

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

+ RSA 3/2014& CM No.182/2014(Stay)

% **6th January, 2014**

VIJAY KUMAR SHARMA Appellant
Through: Mr. Abdul Sattar, Adv.

VERSUS

DESH RAJ (DECEASED) & ORS. Respondents
Through:

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This regular second appeal filed under Section 100 CPC impugns the concurrent findings of facts and law by the courts below. The judgment of the trial court dated 31.8.2012 dismissed the suit of the appellant-plaintiff and appellate court by its judgment dated 10.9.2013 dismissed the appeal. In this case, the plaintiff-appellant claims rights in the suit premises admeasuring 35 sq. yds bearing no. 1880 Udai Chand Marg, Kotla Mubarakpur, New Delhi. Plaintiff filed the suit for permanent injunction claiming that defendants were threatening to dispossess him and he was

entitled to relief of injunction.

2. The trial court by its judgment dated 31.8.2012 has found that actually the premises no. 1880 were in the tenancy of one Sh. Niranjan Dev and he appeared as DW-6 on behalf of the defendants. Sh. Niranjan Dev transferred the tenancy rights to the late defendant no.1 (now represented by his legal heirs), and that the plaintiff was only a partner with the said Sh. Niranjan Dev. It is only because of being a partner that the plaintiff/appellant had certain documents pertaining to the telephone connection, electricity bill etc of the suit premises. Trial court relied upon the admissions made by the appellant-plaintiff in the judicial proceedings wherein it was admitted by him that he was only a partner with Sh. Niranjan Dev. This statement in the earlier proceedings before the Metropolitan Magistrate made by the appellant- plaintiff was filed and exhibited as Ex.DW1/8. The relevant observations in this regard are also made by the appellate court in para 29 of its judgment and which reads as under:-

“29. Ground is taken that Trial Court erred in not relying upon government documents as well as other documents from Ex.PW-1/1 to Ex.PW-1/19 which have been duly proved. The purpose of exhibiting and proving documents Ex.PW-1/1 to Ex.PW1/19 by appellant appears to be to prove his possession qua suit shop.Ex.PW-1/1 is site plan of suit shop which has been again got exhibited by appellant through PW-7 vide Ex.PW-7/1 (Both site plans are same content-wise). Ex.PW-1/2 is complaint dated 25.08.1999 given by

appellant to SHO, PS Kotla Mubarakpur, Ex.PW-1/3 and Ex.PW-1/4 in affidavit of examination-in-chief of PW-1. Ex.PW-1/6, Ex.PW-1/7, Ex.PW-1/9 and Ex.PW-1/16 in affidavit of PW-1 were also got marked in examination-in-chief of appellant. Ex.PW-1/5 is copy of complaint dated 27.01.2000 given by appellant to SHO Kotla Mubarakpur, Ex.PW-1/8 is certified copy of judgment passed by Court of Sh. P.K.Sexena, the then Ld. ARC dated 04.08.1999 vide which objection of appellant that he was tenant in his own right in Shop No. 1893, Udai Chand Marg was upheld and it was further held that eviction order dated 06.09.1996 passed in E No. 158/94 under Section 14(1)(b) of DRC Act was not binding upon him. Ex.PW-1/10 is certificate dated 06.09.1999 purportedly issued by Vijaya Bank to the effect that appellant was operating a JND A/c from concerned branch of Vijaya Bank and having got recorded his address as that of suit shop. Ex.PW-1/11 is telephone bill pertaining to year 1996 in name of appellant in which address of appellant has been mentioned to be that of suit shop. Ex.PW-1/12 is passbook of State Bank of India issued on 07.06.1993 in name of appellant in which address of appellant has been mentioned to be that of suit shop. Ex.PW-1/13 and Ex.PW-1/14 are receipts issued by courts of Metropolitan Magistrates in name of one Narender and appellant which do not record address of appellant and so are not relevant to controversy in hand. Ex.PW-1/15 is self assessment Tax challan receipt for assessment year 1995-96 in name of Narinder Kumar in which address of Narinder Kumar is that of suit shop. Ex.PW-1/17 is copy of complaint dated 27.08.1999 made by appellant to DCP (Vigilance). Ex.PW-1/18 is copy of complaint dated 27.08.1999 made by appellant to Commissioner of Police. Ex.PW-1/19 is copy of complaint dated 29.08.1999 made by appellant to SHO, PS Kotla Mubarakpur. Ex.PW-1/10 though dated 06.09.1999 does not show as to when the said account was opened by appellant with Vijaya Bank. Ex.PW-1/11 pertains to year 1996, Ex.PW-1/12 is of year 1993, Ex.PW-1/15 pertains to assessment year 1995-96. None of these documents brought and exhibited on record by appellant are after date 24.08.1999 i.e. the date on which possession of suit shop was delivered by Niranjana Dev Manchanda to late defendant Desh Raj as per respondents. Ex.PW-1/2, Ex.PW-1/5, Ex.PW-1/17 to Ex.PW-1/19 are police complaints made by appellant to various police authorities which though are after date 24.08.1999 but they do not prove that after 24.08.1990, possession of suit shop remained with

appellant as at the best these complaints can be treated as allegations, contents of which unless and until proved in accordance with law are of no help to appellant. These complaints do not prove that appellant retained his possession over suit shop after 24.08.1999. So far as Ex.PW-1/8 is concerned, I am of the opinion that evidence in objections of appellant might have been recorded after year 1996 i.e. the year in which Eviction order was passed in E.No. 158/94 but statement of appellant in FIR No. 143/87 in case titled as State Vs. Madan Lal under Section 307 IPC and under Section 27 of Arms Act, PS Kotla Mubarakpur was recorded in the year 1988 and 1989 (Ex.DW-1/8) i.e. much prior to when objections of appellant vide Ex.PW-1/8 were decided and statements made prior in date shall prevail upon statements made later as there was earlier no reason for appellant to twist the facts in a case which is totally unrelated to cause of action in present case as at that juncture of time, appellant was supposedly doing joint business with Niranjana Dev Manchanda in shop including suit shop (Shop No. 1893 regarding which Ex.PW-1/8 was passed has also been mentioned by appellant in deposition in FIR No. 143/87). In his statement Ex.DW-1/8, appellant has stated that he is running a ration depot from Shop No. 1893 and suit shop in partnership with Niranjana Dev Manchanda. Appellant was confronted with his statement recorded in FIR NO. 143/87, PS Kotla Mubarakpur vide mark X1 (later on exhibited as Ex.DW-1/8) in deposition of DW-1) upon which appellant stated that it does not bear his signatures at point A. Regarding case in FIR No. 143/87, PS Kotla Mubarakpur, appellant has stated that he does not remember as to whether this case was pending before court of Ld. ASJ, Delhi. He is in cross examination in this regard further stated that he does not remember whether he appeared as witness in the said case. He in his cross examination further stated that he does not remember whether he appeared in that case alongwith Niranjana Dev Manchanda as witness. In this cross examination recorded on 12.10.2004, appellant has stated that he does not remember as to whether he signed at Point B on Mark X-2(part of Ex.DW-1/8 and recorded on 19.07.1989). Regarding attack on Niranjana Dev Manchanda with regard to FIR No. 143/87, PS Kotla Mubarakpur, appellant has stated that he does not remember whether Madan Lal attacked Niranjana Dev Manchanda due to which Niranjana Dev Manchanda lost his fingers. Appellant in his cross examination has nowhere stated that Mark X-1 and Mark X-2 (later

on Ex.DW-1/8) are forged. Merely not remembering a thing does not mean that a person denies that fact and not speaking anything regarding genuineness of certified copy of testimony put to appellant in his cross-examination before the Trial Court indicates and is suggestive of the fact that appellant does not dispute genuineness of the same. Further appellant in his cross examination has initially said that he does not know any person in name of Niranjana Dev Manchanda but he again said that he knew Niranjana Dev Manchanda before 1987. This reduces credit of appellant as witness before Trial Court. Section 77 of the Indian Evidence Act provides that such certified copies may be produced in proof of contents of the public documents or parts of public documents of which they purport to be copies. Testimony of appellant in FIR No. 143/87, PS Kotla Mubarakpur is a certified copy of public documents within meaning of Section 76 of Indian Evidence Act. Respondents even tried to call record of FIR No. 143/87 PS Kotla Mubarakpur bearing SC No. 23/88 decided by Court of Sh. S.S.Bal, the then Ld. ASJ but person from record from i.e DW-3 made statement before Court that the record of the same has been destroyed by weeding out cell. In these circumstances and in view of the fact that respondents were not a party in E.No. 158/94 and in Ex.PW-1/8, it cannot be said that Trial Court did not consider Ex.PW-1/8 because as mentioned above testimony/statement recorded earlier in time shall prevail upon statement made later on. Further DW-6 in his examination-in-chief has stated that he handed over actual possession of suit shop to deceased Sh. Desh Raj on 24.08.1999. Accordingly this ground of appellant is rejected. (Emphasis supplied)

3. Similar observations made by the trial court in its judgment dated 31.8.2012 in paras 17 to 22 read as under:-

“17. On the other hand defendant had also lead voluminous evidence to establish that defendant no.1 had inducted Sh. Niranjana Dev as a tenant in the suit property. The defendant has categorically deposed that plaintiff was never in possession of the property. The defendant also examined independent witnesses i.e. DW-2 Sh. Jagpal and DW-6 Sh. Niranjana Dev. The testimony of DW-6 is very important for the adjudication of the controversy at hand. This witness duly supported the case of defendants. He has deposed that he was tenant

in the suit property under defendant no.1 and he handed over the possession on 24.08.99. The defendants have also proved the documents of handing over of the possession as Ex.DW1/5 and the receipt as Ex.DW1/6.

18. The defendant also proved the statement of plaintiff given in the court of Ld. ASJ, Delhi on 19.09.1998 as well as the complaint given by him to police on 12.07.1987. The counsel for plaintiff had argued that these documents were objected to and these are not admissible in evidence. However, documents Ex.DW1/8 & Ex.DW1/12 are certified copies of the judicial record. These documents were also put to the plaintiff in his cross-examination. The plaintiff did not deny his statement given in the court as well as to the police. The plaintiff stated that he does not remember as to whether he signed at the statement. The question regarding his statement before the police as well as in the Court were put to him in the cross examination. The plaintiff did not deny the facts that Sh. Madan Lal attacked Sh. Niranjana and whether on 12.07.1987 he was sitting in shop no. 1880. Thus the plaintiff did not deny his statement. He also did not say that he did not sign on those statements. It is settled proposition of law that presumption is attached to the judicial proceedings. Statement Ex.DW1/8 was recorded in court. DW-6 Sh. Niranjana Dev also identified the signatures of plaintiff on the aforesaid statement. He also proved his statement given in the court as Ex.DW1/7. Both these statements were given in the same court in the same case title as State Vs. Madan Lal. Thus the defendant duly proved the statement of plaintiff given to police and in the court. Thus the statement Ex.DW1/A & DW1/2 stands proved.

19. In the statement Ex.DW1/12 the plaintiff had stated that Niranjana Dev is carrying on Kiryana Shop bearing no.1880 and another shop of Ration in shop no. 1893. He further stated that he developed partnership with Niranjana Dev 15/20 days before that date i.e. 12.02.1987 and both of them were running kiryana shop and a ration shop. In the Statement Ex.DW-1/1 he reiterated the aforesaid plan. Thus as per statements Sh. Niranjana Dev was a tenant in the shop bearing no. 1880 and plaintiff was having partnership with him. The aforesaid admissions of plaintiff coupled with the evidence of defendant witness i.e. DW-1, DW-2 Sh. Jagat and Sh. Niranjana Dev proved that Sh. Niranjana Dev was a tenant in the shop no.1880 and

the plaintiff entered into a partnership with him 15/20 days prior to 12.02.1987.

20. The plaintiff has made out a case in the plaint and his father occupied the suit property and subsequently started using the number of 1880 of his own convenience. He further stated in the plaint itself that a property bearing no. 1880 belongs to defendant no.1. The plaintiff has not mentioned the date, month and year when his father started using the number of shop as 1880. It is difficult to comprehend that a person will start using a number for his shop which he already knows is of a shop of another person in the same locality. The use of same number can never be a cause of convenience to anyone.
21. In his cross-examination the plaintiff admitted that Municipal number of suit property is 1880. After the number of property is given by Municipal Corporation no person would use it for convenience. The plaintiff has not produced any document pertaining to payment of house tax of the suit property. The plaintiff in his cross-examination also stated that neither he nor his father is giving house tax. On the other hand the defendant has proved the receipt of house tax of property no. 1880 as Ex.DW4/1 & Ex.DW4/2 respectively. Thus from the evidence it is clear that there is only one shop bearing no. 1880 on the spot. Plaintiff has merely created a story that he is using number of suit property as 1880 for convenience.
22. Thus it is established on record that there is only one shop bearing no.1880. Sh. Niranjana Dev was inducted as tenant in it by defendant no.1. Though it has come on record that plaintiff was also using the suit property along with Sh. Niranjana Dev but it has been proved that suit property was let out to Sh. Niranjana Dev by defendant no.1. Therefore, subsequent creation of partnership by Niranjana Dev would not change the character of tenancy in his favour. The tenancy continued to be in favour of Sh. Niranjana Dev. This also explains the existence of telephone bills and other bills Ex.DW1/11 and Ex.DW1/5 respectively in the name of plaintiff. The defendant has proved that Sh. Niranjana Dev handed over tenancy in favour of defendant no.1. Thus the tenancy came to end on the surrender of tenancy by the tenant Sh. Niranjana Dev. The plaintiff was never in

exclusive possession of suit property in his personal rights as a tenant or otherwise. Therefore his possession cannot be termed as settled.”
(emphasis supplied)

4. In my opinion, both the courts below were perfectly justified in relying upon the admissions of the appellant/plaintiff which are the best proof of a fact unless they are sufficiently explained. Admissions of the appellant-plaintiff were in fact made in judicial proceedings that he was only a partner with Sh. Niranjan Dev and which Sh. Niranjan Dev appeared as a witness on behalf of the defendants and proved his documents by which he had transferred tenancy rights to the defendants. Appellant-plaintiff was therefore not in a settled position to claim benefit of the ratio of the judgment of the Supreme Court in the case of ***Rame Gowda Vs. M. Varadappa Naidu and Anr. AIR 2004 SC 4609.***

5. Both the courts below have also rightly found it strange that why should a person such as the plaintiff-appellant give his alleged property of a same number 1880 as was the actual property number of the defendants and originally in the tenancy of Sh. Niranjan Dev. The courts below have also observed that whereas the defendants filed house tax receipts with respect to the said suit property, appellant-plaintiff did not file any such house-tax

receipts, to establish his settled possession of the suit property no. 1880.

6 A second appeal under Section 100 lies only if there is a substantial question of law. The aforesaid discussion shows that there is no question of law involved, much less a substantial question of law, as required under Section 100 CPC for this Court to interfere. The appeal therefore being without any merit is accordingly dismissed, leaving the parties to bear their own costs.

JANUARY 06, 2014/ib

VALMIKI J. MEHTA, J.