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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RSA No. 1/2010

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30th August, 2016

OM PRAKASH KAUSHIK

..... Appellant

Through: Mr. Manoj Sharma, Advocate with Mr.
Kapil Kaushik, Advocate.

Versus

RADHEY MOHAN

..... Respondent

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 is filed under Section 100 of the Code of Civil Procedure, 1908 (CPC) by the appellant/defendant against the concurrent Judgments of the courts below; of the Trial Court dated 4.10.2008 and the First Appellate Court dated 22.9.2009; by which the courts below have decreed the suit of the respondent/plaintiff/landlord for arrears of rent of Rs.1,11,959.50 being the arrears of rent due at the rate of Rs.4,100/- per month from October, 2001 till the filing of the suit on 3.9.2003.

2. As per the plaint, the case of the respondent/plaintiff/landlord was that a raid was conducted by Enforcement Cell of the Delhi Vidyut Board in the suit/tenanted premises on 11.10.2001 and the

appellant/defendant/tenant in the suit/tenanted premises situated at 112A, Lawrence Road, Ram Pura, Delhi was found to be misusing electricity by using extra load. The case of the respondent/plaintiff was therefore that the appellant/defendant thereafter locked the suit premises fearing the consequences of the raid conducted in the premises on 11.10.2001. Respondent/plaintiff firstly served a Legal Notice dated 20.5.2002 demanding rent from 1.11.2001 and which was replied to by the appellant/defendant vide Reply dated 30.5.2002 stating that the appellant/defendant had vacated the suit premises in October, 2001 itself and hence no rent was due to the respondent/plaintiff. Respondent/plaintiff thereafter issued another Legal Notice dated 18.7.2003/Ex.PW1/3 again demanding rent and by making reference to the earlier Legal Notice dated 20.5.2002, and to which notice appellant/defendant replied vide his Reply dated 30.7.2003 again stating that the suit premises were already vacated in October, 2001. Appellant/defendant in fact claimed back, as per the counter-claim filed, the security amount of Rs.20,000/- which as per the appellant/defendant was not paid to him by the respondent/plaintiff when the suit/tenanted premises were vacated by the appellant/defendant. The subject suit came to be filed which was for amount of arrears of rent from 1.10.2001 till the filing of the suit on 3.9.2003 at the rate of Rs.4,100/- per month

totaling to Rs.90,200/- with other charges being claimed towards legal notice and court fees.

3. Appellant/defendant in the written statement took up the same case which was taken up in the Replies given by the appellant/defendant dated 30.5.2002 and 30.7.2003 that the suit premises were already vacated in October 2001, and therefore, no rent was payable as claimed by the respondent/plaintiff.

4. It may be noted that appellant/defendant filed a counter-claim seeking recovery of the security deposit of Rs.20,000/- as also an amount of Rs.23,700/- which the appellant/defendant claimed to have deposited for enhancement of load on the electricity connection installed in the suit/tenanted premises. Today counter-claim is pressed only to the extent of recovery of the security deposit advance of Rs.20,000/-.

5. Trial court framed the following issues:-

- “1. Whether the suit is maintainable in its present form? OPP
2. Whether the suit has been filed by duly authorized person? OPP
3. Whether there exists a relationship of landlord and tenant in between the parties? OPP
4. Whether plaintiff is entitled to recover the amount as claimed? OPP
5. Whether plaintiff is entitled to the interest on the amount claimed? If any at what rate? OPP
6. Whether the tenancy has been terminated by the plaintiff?OPP
7. Whether any notice is served upon the defendant for termination of tenancy?OPP

8. Whether plaintiff is entitled for possession of the suit premises?
OPP
9. Relief.”

6. At this stage, it is required to be noted that the original suit which was filed was a suit for possession as also recovery of arrears of rent, however, during the pendency of the suit in terms of the statement recorded of the respondent/plaintiff on 8.10.2004, relief of possession was withdrawn. The Order dated 8.10.2004 and the Statement of the respondent/plaintiff recorded on 8.10.2004 read as under:-

“Order dated 8.10.2004

Mr. Sh. N.K.Kohli Cl. for pltf with PW.

Sh. Manoj Sharma Cl. for deft.

PW is present today and one affidavit is filed.

However it is stated by the cl. for deft that advance copies are not supplied. They are supplied today in the court. He seeks time for cross examination. Allowed.

Now come up again for cross examination of PW for 22.11.04.

Sd/-

CJ/Delhi

At this stage, plaintiff has given his statement that he is withdrawing this relief of possession against the defendant. Statement to this effect is recorded vide separate order sheet. Thus the relief of possession is withdrawn. In the light of this statement, issue no.8 has no relevance hence it is deleted.

Now come upon for PE on 22.11.04.

Sd/-

CJ/Delhi

Statement of the respondent/plaintiff dated 8.10.2004

Statement of Sh. Radhey Mohan S/o Sh. Sher Singh, R/o H.No. 47, Ram Pura, Delhi 35.

On S.A.

I undertake to state that I had filed the present suit for recovery against the defs and I had prayed that decree of recovery as well as possession be passed against def. However I do not want to pursue my case with regard to the relief of possession against the defendant. I may be allowed to withdraw the relief.

RO & AC
Sd/-

Sd/-
CJ/Delhi
8.10.2004”

7. The aforesaid statement recorded on behalf of the respondent/plaintiff is curious inasmuch as the statement does not state that why relief of possession was given up and if possession of the suit premises was already with the respondent/plaintiff/landlord, then, possession of the suit premises was with the respondent/plaintiff/landlord since when i.e which month and year. One thing is however clear that relief claimed for possession under the suit was withdrawn because possession of the suit premises was already with the respondent/plaintiff/landlord. This aspect would be relevant and will be referred to hereinafter for determining the period for which the appellant/defendant/tenant would be liable to the respondent/plaintiff for arrears of rent.

8. It is not disputed that the appellant/defendant was a tenant in the suit/tenanted premises. Also, the respondent/plaintiff in his cross-examination conducted on 16.3.2005 admitted that he had received an advance amount of Rs.20,000/- but this advance amount was never returned to the appellant/defendant. I would also like to note that the Legal Notice

dated 20.5.2002 sent by the respondent/plaintiff to the appellant/defendant is admitted to have been sent by the respondent/plaintiff to the appellant/defendant as conceded by the appellant's counsel in this Court, and which legal notice was replied to by the appellant/defendant vide his Reply dated 30.5.2002, and therefore, these admitted documents would be referred to for the present decision. I may also note that the second Legal Notice dated 18.7.2003 sent by the respondent/plaintiff to the appellant/defendant has been proved and exhibited as Ex.PW1/3. Reply to this Legal Notice sent by the appellant/defendant is dated 30.7.2003 and this document has been filed by the respondent/plaintiff himself and is admitted on behalf of the appellant/defendant before this Court, and therefore both the Legal Notice dated 18.7.2003 and the Reply dated 30.7.2003 by the appellant/defendant would be referred to for the purpose of the present judgment.

9. The only issue required to be considered for deciding the present second appeal is as to whether the appellant/defendant vacated the suit/tenanted premises in October, 2001 or that the respondent/plaintiff is entitled for the rent of the suit/tenanted premises as the same was not vacated till the suit was filed in September, 2003. Related with this issue will be the aspect of entitlement of the appellant/defendant for adjustment of the security deposit/advance amount of Rs.20,000/- paid by the appellant/defendant at the time of taking the subject/tenanted premises on rent.

10(i) No doubt, the appellant/defendant has led no evidence in the form of documentary evidence showing surrendering of possession of the suit/tenanted premises to the respondent/plaintiff, however, at the very first opportunity which came when the respondent/plaintiff sent his Legal Notice dated 20.5.2002, the appellant/defendant vide his Reply dated 30.5.2002 specifically stated that the possession of the suit premises was handed over to the respondent/plaintiff and the suit premises were vacated in October, 2001. Once the appellant/defendant has clearly stated so in his Reply dated 30.5.2002 even assuming that the appellant/defendant had not handed over the possession in October, 2001, respondent/plaintiff could well have simply walked into the suit premises treating the Reply dated 30.5.2002 of the appellant/defendant as the notice of vacation. Surprisingly, the respondent/plaintiff did not do so, and, it is not the case of the respondent/plaintiff that he could not enter into the suit premises for any reason such as that the same contained machineries or goods etc of the appellant/defendant. It is noted that the respondent/plaintiff did not give any rejoinder to the Reply of the appellant/defendant dated 30.5.2002 stating that the suit premises are not vacant and that if the respondent/plaintiff could not enter into/take possession of the suit/tenanted premises then why not so. Therefore, taking that the appellant/defendant failed to prove handing over of the vacant possession to the respondent/plaintiff in October, 2001, however at

least w.e.f 30.5.2002, the respondent/plaintiff can be said to be in deemed possession of the suit/tenanted premises.

(ii) This aspect becomes more clear because of the curious Statement recorded by the respondent/plaintiff during the pendency of the suit on 8.10.2004 that the respondent/plaintiff is giving up the relief of possession and which statement was made without in any manner stating as to when the respondent/plaintiff had received possession of the suit/tenanted premises. In fact, respondent/plaintiff curiously again sent a Legal Notice dated 18.7.2003 i.e more than one year and one and a half months after the Reply of the appellant/defendant dated 30.5.2002 again claiming rent and to which legal notice once again the appellant/defendant vide his Reply dated 30.7.2003 reiterated the same position of suit/tenanted premises having been vacated in October, 2001 and which was already stated earlier by the appellant/defendant in his Reply dated 30.5.2002.

(iii) This Court is therefore forced to conclude that it is the respondent/plaintiff who for some reason kept on sending legal notice although the case of the appellant/defendant at least from 30.5.2002 was that he was not in possession of the suit/tenanted premises i.e respondent/plaintiff could always have walked into and taken possession of the suit/tenanted premises from 1.6.2002 assuming that till 30.5.2002 appellant/defendant was in possession of the suit/tenanted premises.

11. On preponderance of probabilities, I find that it is total perverse and illegal for the courts below to hold that since the appellant/defendant failed to file any proof of surrendering of possession in October, 2001, liability of the appellant/defendant to pay rent will continue from October, 2001 till September, 2003 when the suit was filed, inasmuch as, the entitlement at best of the respondent/plaintiff for arrears of rent of the suit/tenanted premises legally can only be from 1.11.2001 till 30.5.2002. It is noted that in the legal notice, the respondent/plaintiff has claimed rent from 1.11.2001. I therefore hold that the judgments of the courts below suffer from illegality and perversity to the extent of holding the appellant/defendant liable to pay rent even from and after 1.6.2002 till the suit was filed in September, 2003 and thus the appellant/defendant would only be liable to pay rent from 1.11.2001 till 30.5.2002 at the rate of Rs.4,100/- per month i.e Rs.28,700/-.

12(i) When this second appeal was admitted for hearing on 3.10.2011, the following substantial question of law was framed:-

“When was the possession of the tenanted premises handed over by the appellant to the respondent, considering the fact that the Courts below have overlooked a vital aspect, and thereby committed a perversity, in that though the respondent/plaintiff initially filed the suit, both for recovery of possession and arrears of rent, however, subsequently the suit was not pressed for the relief of possession, thus making it clear that the possession was with the respondent/plaintiff, however, no evidence was led as to when the respondent/plaintiff received possession of the tenanted premises?”

(ii) In view of the aforesaid, this substantial question of law is answered partly in favour of the appellant/defendant and partly in favour of the respondent/plaintiff by holding that the appellant/defendant would be liable to pay rent of the suit premises at Rs.4,100/- per month from 1.11.2001 only till 30.5.2002 i.e a total amount of Rs.28,700/- and not the suit amount of Rs.1,11,959.50/-. In fact, since the respondent/plaintiff in his cross-examination dated 16.3.2005 has admitted that he still has an amount of Rs.20,000/- of the appellant/defendant with him, therefore, from the amount of Rs.28,700/- an amount of Rs.20,000/- is liable to be deducted and therefore there will only be a money decree of Rs.8,700/- in favour of the respondent/plaintiff with *pendente lite* and future interest @ 6% per annum.

13. When this Regular Second Appeal was filed in this Court, stay was granted of the impugned judgment subject to the appellant/defendant depositing the principal decretal amount. The appellant/defendant had deposited an amount of Rs.1,12,000/- in this Court. Accordingly, out of this amount deposited in this Court, respondent/plaintiff will be entitled to a sum of Rs.8,700/- plus interest thereon at 6% per annum from the date of filing of the suit on 3.9.2003 till the amount was deposited in this Court on 22.3.2014. This amount will be taken as the principal amount i.e the amount of Rs.8,700/- plus interest @ 6% per annum till 22.3.2014 will be taken as the principal amount and on this amount whatever interest has accrued on

account of the amount deposited by the appellant/defendant in this Court being put in the fixed deposit, the same would be paid to the respondent/plaintiff. Putting it in other words the amount of Rs.8,700/- plus interest @ 6% per annum from 3.9.2003 till 22.3.2014 will be taken as principal amount for earning of interest as per the fixed deposit created by this Court and which amount would be payable to the respondent/plaintiff in terms of the money decree passed by today's judgment. The balance amount i.e principal amount in excess of Rs.8,700/- plus interest @ 6% per annum from 3.9.2003 till 22.3.2014 will be treated as the amount liable to be refunded to the appellant/defendant and which amount be refunded to the appellant/defendant alongwith interest accrued thereon in terms of the fixed deposit of this amount created in this Court.

14. The present Regular Second Appeal is therefore partly allowed and partly dismissed by passing a money decree for a sum of Rs.8,700/- alongwith *pendente lite* and future interest in favour of the respondent/plaintiff from 3.9.2003 till 22.3.2014. Parties are left to bear their own costs.

AUGUST 30, 2016
ib/Ne

VALMIKI J. MEHTA, J