

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

% *Date of Judgment : 27.4.2011*

+ **R.S.A.No. 459/2006 & CM No. 17688/2006 (for stay)**

SH. MOHD. TAJ

.....Appellant

Through: Mr. Sudhir Nandrajog, Sr.
Advocate along with Mr.
Nishant Nandan, Advocate.

Versus

SH. MIRAZ AHMED & ANOTHER Respondents

Through: Mr. G.K. Shrivastava, Advocate
along with Mr. Daleep Singh,
Advocate.

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 19.09.2006 which had endorsed the finding of the trial judge dated 25.08.2004 whereby the suit filed by the plaintiff Sh. Mohd. Taj seeking recovery of possession of the suit property bearing no. 856 Haveil Azam Khan, Chitli Qabar, Delhi along with the

damages and mesne profits had been dismissed.

2. The plaintiff had averred that his father had started a factory of nickie polish and lathe in two rooms and dochatti on the ground floor of the suit property. The charge of running the factory was handed over to defendant no. 1 who was working as an apprenticeship with the father of the plaintiff. In 1974, defendant no. 1 asked the father of the plaintiff to allow him to run the said factory at his own risks and costs, which was accordingly permitted; defendant no. 1 was the licensee of the father of the plaintiff. After the death of the plaintiff's father, on 08.04.1981, plaintiff requested the defendant no. 1 to stop the user of the said factory; at request of defendant no. 1, plaintiff permitted him to continue the user; plaintiff used to open and lock the main doors of the rooms and dochatti. In March 1984, defendant no. 1 did not allow the plaintiff to put the lock over the rooms; he put his own locks, this was with a dishonest intention; plaintiff terminated the licence of the defendant no. 1 vide notice dated 06.07.1984. Defendant had failed to vacate the suit property; he was liable to stop the user of the suit premises and deliver its possession along with factory installations and pay damages for use and occupation at the rate of Rs. 300/- per

month. Suit was filed.

3. In the written statement, preliminary objection was that the suit is barred under Section 50 of the Delhi Rent Control Act (DRCA). The defendant no. 1 was the tenant of the father of the plaintiff and in fact, the rent receipt was also issued by him in his favour. Defendant no. 1 had purchased the machinery in the factory and gave it to defendant no. 2; defendant no. 1 had all along requested the father of the plaintiff to execute the rent receipt in the name of the defendant no. 2; father of the plaintiff, however, did not execute the rent receipts in the name of defendant no. 2 but continued to consider him as his tenant; he was accepting rent of the suit premises from defendant no. 2. Defendant no. 2 was the lawful tenant in the suit premises and was running the machinery owned and possessed by him. Suit was liable to be dismissed.

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

- (i) *Whether father of plaintiff allowed defd. No. 1 to run the factory as licensee? OPP.*
- (ii) *Whether the present suit is barred under Section. 50 of the D.R.C. Act? OPD.*
- (iii) *Whether defendant no. 2 is tenant? OPD*
- (iv) *Whether the defd. No. 1 was a tenant under the plaintiff in respect of the premises in suit as*

- alleged? OPD.*
- (v) Whether the machinery in respect of which the relief is claimed was installed by plaintiff's father & belongs to him? OPP*
 - (vii) Whether the machinery in question was purchased by defendant no. 1 and was delivered to deft. no. 2? If so, the effect thereof? OPD.*
 - (vii) Whether plttff is entitled for the relief claimed in the plaint? OPP.*
 - (vii) Relief.*

5. Oral and documentary evidence was led. Plaintiff had examined himself and produced the sale deed Ex. PW 1/1 in the name of his father. He had terminated the purported licence of the defendant vide legal notice Ex. PW 1 /2. The receipt of this notice was even otherwise not denied. In defense, the defendants had produced the statement of account of the firm from 1974 to 1982 i.e. M/s Fine Electro Plating as Ex. DW 2 /2 showing that this factory was being run from the aforementioned suit premises. DW 3 had proved the details Ex. DW 3 /1 and Ex. DW 3/2 showing the purchase of the machinery by defendant no. 2. The rent receipt executed by the father of the plaintiff in favour of the defendant no. 1 had been proved as Ex. DW 5/1. On the preponderance of probabilities and in view of the oral and documentary evidence, the trial judge was of the view that the factory was, in fact, being run by defendant no. 2; defendant no. 2 had, in fact, purchased the machinery for the factory; rent receipt

Ex. DW 5/1 was also adverted to. Defendants were held to be in occupation in the premises as tenants and not as licensees. Suit of the plaintiff was dismissed.

6. This was endorsed in first appeal.

7. This is a second appeal had been admitted and on 25.05.2010, the following substantial question of law had been formulated.

It interalia reads as follows:-

“Whether the impugned judgment is perverse inasmuch as the contradictory plea of the defendant that either defendant no. 1 or defendant no. 2 is a tenant of the plaintiff? If so, its effect?”

8. On behalf of the appellant, it is urged that the judgment of the two courts below suffers from the perversity; defendant in his written statement is not clear as to who is the tenant; he has been blowing hot and cold; whether defendant no. 1 was the tenant of the plaintiff or whether defendant no. 2 was the tenant has not been explained in the written statement. Even otherwise, contrary pleas could not have been set up by the defendant. Attention has been drawn to the amended written statement as also to the unamended one; it is pointed out that it is necessary to advert to the unamended written statement to show the circumstances under which the defendant had amended his

written statement; it is pointed out that DW-5 in his cross-examination had admitted that in 1967-68 when the premises in dispute had been let out, his son i.e. defendant no. 2 was aged 14 to 15 years; it is submitted that in these circumstances, the written statement had been amended to include the plea that defendant no. 2 was the tenant as a minor could not enter into a contract. Attention has also been drawn to the reply to the legal notice Ex. PW 1/7 wherein the reply states that it is defendant no. 2 who was the tenant; it is pointed out that even in this reply at this time (which was in August 1984), the defense of the defendants had been that defendant no. 2 is the tenant. Defendants now setting up the plea in the amended written statement that defendant no. 1 is the tenant is clearly an afterthought; it was in fact a false plea.

9. Arguments have been rebutted. It is pointed out that all along the case of the defendant was that defendant no. 1 was the initial tenant; tenancy had been created in the year 1967-68; defendant no. 1 was an uneducated man; his son, defendant no. 2, was educated up to 10th standard; defendant no. 1 had requested the plaintiff for creating of tenancy in favour of his son, defendant no. 2 who was actually carrying on the business of the factory and

defendant no. 2 was treated as the tenant of the plaintiff; there has been no shifting in the stand. It is further submitted that scope for interference in a second appeal is limited. Impugned judgment calls for no interference. Record has been perused. The amended written statement had been rightly considered. Once permission has been granted by the court to amend the written statement, the said document had to be read. In para 2(a), it has been stated that the defendant no. 1 was negotiating with the father of the plaintiff for the tenancy to be created in the name of defendant no. 2; the first rent receipt had been issued by the father of the plaintiff in the name of defendant no. 1.

10. In his deposition, DW-5 has explained the circumstances as to why only a single rent receipt had been issued. DW-5 had, on oath, deposed that Ex. DW 5/1 was the rent receipt issued in 1971 by Mirajuddin (father of the plaintiff) in his favour; he had explained that the Government had issued a scheme to allot place for factory to persons who were running business in the walled city of Delhi; they had been asked to annex proof of occupation; at request of DW-5, Mirajuddin had issued this single rent receipt. PW 1/7 dated 7.08.1984 was the reply given by the defendant to the legal notice of the plaintiff where it had been stated that

defendant no. 2 is the tenant of the plaintiff and he has been running this factory at the aforementioned suit premises. This reply can, in no manner, be said to be contrary to the plea in the amended written statement. In the written statement, it had been stated that defendant no. 1 had been negotiating with the father of the plaintiff to treat defendant no. 2 as his tenant and, in fact, he was also been so treated; single rent receipt Ex. DW 5/1 in the year 1971 had been issued in the name of defendant no. 1 only for the purposes of the allotment of a plot in terms of the policy of the Government; the issuance of a single rent receipt has adequately been explained in the testimony of DW-5. The pleas of the defendant can, in no manner, be said to be contrary. His case all along as is evident from the record is that defendant no. 1 was initially the tenant of the father of the plaintiff; this was in the year 1967-68; rent receipt Ex. DW 5/1 dated 12.08.1971 had been issued in the name of defendant no. 1 for the purposes of allotment of factory and this was at the request of defendant no. 1; negotiations were going on between the father of the plaintiff and defendant no. 1 to treat defendant no. 2 as the tenant; defendant no. 2 was actually running the business; he was educated up to 10th standard and doing the business. The plaintiff was actually treating defendant no. 2 as his tenant and was

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receiving rent from him.

11. PW-1 was the son of the plaintiff Mirajuddin. He had admitted that the terms of settlement between his father and defendant no. 1 were not settled in his presence; he had been informed by his father that the place has been given on license; his testimony is necessary in this Court. PW-1 has also admitted that his father, Mirajuddin, was carrying on the business of electroplating with Mhd. Ahmad at Kali Masjid which admittedly is at the distance from the suit property. Defense of the defendant was that plaintiff had given the suit property to the defendant on rent as he was carrying on his business from another location; testimony of PW 1, on this count, supports this defense of the defendant.

12. The impugned judgment had noted all the aforementioned arguments and had answered them against the appellant. The finding returned is as follows:-

7. The emphasis of the learned counsel for appellant is on inconsistent defence of the defendants/respondents as the reply to the notice is the basis of the defence of the defendants which was in consonance with the plea as was taken before amendment in the written statement. In the amended written statement, the defendants/respondents have changed the stand which according to appellant cannot be permitted. This argument does not lie when the amendment has been permitted and the case was contested by the defendants/respondents on the plea as was taken in the amended written statement. The notice Ex. PW 1/2 and the reply thereto Ex. PW 1/7 read with amended written statement are in consonance with each other wherein the defendants pleaded that negotiation of tenancy for the suit premises was

made by the defendant no.1 and father of the plaintiff for and in the name of defendant no.2 as the defendant no.1 was looking after defendant no.2 and the first rent receipt was executed by the father of the plaintiff in the name of defendant no.1 and the defendant no.1 requested the plaintiff's father to execute the rent receipt in future in the name of defendant no.2 as it was earlier agreed between the plaintiff's father and defendant no.1 but the plaintiff's father refused to execute the receipt in the name of defendant no.2 who, however, continued to consider defendant no.2 as his tenant and was accepting rent for the suit premises from defendant no.2 directly without any rent receipt. It was also pleaded that in case defendant no.2 is not considered as tenant then in the alternative defendant no.1 continued to be a lawful tenant with respect to the suit premises. In the notice Ex. PW 1/7 the defendant no.1 had replied through the counsel that defendant no.2, son of defendant no.1, has been a tenant of the suit premises on monthly rent of Rs. 120/- exclusive of electricity and water charges and defendant no.2 has been carrying on business of electroplating in the said premises in the name and style of M/s Fine Electroplating Works as sole proprietor since inception of the tenancy. Defendant no.1 in fact had denied himself to be a tenant or licensee besides the plea as has been taken in the plaint against him. The defendant no.1 has also denied possession over the suit premises. More so, the defendants are within their rights to take alternative pleas in their defence which may be inconsistent inter se so as to contradict the case of the plaintiff. The submissions by learned counsel for appellant that defendants cannot change stand in the written statement to that of reply to the notice in itself is not sufficient to accept the case of the plaintiff that defendants were licensee of the suit premises whose license was terminated vide notice Ex. PW 1/2.

13. In 2006 RLR 267 (SC) Gurdev Kaur & Ors Vs. Kaki & Ors, the Apex court had reiterated that under the amended provisions of Section 100 of the Code, a second appeal would lie only if a substantial question of law arises. It is only when there is perversity and there has been an utter disregard of important material on record that interference is called for. No such perversity had been pointed out. Moreover, the defendant had also produced cogent documentary evidence to show that he had purchased machinery which had been installed in the suit property and which was being used to run this business. These

documents had been proved as Ex. DW 3/1 and Ex. DW 3/2. The impugned judgment calls for no interference on any count. Substantial question of law is answered in favour of the respondent and against the appellant. Appeal is without any merit.

14. Appeal as also the pending application is dismissed.

INDERMEET KAUR, J.

APRIL 27, 2011
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