

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

% *Judgment Reserved on: 19.01.2011*
Judgment Delivered on: 21.01.2011

+ **RSA No.2/2004 & CM No.164/2004**

SMT DEVI BAI
(SINCE DECEASED NOW REPRESENTED BY HER LEGAL HEIRS)

.....Appellant
Through: Mr.Ravi Gupta Sr. Advocate with
Mr.Swastik Singh, Advocate.

Versus

SMT. KAILASH DEVI
Through: Mr.Pradep Dewan, Ms.Anupam
Dhingra and Mr.Rajiv Samaiyar,
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 10.11.2003 which had reversed the finding of the trial judge dated 01.4.2003. Vide the judgment and decree dated 01.4.2003, the suit of the plaintiff/appellant Devi Bai seeking mandatory injunction that the defendant be directed to handover the suit property to him along with recovery of ₹1360/- had been decreed in her favour. The impugned judgment had reversed this finding. The suit of the plaintiff stood dismissed.

2. The predecessor-in-interest of the plaintiff i.e. her husband Prithvi Raj Manocha, in the year 1966 had permitted Gobind Ram (husband of the defendant Kailash Devi) to use and occupy a piece

of land with a temporary tin shed on a licence basis. Prithvi Raj Manocha expired in 1976. Gobind Ram became a licensee under the plaintiff Devi Bai. Gobind Ram also expired; his widow Kailash Devi continued to use and occupy the said land. She continued making payment for use and occupation of the said premises to the plaintiff @ Rs.40/- per month up to September 1988. Thereafter there was a default. The licence of the defendant was terminated vide legal notice dated 15.9.1989. Defendant did not vacate the suit property. Suit was filed.

3. Defendant contested the suit. Contention was that the defendant Kailash Devi is a lawful tenant for the last 20-25 years and had been paying monthly rent of Rs.40/- per month; she had not defaulted in payment of rent; the enhanced rent for the month of September 1989 and October 1989 had been deposited in the court of Additional Rent Controller, Delhi. It was admitted that the tenanted premises comprised of one room/shop covered with asbestos sheets and a front verandah. The jurisdiction of the Civil Courts is barred as there existed a relationship of landlord-tenant between the parties.

4. Issues were framed. Thereafter oral and documentary evidence was led by the respective parties. Two witnesses had been examined on behalf of the plaintiff. Seven witnesses were examined by the defendant. The trial judge found the version of the plaintiff more credible. The documentary evidence adduced by the defendant i.e. Ex.DW-2/1 and Ex. DW-1/2 which were the inspection reports of house tax department where the name of the Gobind Ram (husband of the defendant) had been mentioned as a tenant were held not by themselves sufficient to establish the

tenancy of the defendant. Versions of DW-6 and DW-7 were discarded on the ground that it was a hearsay evidence. Trial judge was of the view that the intention of the parties was to create a licence. The licence had been validly terminated vide the legal notice Ex.PW-1/3. Suit of the plaintiff was accordingly decreed.

5. The impugned judgment while reversing this finding was of the view that the testimony of DW-6 and DW-7 could not be regarded as hearsay. The plaintiff had failed to adduce any documentary evidence. Per contra the defendant had produced four documents in his support which were Ex.DW-2/1 to Ex.DW-2/2 (noted supra); Ex.DW-1/1 was the certified copy of the Shops and Establishment Department. Ex.DW-7/B was the ration card produced by the defendant substantiating his possession in the suit property. The appellate Court was of the view that the long period of occupation by the defendant in the suit premises without any demur or protest by the plaintiff was an additional factor depicting the intention of the parties which was to create a lease. The relationship between the parties was that of landlord-tenant; jurisdiction of the Civil Court was barred under Section 50 of the Delhi Control Act (hereinafter referred to as 'the DRCA'); suit was dismissed.

6. This is a second appeal. It was admitted and the following substantial questions of law were formulated on 27.7.2009:

"1. Whether Notice dated 15th September, 1989 sent through Under Certificate of Posting is deemed to be valid service of notice on the respondent?

2. Whether respondent is a licensee or a lessee in the suit property?"

7. On behalf of the appellant, it has been urged that the judgment of the trial court is perverse; the trial judge had rightly rejected the version of DW-6 and DW-7 which was only hearsay. The documentary evidence adduced by the defendant could not be relied upon to decipher the intent of the parties. Ex.DW-2/1 and Ex.DW-2/2 were merely cyclostyled formats of the House Tax Department. Entire property owned by the plaintiff is about 300 sq. yards of which only 12 to 15 sq. yards are in possession of the defendant; this is also a deciding factor to determine the intention of the parties; intent was not to create a lease; it was only a permissive user granted to the defendant. The finding in the impugned judgment that merely because the legal notice had been sent by UPC is not sufficient to hold that it would be suspect document; such a finding is an illegality. For this proposition reliance has been placed upon RCR 1974 578 Kishan Chand Vs. Satya Paul (Delhi); another judgment of the this Court reported in 35 (1998) DLT 279 Prem Chander Jain Vs. Jagat Parkash Gupta. It is pointed out that even for a communication sent by UPC, a presumption of service can be raised.

8. Arguments have been countered. It is pointed out that the intent of the parties was clear from the fact that the predecessor-in-interest of the plaintiff had initially allowed Gobind Ram, the husband of the defendant, to use and occupy the suit property. It is pointed out that this is clear from the averments made in the plaint. Even after the death of the predecessor of the plaintiff as also the husband of the defendant, the relationship between the parties i.e. between Devi Bai and Kailash Devi continued; rent was also enhanced. It is submitted that this by itself reflects upon the

intent of the parties which was to give exclusive right of user to the defendant; it was a landlord-tenant relationship between the parties. Learned counsel for the respondent has placed reliance upon a judgment of the Apex Court reported in AIR 1959 1261 Associated Hotels of India Vs. R.N.Kapoor ; a subsequent judgment dated reported in (1989) 3 SCC 574 Capt. B.V. D,Souza Vs. Antonio Fausto Fernades ; as also on another judgment reported in (2006)6 SCC 394 Anthony Vs. K.C. Ittoop & Sons to bring out a distinction between a lease and a licence. It is pointed out that applying the ratio of the aforementioned judgments it can clearly be concluded that the parties had in fact intended to create a lease. On the question of notice, it is submitted that the defendant all along had pleaded that the notice Ex.PW-1/3 terminating his tenancy had not been served upon him. Reliance has been placed upon (1994) 4 SCC 445 Shiv Kumar and Ors. Vs. State of Haryana & Ors. to support his submission that mere a bald assertion by the plaintiff that he had served the notice is not by itself sufficient.

9. Record has been perused. The substantial questions of law as aforementioned have also been noted.

10. Question no.2 shall be answered first; whether it was a lease or a licence? The Apex Court has time and again reiterated these principles which have to be borne in mind to answer this issue. All the aforementioned judgments have proceeded on the assumption that there was a document in writing between the parties. In the instant case there is no such document. There is no such averment in the plaint that the parties had created any document by virtue of which the defendant had been inducted into present premises. In the written statement, contention of the defendant was that he is a

tenant. He had also not stated that there was any document in writing between the parties to create this tenancy. In his cross-examination, PW-10 had in fact admitted that there was a written licence deed between his father Prithvi Raj Manocha and Gobind Ram although it was not registered; he does not know whether it was notarized or not. This document has not seen the light of the day. The positive assertion of the plaintiff that there was a written licence deed between the parties and he not having produced it, this Court is constrained to draw an adverse inference against him; the adverse inference being based on the presumption that if this document would have been produced it would have gone against the interest of the plaintiff.

11. PW-1 had deposed that in the year 1966 his father Prithvi Raj Manocha had allowed Gobind Ram to occupy this piece of land on a licence basis. He has further admitted that after the death of Gobind Ram his wife Kailash Devi continued to stay there; she had opened a tea stall in the suit premises; she was also residing therein. He had further admitted that Prem Prakash Bhaskar was another tenant under his father and he was running a coal depot there. It has also been admitted that the verandah in front of the room in occupation of the defendant, did not have any roof earlier but later on the defendant had covered it with tin sheets. It is also not in dispute that after the death of Prithvi Raj Manocha on 28.6.1976, the plaintiff Devi Bai continued to accept occupation charges from Gobind Ram @ ₹40/- per month. After the death of Gobind Ram the same arrangement continued with his widow Kailash Devi. It is also not disputed and in fact it has been elicited in the cross-examination of PW-1 that initially the rate of

occupation charges was ₹20/- and thereafter it was enhanced to ₹40/- and the same continued to be accepted by plaintiff Devi Bai. The relationship between the parties whether it to be attributed as a licensor-licensee relationship or as a landlord-tenant relationship had continued right from 1966 up to the time when the legal notice was sent by the plaintiff to the defendant which on 15.6.1989 i.e. for an intervening period of more than 23 years.

12. Ex.DW-1/1 was the certificate of Shops and Establishment Department. Ex.DW-7/B is the copy of the ration card; both these documents establish the possession of the defendant which otherwise is not contentious. Ex.DW-2/1 and Ex.DW-2/2 were the documents of the House Tax Department which are dated 10.9.1970 and 20.8.1984. There is a gap of 14 years between the two documents. Ex. DW-2/1 records the name of Gobind Ram as a tenant; the next document i.e. Ex.DW-2/2 has recorded the name of Gobind Ram as an old tenant. This was as per the survey report of the MCD. These documents by themselves are not sufficient to deduce the intent of the parties i.e. whether the parties had intended to create a landlord-tenant relationship or that of a licensor-licensee is an undisputed proposition. Nevertheless these documents cannot be overlooked. DW-5 was a neighbour living in the vicinity for the last 25 years. DW-6 was also living in the vicinity since the year 1956. Both these witnesses have deposed that the suit property had been rented out to Gobind Ram @ ₹20/- per month; thereafter was enhanced to ₹40/- per month. No suggestion has been given to DW-5 that he was deposing falsely at the behest of the defendant. DW-6 has admitted that he had no family relation with Gobind Ram.

13. The oral and documentary evidence led in the Courts below had been rightly adverted to in the impugned judgment to return a finding that this evidence adduced between the parties had in fact intended to create the relationship of a landlord-tenant. PW-1 had admitted that there was a licence executed between his father and Gobind Ram; he did not produce it for the reasons best known to him. Gobind Ram had first been inducted into the premises in the year 1966 by Prithvi Raj Manocha. After the death of Prithvi Raj Manocha his wife Devi Bai continued her relationship with Gobind Ram. She continued to accept the user and occupation charges being paid by Gobind Ram. After the death of Gobind Ram, Kailash Devi stepped into the shoes of Gobind Ram. The arrangement between Devi Bai and Kailash Devi continued. In fact this arrangement had lasted for more than 23 years when the legal notice was issued by the plaintiff. The defendant had initially been allowed to use a room with a front verandah. The verandah thereafter was covered with tin sheets; no demur or protest was raised even then. The tea stall of the defendant was continuing even during the lifetime of Gobind Ram. The premises were being used for running a tea stall as also for the residence of the defendant. A part portion of the property had also been tenanted out to another tenant namely Prem Prakash Bhasker. There was no reason as to why the DW-5 and DW-6 who were neighbours living in the vicinity of both the plaintiff and the defendant would have deposed falsely. No ulterior motive was also attributed to them. Documents i.e. Ex.DW-2/1 and Ex.DW-2/2 were additional features depicting the intent of the parties. The long possession of the defendant without any interference, demur or protest has been

established. Ex.DW-1/1 evidenced that even in April 1970 a tea shop was being run by the defendant. PW-1 had admitted that the open verandah in front of the room in occupation of the defendant was subsequently covered by tin sheets; no protest was lodged. All these factors clearly establish that the parties had intended to create a relationship of landlord and tenant between themselves.

14. The jurisdiction of the Civil Court is thus barred under Section 50 of the DRCA. Substantial question no.2 is answered accordingly.

15. This Court shall now advert to the substantial question no.1. The substantial question no.1 as framed is not required to be answered in view of the finding returned on substantial question no.2. Whether the notice Ex.PW-1/4 had or had not been served upon the defendant is of little consequence in view of the finding that the parties being governed by a relationship of landlord-tenant relationship; the Civil Court has no jurisdiction to entertain the suit. This has been rightly held in the impugned judgment. Such a finding calls for no interference.

16. Appeal is without merit. The appeal as also the pending application is dismissed.

INDERMEET KAUR, J.

JANUARY 21, 2011
nandan