

R-272

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

% *Date of Judgment: 05.5.2011*

+ **R.S.A.No.253/2007**

SH.RAJINDER KUMAR & ORS. Appellants
Through: Mr.Mayank Goel, Advocate.

Versus

MRS.PADMAWATI & ORS. 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 25.4.2007 whereby the suit filed by the plaintiff Rajinder Kumar and Others seeking a declaration and permanent injunction to the effect that the plaintiffs (claiming through their father who was the tenant of the defendant) be not evicted from the suit property

and the defendant be restrained from increasing the rate of rent of the suit property had been dismissed.

2. Plaintiffs have filed the aforementioned suit. Their father Duli Chand had taken shop No.327, Anaj Mandi, Shahdara, Delhi along with its roof rights (hereinafter referred to as 'the suit property') on rent of Rs.65/- per month from late Daya Nand Sharma vide rent note dated 15.9.1970. Plaintiff has installed two shutters on the front side of the shop; in December 1990 the defendant threatened the plaintiffs as to how the shutters were installed. Written complaint was made to the concerned police station. On 11.11.1989, the father of the plaintiffs died. Rate of rent was increased from time to time and it was finally settled at Rs. 225/- per month and there was an agreement that the rent would not be increased in future. The plaintiffs are since then carrying on business in the suit property since they have inherited tenancy rights. Defendants have again started threatening the plaintiffs to increase the rent and the defendants are seeking their eviction. Present suit was accordingly filed.

3. Defendants contested the suit. They also filed a counter claim. They had alleged that the plaintiff had not come to the court with clean hands as they wanted to grab the property of the defendants. The widowed daughter of the defendant Usha was

residing on the first floor for the last two years; plaintiffs wanted to dispossess the defendants. It was not disputed that complaints had been lodged by the parties. It was contended that on 23.11.1992 the plaintiffs in collusion with local police had thrown out the house-hold goods of Usha from the first floor. It was denied that that roof was in this tenancy; only two rooms, one verandah, one sahan and baithak had been let out to the father of the plaintiffs vide the aforementioned rent note dated 15.9.1970. The passage to the first floor from northern side was not included in the tenancy. On 17.2.1991 an agreement was arrived at between the parties whereby they had agreed not to interfere with the egress and ingress of each other. Defendant no.1 had been letting out first floor to the tenants seasonly but now his widowed daughter was residing therein. All other allegations were denied. In the counter claim, the defendants claimed that the plaintiff be restrained from disposing their widowed daughter from the first floor and from interfering in the egress and ingress to the first floor through the staircase. Further the plaintiffs be directed to pay arrears of rent w.e.f. 15.01.1991.

4. On the pleadings of the parties, the following six issues had been framed:

1.Whehter the father of plaintiff's took the entire tenanted
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premises alongwith its roof at a monthly rent of Rs.65/- from Sh.Dayanand Sharma vide rent note dated 15.9.1970? OPP

2.Whether the plaintiffs have not come with clean hands? If so, its effect? OPD

3.Whether the plaintiff is entitled to the decree of declaration, as prayed for? OPP

4.Whether the plaintiff is entitled to relief of injunction as prayed for? OPP

5.Whether the defendants are entitled to the relief as prayed for in their counter claim? OPD

6.Relief.

5. Oral and documentary evidence was led.

6. Agreement/Rent Note dated 15.9.1970 had been examined.

It was proved as Ex.PW-1/1; Ex.PW-1/4 was the settlement dated 17.01.1991 arrived between the parties whereby the rent of the tenanted premises had been increased by 10%; i.e. ₹ 225 p.m; defendant had also a statement that he had no objection to the installation of a shutter; however, the plaintiff would not be allowed to install any other shutter around the pillar. The evidence adduced showed that the plaintiff had been let out the premises without roof rights; defendant late Dayanand Sharma had reserved the rights of the passage for use for egress and ingress to the first floor. Plaintiff had filed to establish that the roof rights had been let out to him. In his cross-examination plaintiff (examined as PW-1) had also admitted that the tenanted premises let out to him comprised of one verandah, one sahan,

baithak and two rooms on the ground floor. No roof right had been mentioned. Plaintiff had not come to the court with clean hands; he was not entitled to the relief. Suit was dismissed. Counter claim of the defendant was decreed after the examination of the testimony of DW-1 and DW-2.

7. This finding of the trial judge was endorsed in first appeal.

8. This is a second appeal. It has been admitted and on 27.1.2010 the following substantial questions of law were formulated:

1. Whether the courts below erred in law in not deciding the objections filed to the Local Commissioner's Report and in completely ignoring it while decreeing the counter claim of the respondent?

2. Whether the findings of the courts below are perverse on facts and law?

9. On behalf of the appellant, it has been urged that the impugned judgment suffers from a perversity for the reason that the document Ex.PW-1/1 which is the rent note and Ex.PW-1/4 which is Panchayat Faishla have not been considered in their correct perspective; the impugned judgment had failed to note that the only mode of access to the terrace/roof was through a room which was admittedly a part of the tenanted premises; in this view of the matter the claim of the plaintiff having been dismissed suffers from a perversity. Learned counsel for the

appellant has placed reliance upon 1983 RLR 381 Ramjilal Mahinder Kumar Vs. Naresh Kumari to support his submission that a building comprises of a hall and a roof is deemed to a part of the building; the roof, in fact, had been let out to the plaintiff and was a part of the tenanted premises. On the same corollary counter claim of the defendant also could not have been decreed. It is pointed out that the local commissioner had submitted his report on 03.12.1992 to which objections had been filed by the appellant but the courts below had not dealt with the objections; this is also a perversity and has raised a substantial question of law.

10. None has appeared for the respondent.

11. Admittedly the father of the plaintiff namely Duli Chand had been let out the demised premises; a rent note Ex.Pw-1/1 dated 15.7.1970 had been executed between the father of the plaintiff and the father of the defendants. In terms of this rent note the tenanted property had been described; it comprised of one sahan, verandah, two rooms and one baithak; rate of rent was Rs.65/- per month; rent would be paid in advance; statement of the father of the plaintiffs (Duli Chand) was also to the effect that he would have no objection to the passage left for the ingress and egress of the other tenants. This document has been interpreted by both the two facts finding courts. Both the courts below have noted

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that the reference made by the father of the plaintiffs that he would have no objection to the passage which is available for the ingress and egress of the other tenants means that there were other tenants in the suit property and the plaintiff was not the sole tenant. Moreover this document Ex.PW-1/1 had specifically described the tenanted premises which have been described hereinabove. Admittedly there is no reference to the roof rights.

12. The second document which was interpreted by the two fact finding courts below is Ex.PW-1/4 which was the Panchayat Faisla entered into between the parties on 03.1.1991. In terms thereof the plaintiffs had agreed to increase the rent; the rent agreed was Rs.225/- per month; in terms of this agreement, the defendant had made a statement that he had no objection regarding the installation of the shutter in the said shop; arrears of rent had also been received; he had agreed to give up his complaint; it had further been agreed that no shutter except the two shutters already installed shall be installed. This document had also been interpreted by the two fact finding court below; even in this document which was executed more than two decades after the inception of the tenancy of the plaintiff i.e. in the year 1991 there was no reference to any roof rights.

13. DW-1 was the defendant. He has come into witness box and

deposed that roof rights are with them and the same are being leased out periodically. Presently their widowed daughter Usha is residing in the said premises. Usha had also entered into witness box as DW-2. As per her version she was living on the roof; her household goods were thrown down by the plaintiffs. The counter claim had sought an injunction that the plaintiffs should not interfere in the possession of the roof rights of DW-2; at the same time her house hold goods which had been removed be restored to her.

14. A local commissioner had also been appointed in the trial court to give his report on the factum of possession in the suit property. He had given his report on 03.12.1992 wherein it had been noted that the defendant no.3 was found present at the spot; the 'Chapper' i.e. the roof could accommodate a small family. Objections to the said report have been filed to which reply had also been filed by the non-applicants. Impugned judgment had dealt with this contention of the learned counsel for the appellant that the objections had not been decided one way or the other. In para 16 of the impugned judgment the court had examined the report of the local commissioner and had accepted it in favour of the defendants; court had noted that the local commissioner found the presence of Usha at the spot; further

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PW-1 Rajinder Kumar had come into witness box and in his cross-examination he had admitted that he had not filed any objection to the report of the local commissioner. At this stage learned counsel for the appellant has drawn attention of this court to the said objections which had been filed by the brother of Rajinder Kumar namely Ashok Kumar who was arrayed as plaintiff no.2. Be that as it may, the very fact that the court had accepted the report of the local commissioner and had relied upon it, it is implicit that the objections stood rejected. There is no perversity on this score.

15. All these fact findings have been gone into deep detail by the two courts below. Unless and until a perversity is pointed out a second appeal court cannot interfere with findings of fact. The courts below had noted that the documentary evidence adduced by the plaintiff evidenced that what had been let out to him was only a sahan, baithak, verandah and two rooms; he was not entitled to the roof rights; Panchayat Faisla had also noted the statement of the plaintiff that he would have no objection to the ingress or egress for the passage of the other tenants meaning thereby he was not the sole occupant of this property. Case of the defendants was that the roof rights were being leased out periodically; at present their widowed daughter Usha is residing

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therein. This has also been supported by the report of the local commissioner. This finding in no manner can be said to be perverse and this finding in no manner calls for any interference. Status of the plaintiffs is admittedly recognized as a tenant on the ground floor i.e. in the sahan, baithak, verandah and two rooms as aforesaid i.e. excluding the roof. They, however, have no roof rights.

16. Substantial questions of law are answered in favour of the respondents and against the appellants. There is no merit in the appeal. Dismissed.

INDERMEET KAUR, J.

MAY 05, 2011
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