

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

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Date of decision: 5th July, 2013

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RFA 292/2013 & CM No.9821/2013 (for stay)

SHRI SANJAY SHARMA

..... Appellant

Through: Mr. R.P. Gupta, Advocate.

Versus

SHRI MADAN MOHAN SHARMA

..... Respondent

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. Though this is a first appeal under Section 96 of Civil Procedure Code (CPC), 1908 against the judgment and decree of the learned Additional District Judge and is before this Bench today for the first time for admission and further though ordinarily first appeals require consideration on merits after perusal of the records, but the facts of the present case are such that there is no need to follow the said ordinary procedure which would result in the negation of justice.

2. The respondent filed the suit from which this appeal arises against the appellant for recovery of possession of flat No.74C, Pocket-E, Dilshad Garden, Delhi claiming the appellant to be in trespass/unauthorized possession thereof and for recovery of mesne profits at the rate of Rs.6,000/- per month.

3. The appellant set up the defence of being tenant under the respondent in the said flat at a rent of Rs.2,200/- per month.

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

“1. Whether the defendants No.1 and 2 are trespassers in suit premises? OPP

2. Whether the defendant No.1 is a tenant under the plaintiff in the suit premises? OPD-1

3. Whether the jurisdiction of this Court is barred by Section 50 of the DRC Act? OPD-1

4. Whether the plaintiff is entitled to possession of the suit premises? OPD

5. Whether the plaintiff is entitled to damages/mense profits? If so, at what rate and for what period and against whom? OPP

6. Whether the plaintiff is entitled for injunction as prayed for? OPP

7. Relief.”

5. Prior to the institution of the aforesaid suit by the respondent, the appellant had instituted a suit against the respondent, for injunction, to restrain the respondent from forcibly dispossessing the appellant from the said flat. The plea of the appellant in his suit for injunction also was that he was a tenant under the respondent in the said premises. In the said suit, the following issues were framed:

“1. Whether plaintiff is a tenant in the suit property? OPP

2. Whether plaintiff is entitled for relief of permanent injunction as prayed for? OPP”

6. The suit for injunction filed by the appellant was decreed in his favour by the Court of the Civil Judge who decided both the issues aforesaid in favour of the appellant, holding the appellant to be a tenant in the flat. The respondent preferred an appeal against the said judgment and decree and which appeal was allowed and it was held that the appellant is a trespasser in the flat and is not a tenant therein under the respondent; however since the possession of the appellant was admitted and further since the respondent had by then already filed the suit for possession from which this appeal arises, injunction was granted restraining the respondent from forcibly and without due process of law dispossessing the appellant from the premises.

7. After the aforesaid judgment, the respondent in his suit for possession applied under Order 12 Rule 6 of the CPC on the basis of the finding of the Appellate Court in the suit for injunction filed by the appellant of the appellant being a trespasser.

8. The appellant in reply to the said application took a plea that he had filed a second appeal against the judgment aforesaid in first appeal.

9. However the appellant till the arguments and decision on the said application under Order XII Rule 6 CPC could not give particulars of the said second appeal stated to have been filed by him. In the circumstances, the learned Additional District Judge in the impugned judgment dated 8th March, 2013 held that the finding returned in the appeal against the

judgment in the suit for injunction filed by the appellant, of the appellant being a trespasser and not a tenant in the premises, and which finding had attained finality, the respondent was entitled to a decree for possession. As far as the claim for mesne profits was concerned, the same was restricted to Rs.2,200/- per month being the rate at which the appellant claimed to be the tenant in the flat and which tenancy he had been unable to prove.

10. The appellant in this appeal has stated that though the appellant had instructed an advocate for filing a second appeal against the judgment in the first appeal holding the appellant to be a trespasser but has now learnt that the said advocate did not file any appeal. The counsel for the appellant on enquiry confirms that no appeal has been filed till date.

11. Whatsoever the reasons may be for the appellant not filing the second appeal, they do not come in the way of the finding in the judgment in the first appeal of the appellant being a trespasser in the premises having attained finality.

12. The only argument urged by the counsel for the appellant is that since the issues had been framed in the suit, trial should have been permitted.

13. The said argument has no basis in law. It has been held by the Supreme Court in *I.T.C. Limited Vs. Debts Recovery Appellate* that merely because issues have been framed, is no reason for the trial to be undertaken, if it is brought to the notice of the Court that the same is not necessary. Similarly, it has been held in *Parivar Seva Santhan Vs. Dr. Veena Kalra* AIR 2000 Delhi 349, *Meera Gupta Vs. Dinesh Chand* 94 (2001) DLT 10 & *State Trading Corporation of India Vs. Nirmal Gupta*

MANU/DE/3155/2012 that framing of the issues is no bar to consider the application under Order 12 Rule 6 of CPC.

14. In the present case, no trial on the same issues, findings whereon have attained finality, in any case could have been undertaken.

15. No other argument has been urged.

16. It would thus be clear that there is no need to call for the records of the suit or to issue notice to the respondent.

17. The appeal is without any merit and is dismissed; however the same having been dismissed on the very first date, no order as to costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

JULY 5, 2013

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