

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

% *Judgment reserved on : 27.05.2011*
Judgment delivered on : 30.05.2011

+ **R.S.A.No. 156/2008**

NARENDER KUMAR JAIN Appellant
Through: Mr. R K Saini and Mr. Sitab
Ali, Advocates.
Versus

PRADEEP KUMAR JAIN Respondent
Through: Ms. Kumkum Jain, 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 08.05.2008 which has reversed the finding of the trial Judge dated 26.05.2007. Vide judgment and decree dated 26.05.2007 the suit filed by the plaintiff Narender Kumar Jain seeking possession of the suit property (i.e. shop No. 18, forming part of property No.X/4058, ground floor, Jain Cloth Market, Gali No. 17, Shanti Mohalla, Gandhi Nagar, Delhi 110031) as also damages had been

decreed in favour of the plaintiff. The impugned judgment had reversed this finding; suit stood dismissed.

2. The plaintiff claimed himself to be owner of aforementioned suit property. On 03.08.2001, an agreement had been entered into between the parties for a period of 12 months by virtue of which the plaintiff had given this shop to the defendant for the purpose of running his cloth business; the contractual amount was ₹2,000/- per month; the defendant was paying this amount regularly; it was agreed that if this amount is not paid, the defendant would not be permitted to carry out his business and the plaintiff will have the right to cancel this agreement before its expiry. The defendant thereafter failed to pay the agreed amount i.e. between August, 2001 to October, 2001; the amount of ₹6,000/- became due. The agreement stood terminated vide legal notice dated 01.11.2001; the premises was not handed over; the plaintiff had also claimed damages @ ₹5,000/- per month.

3. The defendant contested the suit. It was stated that the plaintiff was neither the owner and nor the landlord of the said premises; his contention was that the plaintiff had approached the defendant for a loan of ₹2 lacs and in lieu of that the plaintiff had given vacant possession of the shop to the defendant; it was

agreed that unless and until the loan of ₹2 lacs is paid back to the defendant, the defendant will continue to occupy the premises; the agreement relied upon by the plaintiff is a sham document; even otherwise the defendant is a tenant and the suit is barred under Section 50 of the DRCA.

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

- “1. Whether the defendant gave a loan of Rs.2 lacs to the plaintiff against the consideration of the possession of the suit property? OPD
2. Whether the suit of the plaintiff is barred by section 50 of Delhi Rent Control Act? OPD
3. Whether the plaintiff is entitled for the decree of possession as prayed for? OPP
4. Whether the plaintiff is entitled for decree of Rs.26,000/- as prayed for? OPP
5. Whether the plaintiff is entitled for any interest, if so at what rate and for what period? OPP
6. Whether the plaintiff is entitled for any pendente lite and future damages, if so, at what rate and for what period? OPP
7. Relief.”

5. Oral and documentary evidence was led. The court was of the view that the defendant has failed to show that the suit property is covered by the DRCA; the plaintiff is entitled to a decree; suit premises were given to the defendant only as a licensee and license stood terminated. Suit of the plaintiff had been decreed.

6. In appeal, this finding was reversed. The agreement Ex. PW-1/B had been adverted to; distinction between a lease and license has been expounded; the court was of the view that the defendant is a tenant in the suit premises; the bar of Section 50 is operative; jurisdiction of the civil Court is barred; suit stood dismissed.

7. This is a second appeal. Appeal had been admitted and on 26.05.2009, the following substantial question of law was formulated:-

“Whether the first appellate court acted perversely and committed a serious error of law in holding that the respondent was a tenant under the appellant in respect of the demised shop at a rent of ₹2,000/- per month when there was no such claim by the respondent?”

8. On behalf of the appellant it has been urged that the judgment of the trial court suffers from a perversity; the impugned judgment had wrongly construed the document Ex.PW1/B to be a lease; even the defendant had not set up this plea; his defence all along was that he was in possession of the suit property in lieu of Rs.2 lakhs which he had given to the plaintiff as a loan and the plaintiff had handed over the vacant possession of the land to him; construction of the aforementioned document as a lease is an illegality. Impugned liability is liable to be set aside.

9. Arguments have been countered. It is pointed out that the

judgment of the court below calls for no interference.

10. Record has been perused. The case of the plaintiff is that he was running the business of a cloth merchant from suit property. He had entered into a "contract agreement" dated 3.8.2001 (Ex. PW1/B) for a period of one year with the defendant by virtue of which he had permitted the defendant to run his business of clothes at a monthly contractual rate of Rs.2,000/-; this amount had to be paid regularly by the defendant; the defence of the defendant was that in lieu for a sum of Rs.2 lakhs which he had advanced to the plaintiff vacant possession had been handed over to him; further defence was that the agreement Ex.PW1/B was forged and fabricated; further that the sum of Rs.2000/- being paid per month was paid by the defendant as rent and being less than Rs.3500/-, the suit was barred under Section 50 of the DRCA. This defence in the written statement, as is evident from his pleas, shows that the defendant had taken contrary stands; in one breath he had stated that he is in physical possession of the property because of the loan of Rs.2 lakhs that had been advanced to the plaintiff; thereafter his submission was that Ex.PW1/B was forged and fabricated; in the same breath he had stated that the sum of Rs.2,000/- was paid as rent and being below Rs.3500/- the suit was barred under Section 50 of the DRCA.

11. Both the fact finding courts had returned a positive finding that Ex.PW1/B had been executed by the defendant; his defence that this document had not been executed by him had been repelled. This finding has not been assailed even before this Court.

12. This court has to thus consider the document Ex.PW1/B to decide whether it had created the relationship of a landlord/tenant between the parties (as has been held in the impugned judgment) or whether the defendant was a licensee which was the finding of the trial judge.

13. Ex.PW1/B is reproduced herein as under :

Contract Agreement

This Contract Agreement is made at Delhi on this 3rd day of August 2001, between Shri Narender Kumar Jain S.o Shri Mahabir Parshad Jain R/o X/2718, Gali No.6-A, Raghubarpura No.2, Gandhi Nagar, Delhi-31, hereinafter called the first party and Shri Pardeep Kumar Jain S/o Shri Vakil Chand Jain R.o X/3238, Gali No.12, Shanti Mohalla, Gandhi Nagar, Delhi-31, hereinafter called the Second Party.

Whereas the first party is already running business of Sale of Cloth in Shop NO.18, on ground floor, part of property No.X/5058 situated at Jain Cloth Market, Gali No.17, Shanti Mohalla, Gandhi Nagar, Delhi-31.

And whereas the first party has given the said business to the second party on contract basis, for running of the same on the following terms and conditions :

1. That this contract is for the fixed period of One Year w.e.f. 1-8-2001.
2. That the second party is bound to pay a sum of Rs.2,000/- (Rs.Two Thousand only) per month to the first party as contract amount monthly and regularly and the second party shall do the said business as per wishes and instructions of the first party.
3. If the second party will fail to pay the said contract amount monthly and regularly to the first party or fail to do the said business as per wishes and instructions of the first party then the first party shall have full right to cancel this contract before its expiry.
4. At this time of expiry of this contract the second party shall retain no right or concern whatsoever with the said business premises, assets etc. in any case and shall have no right to claim demand any goodwill,

- compensation etc, whatsoever from the first party.
5. The first party is not responsible for any kind of loss in the said business.

In the witnesses whereof the parties have signed this Contract Agreement on the date, month and year first written above.

Witnesses :

- | | |
|---------|----------------------|
| 1. Sd/- | Sd/-
First Party |
| 2. Sd/- | Sd/-
Second Party |

14. The document has been described as a “contract agreement”. It was for a period of one year. The first party i.e. the plaintiff was admittedly carrying on the business of cloth merchants from the suit property; he had given this business to the second party on a contractual basis for running it; it clearly recites that the business along with the premises has been given to the defendant; a fixed monthly amount of Rs.2,000/- would be paid by the defendant to the plaintiff and in case this amount was not paid the plaintiff would have a right to cancel the contract even before the expiry of one year. On the expiry of the contract, the business, the assets of the business and the goodwill would no longer remain with the defendant; meaning thereby that what had been transferred by the plaintiff to the defendant was a business to be run from the said premises; that is how and why reference to “assets” and “goodwill” were mentioned in Ex.PW1/B. Clause 5 is also relevant. It states that the plaintiff would not be responsible

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for any loss in the business. The scrutiny of this document as aforementioned clearly reflects the intent of the parties; plaintiff had given these premises to the defendant as a licensee; the business in the shop was to be carried out by the defendant as per his wishes and instructions; the overall control of the business would be retained and supervised by the defendant; after the expiry of the contract period the assets, business and the goodwill would no longer remain with the defendant; it would revert back to the plaintiff. An undertaking of an even date i.e. 3.8.2011 had also been appended along with Ex.PW1/B. This has been admitted by PW1 in his cross-examination, on a specific suggestion given to him; meaning thereby that it was the defendant himself who had brought this document to the notice of the Court. A perusal of this undertaking accompanying Ex.PW1/B also reflects the intent of the parties; defendant had undertaken to take the contract of running the business of the sale of cloth from the disputed premises; in this undertaking he had specified that the goods lying in the premises belonged to him and plaintiff had no statutory qua this business.

15. The distinction between a lease and license is thin; various tests have been laid down by the Supreme Court. The test of exclusive possession of the suit property is a relevant criterion for

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determining as to whether the document has created or a lease a license; it is however not the sole factor.

16. In 1971 (1) SCC Sohan Lal Naraindas Vs. Lakshmidas Raghunath Gaditi, the Apex Court has noticed as under :

“Intention of the parties to an instrument must be gathered from the terms of the agreement examined in the light of the surrounding circumstances. The description given by the parties may be evidence of the intention but is not decisive. Mere use of the words appropriate to the creation of a lease will not preclude the agreement operating as a licence. A recital that the agreement does not create a tenancy is also not decisive. The crucial test in each case is whether the instrument is intended to create or not to create an interest in the property the subject-matter of the agreement. If it is in fact intended to create an interest in the property it is a lease, if it does not, it is a licence. In determining whether the agreement creates a lease or a licence the test of exclusive possession, though not decisive, is of significance.”

17. It is thus not the document (Ex.PW1/B) alone which has to be considered but also the surrounding circumstances; the relationship between the parties before and after the agreement was created. In this context the defence of the defendant also becomes relevant. He has taken contrary and conflicting stands. He was approbating and reprobating in the same breath. In one breath his submission was that he is in possession of the suit property because he has advanced Rs.2 lakhs to the plaintiff; this submission was never substantiated; he had led no evidence in this score; both fact finding courts have returned a finding against the defendant; his next submission was that Ex.PW1/B was fabricated and forged; rent of Rs.2,000/- was being paid by him

and being less than Rs.3500 p.m., it gave him the advantage of Section 50 of DRCA; this litigant is clearly not sure of his defence; he is a confused person.

18. The aforementioned discussion clearly shows that the parties had intended to create a licence; impugned judgment holding it to be a lease is a perverse finding. It calls for interference. Appeal is allowed. Suit of the plaintiff stands decreed.

INDERMEET KAUR, J.

May 30, 2011
a/vld