

IN THE HIGH COURT OF DELHI AT NEW DELHI

RFA No.492/2011

8th February, 2012

..... Appellant

Through: Mr. Ramesh Saraf, Advocate.

VERSUS

..... Respondent

Through: Mr. Amit Kumar Chaudhary,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. Counsel for the respondent states that the impugned judgment and decree for possession and mesne profits has already been executed and the respondent/plaintiff has received not only the possession of the suit property but also the mesne profits awarded. Counsel for the appellant/defendant states that the appellant seeks to pursue the appeal on merits for setting aside the impugned judgment and decree dated 23.8.2011 by which it was held that the appellant/defendant was not a tenant in the suit

premises and was a trespasser.

2. The facts of the case are that the respondent/plaintiff filed a suit for possession of the suit property comprising of one shop bearing private No.3, measuring 8'3" X 32', forming part of property bearing No.F-169, Khasra No.52/20, Village Khureji Khas, Laxmi Nagar Extension, Delhi. The respondent/plaintiff claimed to have purchased the rights in the suit property from the earlier owner Sh. Prem Chand Jain vide usual documents being the agreement to sell, power of attorney, receipt of payment etc, all dated 7.8.2000. The respondent/plaintiff received possession of the suit shop on execution of the documents dated 7.8.2000. When the respondent/plaintiff visited the suit premises in March, 2001 it was noticed that the locks of the shop had been changed and the appellant/defendant was in possession thereof claiming tenancy rights therein. It was further averred that the respondent/plaintiff lodged an FIR with the police bearing No.167/2001 and which case is pending disposal. It was pleaded that the appellant/defendant was a trespasser in the suit property and therefore the subject suit was filed for possession and mesne profits.

3. The appellant/defendant claimed that he was a tenant who was

inducted by the earlier owner Mr. Prem Chand Jain. Reliance was also placed upon an ex parte decree of perpetual injunction passed by a Civil Judge, Delhi in favour of the appellant/plaintiff and against the earlier owner Mr. Prem Chand Jain.

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

- “1. Whether the plaintiff is the owner of the suit property? OPP
2. Whether notice u/s 106 of The Transfer of Property Act, 1882, was served on the defendant prior to filing of the present suit and if not, what is its effect? OPP
3. Whether the suit has not been properly valued for the purposes of court fee and jurisdiction? OPD
4. Whether the jurisdiction of this court to try the present suit is barred u/s 50 of The Delhi Rent Control Act as alleged in para no.6 of preliminary objections of W.S.? OPD
5. Whether the plaintiff has suppressed material facts from this court and if so, what is its effect? OPD
6. Whether the defendant is a tenant or a tress-passer in respect of suit premises? OP on parties.
7. Whether the plaintiff is entitled to rent/damages in respect of suit premises from the defendant and if so, at what rate and for which period? OPP
8. Whether the plaintiff is entitled to a decree of possession in respect of suit premises against the defendant on the basis of facts mentioned in the plaint? OPP
9. Relief.”

5. The documents which were executed by Mr. Prem Chand Jain in favour of respondent/plaintiff dated 7.8.2000 were proved and exhibited

before the trial Court as Ex.PW1/E (agreement to sell), general power of attorney (Ex.PW1/B) and affidavit with respect to handing over of possession (Ex.PW1/C) etc. I may state that the rights which are claimed on the basis of these documents arise under Section 53A of the Transfer of Property Act, 1882 which gives rights in an immovable property pursuant to the doctrine of part performance. Rights are also created in the suit property in favour of the respondent/plaintiff as per Section 202 of the Contract Act, 1872, by which the power of attorney given for consideration is irrevocable. It is relevant to note that these documents were executed before the provision of Section 53A of the Transfer of Property Act, 1882 was amended in the year 2001, and whereafter rights under Section 53A of the Transfer of Property Act, 1882 can only be claimed if the document is duly stamped and registered. It is relevant to note that the Supreme Court has preserved rights arising from the doctrine of part performance and an irrevocable power of attorney in the decision of *Suraj Lamp Industries Pvt. Ltd. Vs. State of Haryana and Anr. 183 (2011) DLT 1(SC)* as per paras 12, 13 and 16 of the judgment.

6. The trial Court has held that the appellant/defendant failed to discharge the onus of proof to show that he was a tenant in the suit property.

The earlier judgment passed by the Civil Judge dated 17.9.2002 was not only a judgment to which the respondent/plaintiff was not a party, but in any case, the only injunction granted was that the appellant/defendant would not be dispossessed without due process of law. The subject suit for possession was therefore filed to seek possession from the appellant/defendant by due process of law. The trial Court has also held that the suit was not to be barred under Section 50 of the Delhi Rent Control Act, 1958 and which provision would only apply if the appellant/defendant proved his tenancy of the suit premises. The trial Court has also held that no notice was required to be served under Section 106 of the Transfer of Property Act, 1882 as the appellant/defendant was only a trespasser in the suit property.

7. I completely agree with the findings and conclusions of the trial Court. The appellant/defendant filed no proof whatsoever of tenancy existing in his name. There was no rent agreement. There was no rent receipt. There was no proof of payment of rent by any mode including by account payee cheque. In law, a person cannot be called upon to prove a negative i.e. the respondent/plaintiff could not be called upon to prove that the appellant/defendant was not a tenant in the shop. Once the

respondent/plaintiff was the owner of the property he was entitled to possession unless the appellant/defendant showed that he was a tenant in the suit property. Some of the relevant observations of the trial Court are contained in paras 22 and 23 of the impugned judgment while dealing with the issue of whether the appellant/defendant was a trespasser or a tenant.

These paras read as under:-

“22. It is contended by Ld. Counsel for defendant that the latter was inducted as a tenant in the suit shop by Sh. Prem Chand Jain. Nowhere in his written statement, the defendant clarified as he was inducted as a tenant by said Sh. Prem Chand Jain or when the tenancy in his favour was created. This fact was not clarified by defendant in his affidavit (Ex.D1) also, filed in evidence. In his cross-examination, it is disclosed by defendant (DW1) that he was put in possession of suit shop on 15.08.2000. Prior to said date, said shop was in possession of Mr. Prem Chand Jain. Ld. Counsel for defendant gave a suggestion to Sh. Prem Chand Jain (PW2) during latter’s cross examination that suit shop was let out by him to the defendant on 25.08.2000 (not on 15.08.2000) and said fact was denied by PW2. It is admitted by defendant (DW1) that the latter had not filed any document to verify his possession over the suit shop. In this way, there is no evidence at all to prove that defendant was inducted as a tenant by said Sh. Prem Chand Jain or came into possession of same on 15.08.2000 or even 25.08.2000. Trite it to say that as per plaintiff, he noticed the defendant having tress-passed in suit shop in March 2001, when he happened to visit the same. For the sake of arguments even if, it presumed that defendant came in possession of suit shop on 15.08.2000, as per case of plaintiff, same was put in possession of it by erstwhile owner Sh. Prem Chand Jain on 07.08.2000. As discussed above, Sh. Prem Chand Jain (PW2) also admitted the fact that he sold said shop to plaintiff on 07.08.2000. Agreement

to sell (Ex.PW1/E) stipulates that physical vacant possession of the suit shop was handed over to the second party i.e. plaintiff, on the day of execution of said documents i.e. 07.08.2000. All this is tautologized by the plaintiff (PW1) in his affidavit (Ext.P1) stating that after execution of title documents, he put his own lock over the suit property. In this way, it can be presumed that the defendant trespassed in the suit shop after breaking open the lock, put on by the plaintiff.

23. The defendant failed to prove himself as a tenant. Even otherwise, if Sh. Prem Chand Jain, the erstwhile owner had already sold suit shop to the plaintiff or atleast executed GPA after taking consideration, the defendant could not be inducted as a tenant by the same person i.e. Sh. Prem Chand Jain, GPA in favour of plaintiff having become irrevocable.” (underlining added)

8. I completely agree with the findings and conclusions of the trial Court which have been reproduced by me above. A civil case is decided on balance of probabilities. The respondent/plaintiff cannot lose his valuable rights of possession of the suit property merely on the basis of oral averments, and which are not discharge of the onus of proof of existence of tenancy.

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.

VALMIKI J. MEHTA, J

FEBRUARY 08, 2012

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