

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

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Date of decision: 4th September, 2013

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RFA 133/2013 & CM No.4190/2013 (for stay)

NARENDER KUMAR SHARMA

..... Appellant

Through: Mr. Rais Farooqui, Adv.

versus

NEELAM SHARMA

..... Respondent

Through: Mr. Muntazir Mehdi, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns the judgment and decree dated 15th December, 2012 of the Court of the learned Addl. District Judge-03 (East), Karkardooma Courts, Delhi in Suit No.2158/2009 (Unique Case ID No.02402C0361262009) filed by the respondent/plaintiff of eviction of the appellant/defendant from property No.11/424, Lalita Park, Laxmi Nagar, Delhi.

2. The counsel for the respondent/plaintiff being on caveat appeared on 11th March, 2013 when the appeal came up first and vide subsequent order dated 3rd April, 2003 the appeal was posted for hearing on 29th April, 2013 and the statement of the counsel for the respondent/plaintiff that he will not execute the decree recorded. The appeal was thereafter adjourned from time to time and the Trial Court record requisitioned. The counsel for the appellant/defendant was heard on 12th August, 2013 when after some hearing the personal presence of the appellant/defendant was directed for

today and the appellant/defendant also directed to bring a sum of Rs.46,000/- admittedly due from him to the respondent/plaintiff to the Court today.

3. The appellant/defendant is present in person and has tendered the sum of Rs.46,000/- to the respondent/plaintiff in cash and has further stated that in fact a sum of Rs.92,000/- is due, according to the appellant/defendant, to the respondent/plaintiff and undertaken to pay the balance of Rs.46,000/- within three days. However, the counsel for the respondent/plaintiff has refused to accept the said amounts as per the detailed reason recorded in the separate order of today.

4. Be that as it may, the counsels have been heard further.

5. The appellant/defendant first filed a suit for permanent injunction to restrain the respondent/plaintiff from forcibly evicting the appellant/defendant from the first floor and from use of other portions of the said property and for mandatory injunction to direct the respondent/appellant to issue rent receipts to the appellant/defendant. The respondent/plaintiff besides contesting the said suit, filed a counter claim therein for eviction of the appellant/defendant from the portion of the property in his use and occupation and for recovery of *mesne* profits/damages for use and occupation. However upon objection of the appellant/defendant that the counter claim was not maintainable in the suit for permanent and mandatory injunction filed by the appellant/defendant, the respondent/plaintiff withdrew the said counter claim with liberty to file the same as a separate suit. The suit for permanent injunction filed by the appellant/defendant was disposed of on the statement of the respondent/plaintiff that the

appellant/defendant shall not be forcibly dispossessed and the appellant/defendant withdrew his claim for mandatory injunction.

6. Thereafter the respondent/plaintiff filed the suit from which this appeal arises pleading:-

- (a). that she purchased the subject property on 25th November, 1986;
- (b). that the appellant/defendant is the younger brother of the husband of the respondent/plaintiff;
- (c). that at the time of purchase by the respondent/plaintiff of the subject property the appellant/defendant was residing with another brother;
- (d). that the respondent/plaintiff after purchase of the property started residing therein and subsequently constructed the first floor thereof;
- (e). that the appellant/defendant upon the construction of the first floor being completed, requested the husband of the respondent/plaintiff to allow the appellant/defendant to live on the said first floor in view of his financial incapability owing to his paltry monthly income of Rs.200/- to Rs.300/- ;the respondent/plaintiff and her husband in or about the year 1987 allowed the appellant/defendant to so reside on the first floor on compassionate grounds and the appellant/defendant agreed to vacate the premises as and when desired by the respondent/plaintiff;

- (f). that the husband of the respondent/plaintiff also helped the appellant/defendant to establish his business;
- (g). that the appellant/defendant was permitted to reside in the property not only without any consideration but all electricity, water and other charges with respect to the house were also borne by the respondent/plaintiff;
- (h). that in the year 1992 the respondent/plaintiff purchased another property and shifted in the same and since then the appellant/defendant started paying the electricity charges of the subject property;
- (i). that even after shifting to the other house the respondent/plaintiff continued to have possession of the ground floor, with the appellant/defendant being in permissive use of the first floor only;
- (j). that the appellant/defendant started misbehaving with the respondent/plaintiff and her husband and the relationship between the parties deteriorated;
- (k). that ultimately a legal notice dated 10th July, 2009 was got served on the appellant/defendant withdrawing the permission earlier granted to him to use the premises; and,
- (l). that the appellant/defendant in reply thereto claimed to be a tenant at the rate of Rs.2,000/- per month in the premises;

Accordingly, the suit for relief of recovery of possession and for *mesne* profits/damages for use and occupation at the rate of Rs.7,000/- p.m. was filed.

7. The appellant/defendant contested the suit by filing a written statement claiming to be a tenant in exclusive possession of the first floor and the toilet situated on the second floor and of the vacant space on the ground floor since the year 1987 and with the rent then being Rs.2,000/- per month. It was further pleaded in the written statement that in fact the respondent/plaintiff had herself approached the appellant/defendant in the year 1987 to take the first floor on rent and the appellant/defendant had initially occupied the premises at the rent of Rs.250/- per month which was enhanced from time to time to Rs.2,000/- per month. It was further pleaded that the husband of the respondent/plaintiff had been assuring that the said house will ultimately be sold to the appellant/defendant.

8. The respondent/plaintiff filed a replication controverting the written statement and reiterating her case in the plaint.

9. On the pleadings of the parties, the following issues were framed on 23rd July, 2010:-

- i). *Whether the plaintiff is entitled for a decree of eviction against the defendant with respect to the suit property alleged? OPP*
- ii). *Whether plaintiff is entitled for damages/mesne profits for the use and occupation of suit property @ Rs.7,000/- per month with arrears since 10.8.2009 along with interest? OPP*
- iii). *Whether the plaintiff has concealed the material facts from the court, if so, its effect? OPD*

- iv). *Whether this Court has no jurisdiction to try the suit as suit is barred u/S 50 of DRC Act? OPD*
- v). *Relief.”*

10. The respondent/plaintiff besides examining herself also examined her husband and three other witnesses. The appellant/defendant besides examining himself examined one other witness.

11. The learned Addl. District Judge has in the impugned judgment found/observed/held:-

- (i). that the testimonies of the respondent/plaintiff, her husband and other family members examined could not be **discredited** by the appellant/defendant in cross examination and therefrom it was proved and established that the appellant/defendant was inducted in the property under permissive arrangement without consideration;
- (ii). it was thus concluded that the status of the appellant/defendant was as of a licensee;
- (iii). that though the appellant/defendant had attempted to challenge the title of the respondent/plaintiff to the property but had in the written statement not denied the ownership of the respondent/plaintiff; he had rather taken a plea of being a tenant under the respondent/plaintiff and in accordance with the provisions of Section 116 of the Indian Evidence Act, 1872 was estopped from challenging the ownership or title of the respondent/plaintiff;

- (iv). that the onus to prove that he was a tenant was on the appellant/defendant but the appellant/defendant had failed to bring on record any evidence to the said effect;
- (v). that the son of the appellant/defendant examined as DW2 had contradicted the testimony of the appellant/defendant and in any case the testimony of DW2 was on hearsay basis;
- (vi). that the appellant/defendant had failed to establish that he had ever paid any rent to the respondent/plaintiff;
- (viii). that though at the time of final arguments the counsel for the appellant/defendant had filed photocopy of a Notification and contended that the subject property was situated in an unauthorized colony and the Government was the owner thereof but was stopped from raising any such argument; and,
- (ix). that the respondent/plaintiff had failed to lead any evidence on the aspect of *mesne* profits/damages for use and occupation.

Axiomatically the suit in so far as for the relief of eviction/recovery of possession was decreed.

12. During the hearing of this appeal on 12th August, 2013 when it was enquired from the counsel for the appellant/defendant as to what is the proof of the tenancy, the counsel for the appellant/defendant had contended that long possession is proof of tenancy.

13. It was on 12th August, 2013 further enquired from the counsel for the appellant/defendant whether the appellant/defendant had shown or declared

himself as a tenant in the property or as paying any rent thereof in any record whatsoever.

14. The answer to the aforesaid was also in the negative.

15. It was next enquired from the counsel for the appellant/defendant on 12th August, 2013 as to what the appellant/defendant does and how he has accounted for the rent alleged to have been paid. Upon the counsel for the appellant/defendant expressing ignorance, direction for personal presence of the appellant/defendant in the Court for today was made.

16. The counsel for the appellant/defendant on instructions from the appellant/defendant present in the Court states that the appellant/defendant is carrying on business of screen printing, that he keeps some sort of accounts and has been filing Income Tax Returns though of nil Income Tax.

17. On further enquiry whether the appellant/defendant has in the accounts maintained or in the Income Tax Returns filed shown payment of any rent of the property, the answer is again in the negative. On enquiry whether the appellant/defendant is shown as a tenant in the property in the House Tax surveys conducted by the Municipal Corporation from time to time also it is stated that it is not so. In this regard it may be noticed that the respondent/plaintiff in her evidence has proved the House Tax receipt as Ex.PW1/1 and wherefrom it is established that the property is eligible to House Tax. Ordinarily the municipal officers carry out surveys from time to time and record the occupation/possession of the property and of the presence of tenants if any in the property in as much as the same has relevance for the purposes of assessment of House Tax. In the ordinary

course, the appellant/defendant if in occupation of the property as a tenant would have been so recorded as a tenant in the House Tax surveys.

18. The counsel for the appellant/defendant in continuation of his argument of long possession itself being proof of tenancy has today placed reliance on the judgment dated 1st February, 2012 of this Court in RFA No.864/2003 titled ***Harish Kumar Vs. Ashok Gulabani***. However the same is not found applicable. This Court therein upheld the finding of the learned Addl. District Judge of tenancy, for the reason of the parties being not related to each other, the document Ex.DW1/2 proved in that case and the premises being of commercial nature and it being observed that “it is inconceivable that for a long period of as many as 14 years the premises which is used as a shop could have been given merely because of friendly relations”. The document Ex.DW1/2 in that case was a document executed at the time when the defendant was temporarily shifted to another premises. This Court on the basis thereof held that if the occupation of the shop had been friendly, the occasion for executing a formal document when the defendant was asked to temporarily shift to **another premises would** not have arisen.

19. On the contrary the parties in the present case are closely related to each other, the subject premises is a house and there is no document as Ex.DW1/2 in the present case. In the Indian societal context it is not unimaginable for one brother to permit another brother to reside in his house.

20. The counsel for the appellant/defendant has further contended that the pleading of the respondent/plaintiff of having allowed the

appellant/defendant to reside in the house on compassionate basis is falsified from the three receipts dated 18th October, 1984, 9th November, 1984 and 11th November, 1984 of deposit of Rs.400/- each by the appellant/defendant in his account with Syndicate Bank. It is contended that the same falsify the plea in the plaint of the monthly income of the appellant/defendant then being Rs.200/- to Rs.300/-

21. However though the appellant/defendant in his affidavit by way of examination-in-chief had sought to tender the said documents into evidence but the same being found to be merely photocopies were not admitted into evidence but mark X-2, X-3 and X-4 were put thereon.

22. The counsel for the appellant/defendant still insists that they should be read in evidence.

23. I am unable to agree.

24. The appellant/defendant was alerted while tendering his affidavit by way of examination-in-chief in evidence that the said documents had not been admitted into evidence but still did not make any attempt to produce the originals and it is not as if the question of admission of the said documents into evidence was kept open. There is also nothing to show that the appellant/defendant before the Trial Court urged that the said documents to be considered in evidence. Thus the said documents cannot be read.

25. For the aforesaid reasons the contention of the counsel for the appellant/defendant of the respondent/plaintiff having not cross examined the appellant/defendant with respect to the said document also disappears.

26. Once the Court had refused to admit the documents into evidence no adverse inference can be drawn from the non-cross examination by the respondent/plaintiff of the appellant/defendant thereon.

27. The counsel for the appellant/defendant has next contended that the plea taken by the respondent/plaintiff for termination of the license is also false. It is contended that the sewer work in the colony had taken place in the year 1998-99 as admitted by the husband of the respondent/plaintiff in cross examination and the termination of license is of the year 2009.

28. I am unable to see as to how the said fact would be material; what the respondent/plaintiff has pleaded was that over a period of time the relationship between the parties had been deteriorating. Moreover the cause of action for the determination of license is not material and the controversy to be adjudicated between the parties is as to the nature of the occupation/status of the appellant/defendant in the premises.

29. Though no other argument was raised by the counsel for the appellant/defendant but while this judgment is being dictated the counsel for the appellant/defendant has contended that the Trial Court has wrongly observed that the appellant/defendant in the written statement had not challenged the ownership of the respondent/plaintiff. It is further contended that the argument of Section 116 of the Evidence Act was taken by the respondent/plaintiff at the time of hearing only. The counsel for the appellant/defendant is unable to show the challenge to ownership in the written statement and on the contrary now invites attention to the cross

examination of the respondent/plaintiff where the respondent/plaintiff has admitted to the property coming in the area of green belt.

30. The aforesaid contention is also on a misconstruction of the evidence recorded. What has been recorded in the evidence is “the plot comes in the area of green belt declared by DDA. Vol. I do not know”. There cannot thus be said to be any admission. Moreover the appellant/defendant having come into occupation of the premises through the respondent/plaintiff, is liable to deliver back possession of the premises to the respondent/plaintiff and is not entitled to challenge the title of the respondent/plaintiff. The Supreme Court in *Sant Lal Jain Vs. Avtar Singh* AIR 1985 SC 857 and followed by the Division Bench of this Court in *Prabhu Dayal Vs. Roop Kumar* AIR 2005 Delhi 144 has held that it is not open to a licensee during the subsistence of the license or in the suit for recovery of possession of the property instituted after revocation of license to set-up title of property in himself or anyone else and that it is his plain duty to surrender possession of property as licensee and seek his remedy separately.

31. There is thus no error in the impugned judgment and decree; resultantly the appeal is dismissed. The parties to bear their own costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 4, 2013

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