons", but also because I have already held in fact only Sh. Ram Avatar individually is really a tenant in the premises. If there had to be an exclusive tenancy in the name of Sh. Sanjeev Kumar on account of implied surrender by Sh. Ram Avtar and the other two brothers, it was necessary that there

ought to have been consent of the landlord to this arrangement by issuing of rent receipts in the individual name of Sh. Sanjeev Kumar considering that there cannot be alteration in the constitution of the tenancy except with the consent of the landlords as tenancy relation is a contractual matter, and since creation of tenancy is a contractual aspect, therefore equally any alteration/novation of the tenancy constitution has also to be only by a bilateral/contractual act involving the consent of the landlord.

8. I therefore hold that instead of Sh. Ram Avtar being entitled to the relief of exclusive possession of the tenancy premises, besides Sh. Ram Avtar his two sons i.e. the two other brothers of Sh. Sanjeev Kumar namely Sh. Rajeev Kumar and Sh. Manoj Kumar will also be entitled to joint possession in the suit shop 19/1, Yusuf Sarai, New Delhi. I hold that Sh. Ram Avtar and all his three sons are entitled to joint possession of the suit shop and Sh. Sanjeev Kumar is not entitled to exclusive possession of the suit shop. I therefore grant a decree in favour of Sh. Ram Avtar, Sh. Rajeev Kumar and Sh. Manoj Kumar for joint possession of the suit shop against Sh. Sanjeev Kumar.

9. Now on the issue of mesne profits, Sh. Sanjeev Kumar has wrongly prevented his father, Sh. Ram Avtar and his two brothers, Sh. Rajeev Kumar and Sh. Manoj Kumar from enjoying the possession of and earning from the suit premises by effectively

ousting them from user and enjoyment of the suit premises. Before the Trial Court and before this Court also, Sh. Sanjeev Kumar has pendente lite continued to pay charges at Rs.7,500/- per month to Sh. Ram Avatar. This amount of Rs.7,500/- was fixed to be payable from the month of filing of the suit in the year 2003. Rents regularly rise in metropolitan cities like Delhi and it is therefore necessary that there should be a reasonable percentage of increase every year with respect to this rate of mesne profits of Rs.7,500/- per month. Accordingly, I direct that Sh.Sanjeev Kumar will be liable to pay compounded annual increase of 15% every year after the first year 2003 when the amount of Rs.7,500/- per month started to be paid. Since the amount of Rs.7,500/- per month has already been regularly paid by Sh. Sanjeev Kumar, money decree is passed only for this difference being the enhancement of 15% compounded every year which is to be paid by Sh. Sanjeev Kumar. Counsel for Sh. Ram Avtar, Sh. Rajeev Kumar and Sh. Manoj Kumar has made a statement that the payment can be continued to be made in the name of Sh. Ram Avatar and inter se it will be later decided by Sh. Ram Avatar and other two sons namely Sh. Rajeev Kumar and Sh. Manoj Kumar as to the adjustment/distribution of this amount if it is so required. I direct that this amount of difference of 15% increase each year be paid within a period of 4 weeks from today considering that the father Sh. Ram Avtar and two brothers, Sh. Rajeev Kumar and Sh.

Manoj Kumar have been from a very long time ousted from the premises, and if this difference of the amount is not paid within 4 weeks, then the same will carry interest at 9% per annum simple from the end of each year for which the arrears at the difference of the increased rate become payable and till the payment of such amount.

10. The aspect of payment of mesne profits has also an aspect with respect to arrears of mesne profits for three years prior to the date of filing of the suit in 2003. The suit was filed on 24.11.2003. The father, Sh. Ram Avtar and the two brothers, Sh. Rajeev Kumar and Sh. Manoj Kumar will also be entitled to a decree for arrears of mesne profits at Rs.7,500/- per month for the period of 3 years prior to the filing of the suit and which is the maximum period permissible as per Limitation Act, 1963. A money decree is also accordingly passed for a sum of Rs.7,500/- per month for a period of 3 years prior to the filing of the suit. I however, clarify that no interest will be payable on these arrears of mesne profits of Rs.7,500/- per month for the period of 3 years prior to the filing of the suit till the date of filing of the suit provided this amount of arrears for the period of 3 years prior to the filing of the suit are paid within a period of 4 weeks from today failing which the same will also carry interest at 9% per annum simple pendente lite and the future till payment.

11. With the aforesaid observations, the appeals are disposed of by dismissing RFA No. 613/2004 and allowing RFA No. 614/2004 to the extent as stated above qua joint-possession and mesne profits, leaving parties to bear their own costs. Decree sheet be prepared. The decree sheet qua mesne profits decree will be prepared on Sh. Ram Avtar paying court fees payable with respect to the money decree passed. Trial court record be sent back.

SEPTEMBER 19, 2011
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VALMIKI J. MEHTA, J.