

IN THE HIGH COURT OF DELHI AT NEW DELHI
RFA No.864 /2003

% **1st February, 2012**

SHRI HARISH KUMAR & ANR. Appellants
Through: Mr. Mohit Madan, Advocate.

VERSUS

SHRI ASHOK GULABANI Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal filed under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 26.4.2003 dismissing the suit filed by the appellants/plaintiffs for possession and mesne profits with respect to one shop in the premises bearing No.90/40-A, ground floor, Malviya Nagar, New Delhi.

2. The case of the appellants/plaintiffs was that the respondent/defendant was a close friend of plaintiffs and therefore was given one room of 8' X 13' on licence basis. It was stated in the plaint that the room was given about 13 years back because of the close relations and when the respondent/defendant failed to vacate, a legal notice was issued on 1.6.2002 to vacate the property. The notice was replied by the respondent/defendant stating that he was a tenant in the premises at ₹ 2,00/- per month. Since the respondent/defendant failed to vacate the property, the present suit for possession and mesne profits was filed.

3. The respondent/defendant took up a plea that he was a tenant in the premises. It was pleaded that the tenancy was created almost 14 years before filing of the suit. It was argued that when the premises were being re-constructed, the respondent/defendant was shifted to another room and the subject room was returned back to the respondent/defendant after the premises were re-constructed.

4. After completion of pleadings, the trial Court framed the following issues:-

“1. Whether the suit property was given on regular tenancy on rent of Rs.200/- OPD

2. Whether the suit has not been properly valued for the purpose of Court fee? OPD
 3. Whether the defendant gave Rs.1,00,000/- to the plaintiff for hiring of the shop? OPD
 4. Whether defendant paid rent upto May, 2002? OPD
 5. Whether claim made by the defendant in para No.2 on merit is correct and if so, its effect? OPD
 6. Whether the plaintiff is entitled for the relief claimed? OPP
 7. Relief.”
5. The only issue which was necessary to be decided by the trial Court was whether the respondent/defendant was a gratuitous licensee or was a tenant in the suit premises. Though the defendant failed to prove any rent agreement or rent receipt or payment of the amount of Rs. 1 lakh when the possession of the suit premises was taken, however, the trial Court has arrived at a finding of existence of tenancy, not only on account of long period of stay of the respondent/defendant in the suit premises, but also because the respondent/defendant was shifted to another room to allow reconstruction, and the same/suit premises were handed back to the respondent after reconstruction of the building in which the suit room is located. The trial Court has given the following findings with respect to relevant issue Nos.1,3 and 5 which read as under:-

“ISSUE NO.1,3 AND 5: Onus to prove these issues was on defendant. All these issues are inter-connected and common evidence is required to decide these issues and are to be decided together. In para no.2 on merit of Written Statement filed by defendant, plea has been taken that plaintiff and defendants are residing in the same locality and plaintiff no.1 Sh. Harish Kumar approached defendant in 1988 to take a shop on rent which plaintiff had deliberately called room. Accordingly to defendant, in this para, it is mentioned that ₹1 lac was taken as advance as demanded by plaintiff no.1 and the rent was fixed as ₹200/-. According to defendant, he was paying rent regularly, but, plaintiff refused rent w.e.f. June, 2002. It is also plea of defendant that at the time of raising construction in the suit property, the defendant was asked to shift in center portion of the property temporarily and after completion of the construction, defendant was shifted to the original shop. In para no.2 of the replication on merit, the plea taken by plaintiff is that he did not receive amount of ₹1 lac at the time of hiring the said shop and has not received rent @ ₹200/- as claimed by defendant. The plaintiff has also taken the plea in replication that there is no relation of landlord and tenant. Regarding temporarily shifting the defendant to other property, the plaintiff has not denied the same in replication. First of all, it is to be considered if the property was given as regular tenancy on rent of ₹200/-. According to statement of PW1, the property in question was given as the defendant was close friend of plaintiff no.1. The plaintiff did not issue any legal notice to defendant for more than thirteen years and allowed defendant to continue to remain in the suit property. Plea has been taken by plaintiff that he made all requests orally and when the defendant refused to vacate, the legal notice was issued. In the site plan filed by plaintiff Ex.PW1/1, the suit property has been shown as shop. PW1 has also admitted in cross examination that earlier it was used as shop. Admission is also there of PW1 that he was using the portion from 1978 till 1985. The plaintiff has also admitted in cross examination that meter was installed in the portion with defendant which was commercial and still commercial meter is

there in the shop. According to plaintiff in cross examination, the possession of the suit property was given to defendant in 1989 but in cross examination, he further stated that he does not remember if possession was given before 16/10/1987 to the defendant. In cross examination, the plaintiff has admitted that defendant installed telephone without his permission. According to PW1 in cross examination, he came to know about installation of telephone after five/six months of 16/10/1987. These circumstances is relevant to come to the conclusion that the suit premises were given on rent and not on licence basis. Ld. counsel for plaintiff has brought to the notice of the Court cross examination of DW1 and some photographs to show close relation of plaintiff and defendant. If it is presumed for the sake of argument that there was intimacy between plaintiff and defendant and defendant attended marriages in the family of plaintiff, that fact alone is not sufficient to prove that the suit property was given to defendant on licence for using the same for such a long time for commercial purpose. It was in the knowledge of plaintiff that defendant has been using the suit property for commercial purpose, but, he did not raise any objection. In cross examination at page-3, PW1 has admitted that premises were given to the defendant for doing some work. PW1 has also admitted that defendant put board of Hans Property Dealer after two months of letting out. Admission is also there in cross examination of PW1 at page-3 that he came to know after two months of giving possession to defendant that he was doing business in the property.

In para no.2 of written statement, the defendant claim is that at the time of re-construction of the property, the defendant was asked to shift the shop in center portion temporarily and after completion of the construction, the defendant was shifted to original shop and written agreement was executed in this regard. The agreement placed on record by defendant is Ex.PW1/2. This agreement was put at the time of cross examination of PW1. He has denied having signed this agreement. However, shifting of portion in possession of defendant on account of construction has been admitted by plaintiff in his cross examination at page-4.

The statement made by defendant in affidavit filed in the shape of examination in chief that the agreement was signed by plaintiff has not been challenged in cross examination. It is not case of the plaintiff that on agreement his signatures have been forged. In para no.9 of the affidavit filed by plaintiff, there is reference to the written agreement relied on by defendant. It all shows that the agreement was signed by plaintiff. When defendant was allowed to shift his shop in other portion of the property and was further allowed to take back his earlier portion and was further allowed to take back his earlier portion after reconstruction, shows that the plaintiff was there in the capacity of tenant and not licensee. This agreement is undated signed by plaintiff. The defendant has taken the plea in affidavit filed by him that rent upto May, 2002 through money order was received by plaintiff @ ₹200/-. The amount was received by wife of the plaintiff. According to plaintiff, his wife receive a money order inadvertently being illiterate lady. The plaintiff did not examine his wife in support of his plea that money order amount was received inadvertently. There is no specific plea from plaintiff regarding rate of rent. His plea is that it was given without rent on licence basis. The plea taken by plaintiff does not seem to be plausible that the commercial shop was given for about fourteen years without any charges. When wife of the plaintiff accepted money order @ ₹200/-, it is clear that the rate of rent was ₹ 200/- per month which was accepted by wife of the plaintiff. In the light of above discussion, it is clear that the suit property was given on rent basis and it was not on licence basis as asserted by plaintiff. Defendant has taken the plea that amount of ₹ 1 lac was given in advance to plaintiff. It is not clear on what date, month and year the amount was given. It is also not clear from the material on record, in whose presence it was given. The defendant has also not led evidence on this point from where the amount was managed. In the absence of all such explanation, the defendant has not been able to prove the plea that he gave ₹ 1 lac to the plaintiff for hiring of the shop. Mere oral plea of defendant in this regard has to be discarded, and accordingly, finding given on all these issues is that the property was given on rent by

plaintiff to defendant and rent upto May, 2002 has been paid by defendant to plaintiff and the defendant has failed to prove payment of ₹ 1 lac as advance to plaintiff. Issue no.1,3 and 5 decided accordingly.” (underlining added)

6. A reading of the aforesaid paras shows that the trial Court has arrived at a finding and conclusion as per the circumstances of the case of long occupation of the suit premises by the respondent/defendant, the fact that the money order of rent was received on behalf of the appellants which was sent once the disputes had arisen, and more importantly relying upon the document, Ex.DW1/2 which was executed when the respondent/defendant was shifted to another room at the time of re-construction and which document, Ex.DW1/2 reads as under:-

“ The side portion of 90/40A (8’ X 10’ Area) which is occupied by Mr. Ashok Gulabani prop. of M/s Hans Properties is now temporary shifting to Centre portion of 90/40A, (10’X8’ area).

After construction of the side portion of above said premises the same will be handed over to Sh. Ashok Gulabani within 20 or 30 days.

Sd/-

(Heera Khilnani)

Sd/-

(Harish Khilnani)

Owner

(90/40A Malviya Nagar,
New Delhi)”

7. A civil case is decided on balance of probabilities. The trial Court has arrived at a finding based on balance of probabilities, in view of the long possession of the respondent/defendant and also the document Ex.DW1/2. Surely, if the respondent/defendant was a gratuitous licensee as alleged by the appellants, no document would have been executed such as the document, Ex.DW1/2.

8. Learned counsel for the appellants argues before this Court that the suit ought to have been decreed because the onus of proving that the respondent/defendant was a tenant was on the respondent/defendant and which he failed to discharge in view of the admitted fact that there was no rent agreement nor any rent receipt nor any proof of Rs. 1 lakh claimed to have been paid by the respondent. It is argued that the long period of possession cannot mean existence of tenancy inasmuch as long period of possession cannot create any tenancy title. At the first blush, this argument as advanced on behalf of the appellants may carry weight, however, it is inconceivable that for a long period of as many as 14 years a premises which is used as a shop could have been given merely because of “friendly relations”. In fact, the issue of “friendly relations” goes against the appellants/plaintiffs and not against the respondent/defendant inasmuch as

because of the friendly relations, no rent agreement would have been executed or rent receipt given or proof demanded by the respondent from the appellant of having paid to the appellant/plaintiff rent or a sum of Rs. 1 lakh. Whatever doubt remained with respect to entitlement of the respondent/defendant becomes clear from Ex.DW1/2, and which document would never have been executed if the respondent was a gratuitous licensee.

9. In view of the above, I do not find any merit in the appeal, which is accordingly dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

VALMIKI J. MEHTA, J

FEBRUARY 01, 2012

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