

* **HIGH COURT OF DELHI AT NEW DELHI**
+ **R.S.A NO.17/2013 & C.M. NOS.1590-1591/2013**

Decided on : 31st January, 2013

ARTI Appellant
Through: Ms. Gunjan Chowksey, Advocate.
Versus

RAJ KUMAR AGGARWAL & ANR. Respondents

CORAM:
HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (ORAL)

1. This is a second appeal under Section 100 CPC read with Order 42 CPC against the judgment dated 17.10.2012 passed by the learned Additional District Judge.

2. Yesterday, the matter was argued by the learned counsel for the appellant and thereafter the learned counsel had very fairly stated that she is not pressing her appeal and she will confine her submissions only to the question of grant of time as the appellant was in occupation of the premises as a tenant since 1997. Accordingly, the matter was kept for

today for the purpose of obtaining instructions as to how much time is sought by the appellant.

3. Today, the learned counsel for the appellant has started arguing all over again that a substantial question of law is involved inasmuch as the suit of the respondents being barred by Section 50 of the Delhi Rent Control Act, 1958.

4. Briefly stated the facts of the case are that the respondents filed a suit for possession, permanent injunction and mesne profits/damages against the appellant. The case which was setup in the plaint was that respondent No.1 is the owner of property bearing No.1061/B/5/7, Ward No.7, Mehrauli, New Delhi-30, measuring 50 square yards. It was averred that in the month of November, 1997, the appellant had approached respondent No.1 through his sister (respondent No.2 herein) and took the ground floor comprising of two room set with toilet and bathroom and a kitchen on a monthly rent of ₹2,000/- excluding electricity and water charges, initially for a period of 2-3 months and assured to vacate after expiry of the said period. It had been alleged that subsequent thereto, rent was increased to ₹3,000/- per month and at the

time of filing of the suit, the rent was ₹4,000/- per month, which the appellant continued to pay to the respondents. It was alleged that in the month of August, 2004, the appellant approached the respondent No.1 through respondent No.2 and expressed her willingness to purchase the entire property for a total sale consideration of ₹5 lacs. A sum of ₹40,000/- was purported to have been given by the appellant to the respondent No.1 by way of advance money (*bayana*) on 26.8.2004 and the respondent No.2 (Saroj) is purported to have executed a receipt in favour of the appellant on behalf of respondent No.1 (Raj Kumar Aggarwal). It was assured to the appellant that a formal Agreement to Sell/Purchase would be drawn later. Subsequent thereto, the appellant is further stated to have paid a sum of ₹20,000/- to respondent No.2 on 10.12.2004 and Agreement to Sell was also executed in favour of the appellant. In terms of the said Agreement, the balance amount of ₹4,40,000/- was to be paid to the respondent No.1 by 10.1.2005 and on receiving the balance payment, the respondent No.1 was required to handover the vacant and peaceful possession of the first and second floor of the suit property to the appellant. It was stated in the Agreement to Sell that in case the respondent No.1 cancels the deal then he will have to

pay a sum of ₹80,000/- to the appellant. The appellant did not pay the balance amount to the respondent No.1 till the last day of expiry of the Agreement and on request, the time of payment in terms of the Agreement was extended till 31.1.2005. A further sum of ₹10,000/- is stated to have been paid by the appellant; however, as the balance amount of ₹4,30,000/- was not paid by the appellant to the respondent No.1, the deal was cancelled. During this entire period of transaction, the respondent No.1 accepted the appellant as a tenant and it is also not in dispute between the parties that the amount of ₹40,000/- was adjusted as rent for a period of ten months till November, 2005 @ ₹4,000/- per month.

5. The appellant appeared in response to the summons and filed his written statement contesting the claim of the respondent No.1 for possession and permanent injunction and mesne profits/damages. Various preliminary objections were taken for the dismissal of the suit. These were, under Order VII Rule 11 CPC, the plaint be rejected on account of lack of cause of action and that the jurisdiction of the Civil Court is barred under Section 50 of the Delhi Rent Control Act. It was

pleaded by the appellant that the rent of the property was ₹1,300/- per month with effect from December, 1995 excluding electricity and water charges and the suit was not properly valued for the purpose of court fees.

6. On merits also, the claim of the respondents for possession was contested on the ground that even if the stand of the respondent No.1 was accepted that the appellant was inducted as a tenant at monthly rent of ₹2,000/- for a period of 2-3 months in the year 1997, the rent could not be ₹4,000/- per month at the time of filing of the suit in the year 2005 because under the Delhi Rent Control Act, the rent could only be enhanced maximum by 10 per cent for a block of three years and if calculated so, the increase of 10 per cent twice over for a sum of ₹2,000/- would not take the rent above ₹3,500/- so as to deny the protection of Rent Act to the appellant.

7. On the pleadings of the parties, the following issues were framed by the trial court :

- “1. Whether the plaintiff is entitled for the decree of recovery of possession, as prayed for?*
- 2. Whether the plaintiff is entitled for the decree of permanent injunction, as prayed for?*

3. *Whether the plaintiff is entitled for the decree of mesne profit/damages, as prayed for?*
4. *Whether the suit is without any cause of action?*
5. *Whether the suit is barred by Section 50 of DRC Act, 1958?*
6. *Whether the plaintiff has no locus standi to file the suit?*
7. *Whether the present suit is not maintainable as the appropriate remedy should have been to file suit for specific performance?*
8. *Relief.”*

8. On all these issues, a finding was returned by the trial court against the appellant. There is a clear-cut finding arrived at by the trial court that the appellant was a tenant under the respondents on a monthly rent of ₹4,000/- at the time of filing of the suit and, therefore, the rent being well above ₹3,500/-, she did not enjoy the protection of the Delhi Rent Control Act nor did Section 50 of the Act oust the jurisdiction of the Civil Court.

9. Feeling aggrieved by the aforesaid judgment, the appellant preferred the first appeal before the court of learned Additional District Judge. The learned ADJ upheld the findings of the trial court on all the

parameters that the appellant was a tenant paying rent of ₹4,000/- and that the jurisdiction of the Civil Court was not barred. The learned Additional District Judge while dealing with the question of jurisdiction of the Civil Court also gave a reasoning to the effect that once an Agreement to Sell between the appellant and the respondent was executed with certain terms and conditions, there was an express surrender of lease by the appellant under Section 111 (e) of the Transfer of Property Act, 1882. On these reasons, the learned appellate court tried to justify that if an Agreement to Sell was entered into, the appellant had expressly surrendered his tenancy rights in respect of the suit property, the provisions of the Delhi Rent Control Act would not be applicable and consequently, the bar of Section 50 would not come into play.

10. Still feeling dissatisfied, the appellant filed the regular second appeal before this court. I have already observed hereinabove that yesterday, the learned counsel for the appellant took almost 50 minutes to canvass her submission that substantial question of law is involved in the matter and, therefore, the appeal deserves to be entertained and notice deserves to be issued. Since this court was not in agreement with the

submissions advanced by the learned counsel for the appellant, the counsel had taken time to obtain instructions with regard to the grant of time for vacating the premises. But today, a fresh attempt was sought to be made to urge all those points which were urged before this court yesterday. This practice of having a second go at the case is not appreciated. The appellant has formulated the questions in this appeal (at page No.7 of the appeal) as the substantial questions of law. All these questions except question No.2 are essentially questions of fact in respect of which concurrent finding has been returned by the courts below to the effect that the appellant is a tenant under the respondent No.1 and that he was paying a rent of ₹4,000/- at the time of filing of the suit for possession and by virtue of the same, he did not enjoy the protection of the Delhi Rent Control Act. So far as the plea of the appellant that the jurisdiction of the Civil Court was ousted by virtue of Section 50 was concerned, that was also rejected on the ground that the onus of proving the said issue was on the appellant who had failed to discharge the said onus. Therefore, in this factual matrix, there being a concurrent finding of fact arrived at by the two courts below, duly supported by evidence, by no stretch of imagination, the judgment be said to be either perverse or

illegal or not based on evidence which has been produced before the courts as is sought to be urged. The only point to which this court does not agree is the reasoning for non-applicability of Section 50 of the Delhi Rent Control Act, 1958, which has been given by the learned appellate court regarding the applicability of Section 111 (e) of the Transfer of Property Act, 1882, giving the reasons that after the Agreement to Sell was entered into between the respondents and the appellant, there was an express surrender of lease by the appellant in favour of the respondents. I feel that this reasoning is not supported by any evidence because for an express surrender of lease, there has to be evidence by way of oral testimony to show that there has been an express surrender. There is no evidence in this regard. Rather, even after the Agreement to Sell having been entered into, the part payment of ₹40,000/- which was paid towards advance amount (*bayana*) was adjusted towards rent for ten months. This shows that the relationship of landlord and tenant continued and the rent being more than 3,500/-, the Delhi Rent Control Act was not applicable. To that extent, the observations of the learned appellate court are not sustainable. But nevertheless this will not distract from the non-

applicability of the Section 50 of the Delhi Rent Control Act because there is ample evidence in that regard.

11. The learned counsel for the appellant has also referred to some judgments. I have gone through the same. There is no dispute about the law which has been laid down by the Apex Court with regard to the regular second appeal (refer to *Kulwant Kaur vs. Gurdial Singh Mann*; AIR 2001 SC 1273). But the applicability of law will be dependent on the facts of each individual case. Merely because there is an observation in the said judgment that where there is a finding of fact, even if it is erroneous, will not be generally disturbed but where it is found that a finding of fact stands vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein and the High Court will have jurisdiction, is not a test which is applicable to the facts of the present case because, in my view, there is no perversity in the finding of fact arrived at by the two courts below with regard to holding of the appellant as a tenant. I am not purposely referring to other judgments in detail as, in my considered

opinion, after having glanced through the said judgments; they are of not much help to the appellant.

12. For the reasons mentioned above, since no substantial question of law is involved in the matter, the regular second appeal cannot be entertained. Accordingly, the appeal is dismissed.

V.K. SHALI, J.

JANUARY 31, 2013
‘AA’