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HIGH COURT OF DELHI AT NEW DELHI

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R.S.A. No.227 of 2011 & C.M. Nos.23469-23470 of 2011

Decided on : 9th September, 2013

SMT. ROSHAN

..... Appellant

Through: Ms. Suman Kapoor, Advocate.

Versus

SMT. NOOR JAHAN

..... Respondent

Through: Mr. R.K. Singh, Advocate.

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (ORAL)

1. This is a regular second appeal under Section 100 CPC against the judgment dated 15.10.2011 passed by the learned Additional District Judge in R.C.A. No.55/2011 titled *Roshan vs. Noor Jahan*.

2. I have heard the learned counsel for the appellant on the formulation of substantial question of law. Before dealing with the submissions made by the learned counsel for the appellant, it would be worthwhile to give brief facts of the case.

3. The respondent herein, Noor Jahan, filed a suit bearing No.109/06/99 for permanent and mandatory injunction and for recovery

of damages/mesne profits against the present appellant, Roshan, claiming herself to be the tenant of a flat bearing No.41, Second Floor (left hand side), G.B. Road, Delhi on a monthly rent of ₹400/- for commercial purposes. She was inducted as a tenant pursuant to the agreement dated 22.12.1996 purported to have been executed in her favour by Monika Chhabra and Naresh Chhabra. It was stated by her that in the month of April, 1998, she had to go to her native place because of which she permitted the present appellant to use the premises by way of licence for a period of eleven months in her absence. In order to protect her interest, a licence deed dated 15.4.1998 was purported to have been executed between the appellant/licensee and the respondent/licensor. It has been further stated that pursuant to the licence deed, the defendant/appellant herein also deposited a security amount of ₹10 lacs with the respondent herein and agreed to pay ₹200/- per day as a license fee. It was alleged that after the plaintiff/respondent herein returned from her native place in March, 1999, she asked the defendant/appellant herein to vacate and hand over the vacant and peaceful possession of the suit premises to her. The present appellant is stated to have promised to do the needful, however, she failed to honour her commitment as a consequence of which a suit for

permanent injunction apart from damages was filed by the plaintiff/respondent herein against the present defendant/appellant.

4. The defendant/appellant herein contested the suit and took the plea that she was a tenant in respect of the suit premises but there was a tripartite agreement between the present appellant, the respondent and the original landlords, namely, Monika Chhabra and Naresh Chhabra. It was alleged that the plaintiff/respondent had surrendered her tenancy rights in favour of the defendant/appellant for a total consideration of ₹20 lacs. It was further stated that as defendant/appellant was an illiterate lady, therefore, she did not know what documents were got signed by the plaintiff/respondent from her.

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

- “1. Whether the suit is not maintainable under Section 41 ‘h’ of the Specific Relief Act? OPD*
- 2. Whether the plaintiff is entitled for decree of mandatory injunction as prayed? OPP*
- 3. Whether the plaintiff is entitled for recovery of damages. If yes, at what rate and for what period? OPP*

4. *Whether the plaintiff is entitled for a decree of injunction as prayed? OPP*

5. *Relief.”*

6. The plaintiff/respondent in support of her case filed affidavits and made herself available for the purpose of cross-examination. Apart from this, four witnesses were examined on her behalf. None of these witnesses were cross-examined by the defendant/appellant despite sufficient time having been given to her. So far as the defendant/appellant is concerned, neither she entered into the witness box nor did she examine any witness in order to rebut the testimony of the witnesses adduced by the plaintiff/respondent in support of her case. The reason for this was that the defendant/appellant, after filing the written statement, had absented and she was proceeded ex parte. The learned trial court took the note of the fact that the defendant/appellant had also filed an independent suit for injunction against the plaintiff/respondent in which, initially, ex parte ad interim injunction was given in her favour, however, as the suit itself was dismissed, the said injunction also stood vacated. It was also observed by the learned trial court even though the said suit was dismissed, the maximum which the court in that case could

have done was to pass an injunction that the appellant shall not be dispossessed except in accordance with the due process of law. In the instant case, the appellant was being dispossessed pursuant to the due process of law only. Thus, initially the appellate court passed a decree for mandatory injunction and also for damages at the rate of ₹800/- per day against the defendant/appellant. So far as the quantum of damage is concerned, as this was not disputed by adducing any evidence, oral or documentary, the court confirmed the said judgment and the decree passed by the trial court.

7. Feeling aggrieved, the appellant preferred an appeal being R.C.A. No.55/2011 along with an application under Order 41 Rule 27 CPC whereby the appellant had sought permission from the first appellate court to adduce evidence by way of electricity bills, water bills, etc. to establish that she was a tenant in respect of the suit premises in her own independent right. The appeal was dismissed on 15.10.2011.

8. Still not feeling satisfied, the appellant has preferred the present regular second appeal. It has been stated that along with the appeal, the appellant had also filed an application under Order 41 Rule 27 CPC. It

has been contended by the learned counsel for the appellant that without deciding these two applications for adducing of additional evidence, one along with the appeal and the other subsequent thereto, has caused serious prejudice to the appellant and therefore, the matter deserves to be allowed and remanded back to the trial court for adjudication on merits because the appeal is the continuation of the suit and without deciding the application under Order 41 Rule 27 CPC, the decision on the appeal is without any consequence. In addition to this, the learned counsel has also formulated the questions purported to be arising from the appeal, which are reproduced as under :-

- “1. Whether respondent was competent to sublet the suit property in view of special clause in rent agreement between respondent and landlord imposing restrictions against parting with possession of tenancy premises to any one?
2. Whether the respondent was competent to enter into license agreement with appellant?
3. Whether respondent proved on record the alleged license deed unregistered, document in accordance with law?
4. Whether courts below erred in giving weightage to said alleged license deed in absence of any admission on part of appellant and in absence of her thumb impression?

5. Whether respondent can claim use and occupation charges on ₹200/- per day basis, when she herself was tenant on monthly rent of ₹400/-?
6. Whether the suit property is same as mentioned in the alleged license deed and site plan relied upon by the respondent?
7. Had there been the documents upon which the respondent is relying were put to appellant in admission denial and the alleged witness to said documents were examined?"

9. So far as the question of non-disposal of the application under Order 41 Rule 27 CPC is concerned, I have gone through the application as well as the record. An application for adducing of additional evidence under the aforesaid provision can be permitted only if a party shows that despite his due diligence, the evidence which is sought to be produced by him was not within his knowledge or it is a kind of evidence which was beyond his reach on which he has stumbled now and the evidence has a vital impact on the decision of the case.

10. In the instant case, the nature of evidence which is sought to be produced by the appellant is by way of water bills, electricity bills and the documents which admittedly were within her knowledge even at the time

when the suit was filed or the written statement was filed by her to contest the matter. The courts have repeatedly held that the aforesaid provision under Order 41 Rule 27 CPC cannot be permitted to be used to plug the loopholes which a party may leave in his or her case. In the instant case also, this is what precisely the appellant is trying to do. It is not a case that the appellant was not able to produce any specific kind of evidence despite due diligence on her part, on the contrary, the very conduct of the appellant having absented and not even chosen to cross-examine any of the witnesses produced by the respondent/landlord clearly shows that not only she was grossly negligent but took it for granted that no wrong can be visited on her. As a matter of fact, the wisdom to contest the suit seemed to have dawned on the appellant belatedly and she had chosen to file an application under Order 18 Rule 17 CPC for the purpose of recalling witnesses which were examined earlier. This application was also rejected by the trial court giving the reasons that the appellant was deliberately trying to indulge in dilatory tactics, therefore, the appellant's fate was completely sealed by rejection of his application under Order 18 Rule 17 CPC and also by a tacit order of not allowing his application under Order 41 Rule 27 CPC inasmuch as the appellant, both

before the first appellate court as well as before this court, has not been able to show any piece of evidence which is sought to be relied by her to the effect that it was not within her reach despite due diligence. Therefore, I feel that this question which is sought to be raised by the appellant with regard to non-decision on the application under Order 41 Rule 27 CPC is not vital so as to warrant setting aside the concurrent finding of fact returned by the courts below holding her to be a licensee in respect of the suit premises.

11. Admittedly, the order of the learned trial court or the first appellate court are not suffering from any perversity, as is sought to be urged by the learned counsel for the appellant. An order will be said to be suffering from the perversity only if the conclusion which is recorded or arrived at by the court is not supported by the evidence. In the instant case, it has been proved that the respondent was inducted as a tenant and the document of tenancy proved by exhibit PW 1/2 and the present appellant was inducted as a licensee in respect of the same premises when the respondent had to leave the city for a period of eleven months. This license deed was also got signed/thumb marked by the respondent from

the appellant and has been duly proved as exhibit PW 1/4. Therefore, in the teeth of these two documents, it could not be said that there is no evidence which would establish that the appellant was a licensee in respect of the suit premises. So far as the other questions which have been formulated by the appellant are concerned, these are all essentially questions of fact and not questions of law much less the substantial questions of law.

12. I, therefore, feel that the present appeal does not involve any substantial question of law so as to warrant any interference in this appeal. So far as the judgments which are sought to be relied by the appellant are concerned, they are also not applicable to the facts of the present case.

13. For the reasons mentioned above, the appeal is without any merit and accordingly, the same is dismissed.

V.K. SHALI, J.

SEPTEMBER 09, 2013
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