

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

% *Date of Judgment: 30.05.2011*

+ **R.S.A.No. 88/2011**

**SH. HAMID ALI
(SINCE DECEASED THROUGH HIS LEGAL HEIRS)**

.....Appellant s
Through: Mr. S.K. Bhaduri, Advocate.

Versus

**SH. NOOR AHMED
(SINCE DECEASED THROUGH HIS LEGAL HEIRS)**

.....Respondents

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 09.02.2011 which had endorsed the finding of the trial judge dated 16.10.1996 whereby the suit filed by the plaintiff Sh. Noor Ahmed seeking possession and recovery of mesne profits of the

suit property i.e. ground floor of property No. 1056, Phatak Ram Kishan Dass, Chitli Qabar, Delhi had been decreed.

2. Case of the plaintiff was that he was running a factory in partnership with one Sunder Lal in the aforementioned premises. Defendant was an employee and a worker with the plaintiff. In 1978, defendant approached the plaintiff and requested for grant of permission to run a factory in the first room of the aforementioned premises on a monthly license fee of Rs. 300/-. This was exclusive of electricity charges. Thereafter, defendant created problems; in spite of notice dated 18.07.1988 terminating the license of the defendant asking him to vacate the suit property, he did not adhere to it. Present suit was filed.

3. In the written statement of the defendant it was stated that he was the tenant and in exclusive possession of the suit property since the last 12 years. It was stated that he had taken on rent a portion in the ground floor at monthly rent of Rs. 300/- .

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

i. Whether the suit has been properly valued for the purpose of court fees and jurisdiction? OPP

- ii. Whether the defendant is a tenant in the W.S., if so its effect? OPD*
- iii. Whether the suit is within time? OPP*
- iv. Whether the plaintiff is entitled to relief of possession of the suit property and also mesne profits? OPP*
- v. Relief?*

5. Oral and documentary evidence was led.

6. The trial judge had noted the documentary evidence produced by the plaintiff which was the license granted by the Municipal Corporation of Delhi in his favour which is Ex. PW 3/5; license fees paid by the plaintiff to the MCD is Ex. PW 3/6 to PW 3/8; site plan of the property was proved as Ex. PW 3 / 4; legal notice was exhibited as Ex. PW 3/1. The defendant per contra adduced oral evidence; he had no documentary evidence to substantiate his submission that he was a tenant. Even today, this fact is not disputed; submission being that this was an oral tenancy which has been created by the plaintiff in his favour.

7. This is a second appeal which is yet at the stage of admission. Substantial question of laws have been formulated at page 15 of the body of the appeal.

8. Learned counsel for the appellant has placed reliance upon the judgments reported in AIR 1993 Allahabad 138 Ajab Singh Vs. Shital Puri as also upon AIR 1978 Punjab and Haryana 204 Kidar Nath Vs. Swami Parshad and Ors. Reliance has also been placed upon the judgment reported in AIR 2004 Supreme Court 1591 Achintya Kumar Saha Vs. M/s Nanee Printers and Ors to support his submission that a substantial question of law does arise on the interpretation as to whether the relationship between the parties had, in fact, created as lease or a licensee. There is no dispute to this proposition. None of the aforementioned judgments which have been relied upon by the learned counsel for the appellant, however, co-relate to the facts of the instant case. Each case is distinct on its own factual matrix. Even otherwise, there is no dispute to the proposition that where evidence has been ignored and the controversy has not been adjudicated upon by the first appellate court, a substantial question of law does arise and a second appeal is maintainable.

9. In this context, the finding of the two courts below returned on issue no. 2 is relevant.

Issue no. 2 reads as:-

“Whether the defendant is a tenant in the W.S., if so its effect? OPD”

10. Trial judge has noted as under:-

“Finding on Issue No. 2.

Onus to prove this issue was on the Defendant whose case is that he is tenant in respect of property in suit since 1962. Defendant has stated in his statement that he was having the exclusive possession and lock of the key of premises was also with the Defendant. As against this, Plaintiff has stated that lock of the premises was with the Plaintiff and he used to open the same. It is stated by the witnesses of the Defendant DW-1 that they vacated the premises in 1966 and thereafter Defendant was inducted in the premises. However, in his statement Defendant has stated that he is in premises since 1962. No rent receipt has been proved on record. Plaintiff has proved on record the licence fee paid by the Plaintiff in respect of property in suit to the Municipal Corporation of Delhi which is Ex. PW 3/7 and Ex. PW

3/8. In view of the fact that Defendant has failed to proved any rent note or rent agreement on record and in view of the fact that Defendant has failed to establish that he was exclusively in possession and operating the lock and key of premises in suit and in view of the licence fee being paid by the Plaintiff to the Municipal Corporation of Delhi could not be rebutted in the cross examination. Defendant has failed to prove on balance of probabilities that they are tenant in respect of property in suit and in view of 316 All India Rent Control Journal IX 1988 (2) Defendant has failed to prove that they were in exclusive possession of the property in suit and they were tenant in the property. Two certificates from shop and Establishment Department does not show that they were tenant in respect of property in suit. This issue is not proved on balance of probabilities and is decided in favour of Plaintiff and against the Defendant.”

11. Impugned finding on issue no. 2 reads as follows:-

“ The onus to prove this issue was on the defendant. Ld. trial court at the time of deciding this issue was of the view that the case of the defendant is that he is the tenant of the suit property since 1962 and the defendant has stated in his written statement

that he was having exclusive possession and lock and key of the premises was also with him. Ld. trial court has observed that witness of defendant i.e. PW-1 has stated that they have vacated the premises in 1966 and thereafter the defendant were inducted in the premises. Ld. court was of the view that in his statement the defendant has stated that he is in the premises since 1962 but no rent receipt has been proved on record and on the other hand the plaintiff was also able to prove on record that license fees paid by the plaintiff in respect of suit property to the MCD which area Ex. PW 3/7 and Ex. PW 3/8. Ld. trial court has come to conclusion that defendant has failed to prove any rent agreement on record and further failed to establish that he is in the exclusive possession of the suit property and were having the lock and key of the suit premises. Ld. trial court was of the opinion that in view of the license fees being paid by the plaintiff to the MCD and the same could not be rebutted in the cross examination and on the basis of balance of probabilities, defendant was failed to prove that he is the tenant in respect of suit property and was in exclusive possession of the property and tenant in respect of the suit property.

I am of the view that the defendant/appellant had failed to prove that they were the tenant in the suit premises and on the other hand, the plaintiff was able to establish that the suit property was given to the appellant/defendant on license and the plaintiff was able to prove the notice of termination dt. 18.07.88 (PW 3/1) and the lease was terminated. In the present case, the appellant has not brought any evidence on record or produced any witness to establish that he was a tenant in the suit premises as no rent agreement, receipt or any other document have been proved to show that the appellant/defendant was the tenant. So, I am of the view that pleadings is no evidence, far less proof. Appellant has failed to set out their defence that he was tenant in the suit premises. In view of the above said discussion, the finding was given against the defendant/appellant. Since, the plaintiff was able to prove that defendant was licensee and his license was validly terminated by notice. So, I am of the opinion that ld. trial court has rightly come to the conclusion that the defendant was not the tenant in the suit premises and the issue was rightly decided against the defendant.”

12. In no manner can it be said that this finding is perverse. It calls for no interference.

13. The next submission of the learned counsel for the appellant is that the impugned judgment has failed to consider the cross examination of PW 1 where he had, in fact, himself admitted that the value of the suit property is more than 2 lacs; he having valued the suit property at Rs. 5,000/- was an error. This is a perverse finding which calls for interference. Issue no. 1 has been framed qua this submission.

14. Averments in the plaint had been noted wherein the plaintiff had specifically averred that the value of the suit property is Rs. 5,600/- for which the requisite court fee had been paid. The impugned judgment had also noted that a suggestion had been given by the learned defense counsel that the value of the suit property is more than Rs. 2 lacs which had been denied by the plaintiff; this part of the evidence of PW-1 does advance the case of the defendant in any manner. No substantial question of law has arisen.

15. Appeal is dismissed in limine.

INDERMEET KAUR, J.

MAY 30, 2011

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