

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

% *Judgment delivered on : 27.04.2011*

+ **R.S.A.No. 63/2007 & CM Nos. 3218-19/2007 & 1190/2008**

SH. UPENDER SHARMA Appellant
Through: Mr. H.S. Gautam, Advocate.

Versus

SH. MANGAT RAM Respondent
Through: None.

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)

1. This appeal has impugned the judgment and decree dated 06.01.2007 which had endorsed the finding of the trial judge dated 26.05.2005 whereby the suit filed by the plaintiff Upender Sharma seeking possession of the suit property i.e. property bearing no. 33, Gali No. 3&4, North Chhajju Pur, Delhi (hereinafter referred to as 'suit property') along with the mesne profits had been decreed in favour of the plaintiff.

2. Plaintiff claimed himself to be the registered owner of the aforementioned suit property. The document of purchase was dated 15.06.1974. He had constructed the boundary wall, one room with ACC, one latrine, ACC shades and installed a hand pump. Defendant along with his servant was asked to look after the property as also the buffaloes of the plaintiff. Plaintiff had been running milk dairy at 1/4885, Balbir Nagar Extension, Sahara, Delhi up to the period of 1995-96; in this period, the defendant at the request of the plaintiff was living in this said suit property. Thereafter, the defendant left the job of the plaintiff and started his own work; he requested the plaintiff to allow him to continue living in the suit property till he could arrange alternative accommodation for himself. Plaintiff allowed him to do so. Thereafter, on the need of the plaintiff, the plaintiff requested the defendant to vacate the suit property. This was in 1997. The defendant agreed to vacate the property after the Holi festival in 1998. Thereafter, with malafide intentions, defendant filed suit no. 81/98 for permanent injunction seeking restraint against the plaintiff from interfering in his peaceful possession. It was further averred that the defendant had also been conspiring to sell the suit property. Suit was accordingly filed.

3. Defendant contested the suit; it was stated that the suit

property had been let out to the defendant on the monthly rent of Rs. 100/- in 1980; plaintiff had sold this property to the defendant in the year 1989 and had received full and final consideration of Rs. 40,000/-. Relevant documents to the said effect had also been executed. Further, defense had been that the plaintiff had approached the defendant on 06.02.98 and requested him that he required the sale documents of the suit property for urgent information; in good faith, the defendant had handed over the said papers to the plaintiff; in spite of requests, the documents were not handed back to the plaintiff by the defendant; complaint was also lodged before the police on 09.02.98; thereafter, the defendant was constrained to file the suit for permanent injunction. Plaintiff denied the contents of written statement and reiterated the contents of the plaint.

4. On the pleadings of the parties, following issues were framed:-

- i. Whether the defendant was servant of the respondent upto the period 1995-96 as alleged? OPP.*
- ii. Whether the defendant purchase the property in dispute from the plaintiff in May 1989 as alleged in the W.S.? OPD.*
- iii. Whether the plaintiff is entitled to possession of the suit premises? OPP.*
- iv. Whether the plaintiff is entitled for mesne profits, if so at what rate and for which period? OPP.*

v. *Whether the plaintiff is entitled to injunction
as prayed for? OPP.*
iv. *Relief.*

5. Four witnesses were examined on behalf of the plaintiff and
7 DW's had appeared in the witness box on behalf of the
defendants. All the issues were decided in favour of the plaintiff.
It was held that the plaintiff was entitled to recover the suit
property. Mesne profits at the rate of ₹1,500/- per month were
also awarded.

6 This was endorsed in the first appeal.

7 This is a second appeal and it had been admitted and on
23.07.2008, the following substantial question of law had been
formulated. It inter alia reads as follows:-

*"Whether the trial court and the first appellate
court were justified in ignoring the evidence led by
the respondent (plaintiff before the court of Civil
Judge) and to grant mesne profits over and above
the evidence so led?"*

8. On behalf of the appellant, it has been argued that even
while admitting the appeal and framing the substantial question of
law, the Court had noted that the witness of the plaintiff himself
namely PW-4 had admitted that the rent of the suit property in
2003 would be approximately ₹800/- per month and about five

years ago it would be about ₹200/- per month; the court below having awarded mesne profits @ ₹1,500/- per month is clearly a perversity which calls for an interference.

9 None has appeared for the respondent.

10 The suit property has since been vacated; it was vacated on 24.08.2005. The submission of learned counsel for the appellant carries force. Even as per the plaint, the defendant was his servant and he was asked to look after the buffaloes of the plaintiff. The plaintiff had appeared in the witness box as PW-1. He had admitted that he was paying ₹900/- as salary to the defendant; this was in 1993. Version of PW-2 is also to the same effect; he has also stated that the defendant was employed at a salary of about ₹900/- in 1993. PW-4 had deposed that the defendant was employed at a salary of ₹500/- about 10 years ago; this witness had come into the witness box in May, 2003 meaning thereby that in the year 1993, the salary of the defendant was about ₹500/-. This witness has also stated that the rate of rent of similar accommodations in the locality would be about ₹800/- in 2003; about five years ago (i.e. in 1998) the rent would be about ₹200/- per month.

11 The suit property is admittedly 100 square yards of space

comprising of a boundary wall wherein one room with ACC Shed and one latrine has been constructed beside one hand pump. From this evidence, it is clear that the defendant was an employee of the plaintiff; his salary was ₹900/- per month; this was in the year 1993. The award of damages @ ₹ 1,500/- per month, in view of the evidence on record is clearly a perverse finding. The first appellate court had endorsed the finding of the trial Judge without appreciating this factum where the witness of the plaintiff himself had admitted that in 2003 the rate of rent of this property is ₹800/- per month and five years ago i.e. in 1998 the rent would be about ₹200/- per month; the award of damages @ ₹1,500/- per month in this scenario does amount to a perversity.

12 It is a settled proposition that where perversity is noted by the Court, interference is called for even in a second appeal. The impugned judgment has returned a finding which is totally contrary to the evidence on record. It was for the plaintiff to have asserted and proved the amount of damages to which he was entitled. His proof was that ₹800/- per month was the prevailing rent in 2003 and about ₹200/- in the year 1998. The plaintiff had by way of impugned judgment been directed to pay the mesne profits w.e.f. April, 1999.

13 In view of the evidence on record, damages awarded @ ₹800/- per month would be the correct figure. Damages are accordingly awarded at the aforementioned rate of ₹800/- per month i.e. w.e.f. June, 1999 up to the date of vacation of the suit property.

14 Substantial question of law is answered accordingly. Appeal as also pending applications are disposed of in the above terms.

INDERMEET KAUR, J.

APRIL 27, 2011

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