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IN THE HIGH COURT OF DELHI AT NEW DELHI

+ RFA No.82/2008

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Date of decision: 5th July, 2011

DR. MRS. V.V. GUJRAL & ORS. Appellants
Through : Mr. Akshay Makhija and
Mr. Vikas Bhadauria, Advs.

Versus

PUSHPA SHARMA & ANR. Respondents
Through : None.

**CORAM :-
THE HON'BLE MR. JUSTICE J.R. MIDHA**

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

JUDGMENT (ORAL)

1. The appellants have challenged the impugned judgment whereby their suit for recovery of possession and mesne profits has been dismissed by the learned Additional District Judge.

2. The appellants are the owners/landlords of the shop bearing No.P-4, Connaught Place, New Delhi which was let out to respondent No.1 more than 30 years ago at a monthly rent of ₹56/-. According to the appellants, the respondents have sub-let the suit property at a monthly rent of ₹40,000/- due to

which the suit property has gone out of the purview of Delhi Rent Control Act. The appellants terminated the lease vide notice dated 22nd September, 2003 and thereafter instituted the suit for possession and mesne profits.

3. The learned Additional District Judge dismissed the suit on the ground that the appellants did not appear in the witness box and their attorney who appeared as PW-1 was not a competent witness. The learned Trial Court relied upon the judgment of the Hon'ble Supreme Court in the case of **Janki Vashdevo Bhojwani & Anr. v. Indusind Bank Ltd., 2005 (2) SCC 217**. The learned Trial Court further observed that PW-1 failed to prove the sub-tenancy of the suit property at ₹40,000/- per month. It was further held that the rent of the suit property was ₹56/- per month and, therefore, the tenant was protected by Delhi Rent Control Act.

4. The learned counsel for the appellants has made following submissions at the time of hearing of this appeal:-

- (i) PW-1 is a competent witness in terms of the principles laid down by the Hon'ble Supreme Court in the cases of **Janki Vashdevo Bhojwani** (supra) and **Man Kaur v. Hartar Singh Sangha, (2010) 10 SCC 512**.

- (ii) PW-1 has sufficiently proved the case of the

plaintiffs especially the sub-tenancy of the suit property at the rate of ₹40,000/- per month. PW-1 proved the agreement Ex.PW1/3 executed by the respondents which was also admitted by DW-1 in cross-examination. In that view of the matter, the onus to prove that there was no sub-tenancy was on the respondents.

- (iii) The appellants refer to and rely upon **Atma Ram Properties v. Paul Properties, 2001 (91) DLT 438** and **P.S. Jain Co. Ltd. v. Atma Ram Properties, 1997 (65) DLT 308** which have not been considered by the learned Trial Court.

5. In the case of **Janki Vashdevo Bhojwani** (supra), the Hon'ble Supreme Court held as under:-

“13. Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to “act” on behalf of the principal. In our view the word “acts” employed in Order 3 Rules 1 and 2 CPC confines only to in respect of “acts” done by the power-of-attorney holder in exercise of power granted by the instrument. The term “acts” would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has rendered some “acts” in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which

only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.”

6. In the case of **Man Kaur** (Supra), the Hon’ble Supreme Court after considering the judgment of **Janki Vashdevo Bhojwani** (supra) and other relevant judgments summarized the principles as under:-

“12. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with

or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his 'bona fide' need and a purchaser seeking specific performance who has to show his 'readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona

fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

7. In the cases of **Atma Ram Properties** (supra) and **P.S. Jain** (Supra), this Court has held that the properties let out at less than ₹3,500/- per month, lose the protection of Delhi Rent Control if the tenant sub-lets the same at the amount exceeding ₹3,500/- per month.

8. The learned counsel for the appellant further submits that the landlord, in the first instance, has to show that some person other than the tenant is in occupation of the tenanted premises whereupon the onus to prove the status of the person in occupation shifts on to the tenant. The learned counsel for the appellant refers and relies upon the following judgments in this regard:-

(i) **Rajbir Kaur Vs. S. Chokosiri, AIR 1988 SC 1845**

"23. ...If exclusive possession is established, and the version of the respondent as to the particulars and the incidents of the transaction is found unacceptable in the particular facts and circumstances of the case, it may not be impermissible for the Court to draw an inference that the transaction was entered into with monetary consideration in mind. It is open to the respondent to rebut this. Such transactions of sub-letting in the guise of

licences are in their very nature, clandestine arrangements between the tenant and the sub-tenant and there can not be direct evidence got. It is not, unoften, a matter for legitimate inference. The burden of making good a case of sub-letting is, of course, on the appellants. The burden of establishing facts and contentions which support the party's case is on the party who takes the risk of non-persuasion. If at the conclusion of the trial, a party has failed to establish these to the appropriate standard, he will lose. Though the burden of proof as a matter of law remains constant throughout a trial, the evidential burden which rests initially upon a party bearing the legal burden, shifts according as the weight of the evidence adduced by the party during the trial. In the circumstances of the case, we think, that, appellants having been forced by the Courts-below to have established exclusive possession of the Ice-Cream Vendor of a part of the demised-premises and the explanation of the transaction offered by the respondent having been found by the Courts-below to be unsatisfactory and unacceptable, it was not impermissible for the Courts to draw an inference, having regard to the ordinary course of human conduct, that the transaction must have been entered into for monetary considerations. ...”

(ii) **Bharat Sales Ltd. Vs. Life Insurance Corporation of India, (1998) 3 SCC 1**

“4. Sub-tenancy or sub-letting comes into existence when the tenant gives up possession of the tenanted accommodation, wholly or in part, and puts another person in exclusive possession thereof. This arrangement comes about obviously under a mutual agreement of understanding between the tenant and the person to whom the possession is so delivered. In this process, the landlord is kept out of the scene. Rather, the scene is enacted behind the back of the

landlord, concealing the overacts and transferring possession clandestinely to a person who is an utter stranger to the landlord, in the sense that the landlord had not let out the premises to that person nor had he allowed or consented to his entering into possession over the demised property. It is the actual, physical and exclusive possession of that person, instead of the tenant, which ultimately reveals to the landlord that the tenant to whom the property was let out has put some other person into possession of that property. In such a situation, it would be difficult for the landlord to prove, by direct evidence, the contract or agreement or understanding between the tenant and the sub-tenant. It would also be difficult for the landlord to prove, by direct evidence, that the person to whom the property had been sub-let had paid monetary consideration to the tenant. Payment of rent, undoubtedly, is an essential element of lease or sub-lease. It may be paid in cash or in kind or may have been paid or promised to be paid. It may have been paid in lump sum in advance covering the period for which the premises is let out or sub-let or it may have been paid or promised to be paid periodically. Since payment of rent or monetary consideration may have been made secretly, the law does not require such payment to be proved by affirmative evidence and the court is permitted to draw its own inference upon the facts of the case proved at the trial, including the delivery of exclusive possession to infer that the premises were sub-let."

(iii) **Dudabhai Vs. Sulochanaben Gopaldas Kothari, AIR 1995 Guj. 68,**

"13. ... Once it is proved that in relation to a business premises, the tenant has walked out of the premises leaving the premises to another person, (may be, that another person may be his brother) and that another person

is in exclusive possession of the business premises, it would not be out of place to raise an inference that parting of possession by the tenant in favour of that another person must be for valid consideration and the burden would be upon the tenant or the sub-tenant, as the case may be, to prove that parting of possession -- both legal and physical -- by the tenant in favour of that other person was without any valid consideration.”

9. In the present case, the relationship between the parties is not disputed. The appellants have proved the agreement Ex.PW1/3 between the tenant and the alleged sub-tenant which is also admitted by DW-1. The notice of termination of tenancy Ex.PW1/4 is also admitted and replied to by the tenant vide reply Ex.PW1/19. The suit is based on Ex.PW1/3 between the tenant and the sub-tenant which has been placed on record by PW-1. The statement of PW-1 in this regard cannot be thrown out on the ground of his competency in view of the principles laid down by the Hon'ble Supreme Court in the case of **Man Kaur** (Supra). Since the tenant has admitted Ex.PW1/3 under which the tenant received ₹40,000/- per month from the alleged sub-tenant, the onus to prove the status of the alleged sub-tenant was entirely on the tenant in view of the principles laid down in the judgments referred to hereinabove.

10. The learned Trial Court has utterly failed to apply the well settled principles of law to the facts of the present case and,

therefore, the impugned judgment is liable to be set aside.

11. The learned counsel for the appellants submit that during the pendency of the appeal, the respondents took back the possession from the alleged sub-tenant and, thereafter again let out the same to Gandharv Saini at a monthly rent of ₹26,500/-. It is submitted that the respondents thereafter forcibly evicted Gandharv Saini, who filed the suit for possession against the respondents which was decreed by the learned Additional District Judge vide judgment dated 23rd January, 2006. The appellants filed CM No.2667/2008 under Order 41 Rule 27 of the Code of Civil Procedure to place on record the certified copy of the judgment and decree dated 23rd January, 2006 passed in Suit No.307/2004. The aforesaid application was allowed by this Court vide order dated 16th August, 2010. The effect of the additional evidence lead by the appellants also needs to be considered.

12. In the facts and circumstances of this case, the appeal is allowed and the impugned judgment and decree dated 3rd December, 2007 is set aside. The suit is remanded back to the learned Additional District Judge for a fresh decision on the merits. The learned Additional District Judge shall also consider the additional evidence lead by the appellants before this Court.

13. The parties shall appear before the learned Additional District Judge on 8th August, 2011 for fixing the date for hearing of the suit.

14. The learned Additional District Judge shall endeavour to decide this suit within a period of six months.

15. All pending applications stand disposed of.

16. The LCR be returned back immediately through a special messenger.

17. The certified copy of the judgment and decree dated 23rd January, 2006 passed in Suit No.307/2004 filed by the appellants along with CM No.2667/2008 is marked as Ex.PA-1 and the same is directed to be sent to the learned Additional District Judge along with the LCR. However, the copy thereof be retained in the appeal record.

JULY 05, 2011
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J.R. MIDHA, J.