

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

% **Date of decision: 7th August, 2018**

+ **RSA 67/2018, 16792/2018 (for stay) and CM No.16794/2018 (for condonation of 46 days delay in refiling the appeal).**

KISHAN DUBEY

..... Appellant

Through: Mr. R.K. Sharma, Adv.

versus

MUKESH GUPTA

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.16793/2019 (for exemption).

1. Allowed, subject to just exceptions.
2. The application stands disposed of.

RSA 67/2018, 16792/2018 (for stay) and CM No.16794/2018 (for condonation of 46 days delay in refiling the appeal).

3. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 5th January, 2018 in RCA No.98/2016 of the Court of Additional District Judge-I (North-East)] allowing the First Appeal under Section 96 of the CPC filed by the respondent/plaintiff against the judgment and decree [dated 24th October, 2016 in CS No.5338/15 of the Court of Administrative Civil Judge (North-East)] of dismissal of suit filed by the respondent/plaintiff for ejectment of the appellant/defendant from immovable property after determination of tenancy at a rent of Rs.3,600/- per month and for recovery of *mesne* profits. Axiomatically, the First Appellate Court has passed a decree in favour of the respondent/plaintiff and against the appellant/defendant of ejectment of the

appellant/defendant from ground floor of property no.D-416 (Old), new no.D-1051, Bhajanpura, Main Gamri Road, Shahdara, Delhi and for recovery of arrears of rent and for recovery of damages @ Rs.12,000/- per month.

4. The counsel for the appellant/defendant has been heard.

5. The respondent/plaintiff instituted the suit, from which this appeal arises, pleading, (i) that the appellant/defendant was inducted as a tenant in the property in the year 2004, by the mother of the respondent/plaintiff, at a rent of Rs.2,500/- per month which was increased from time to time and the last rent w.e.f. January, 2011 was Rs.3,600/- per month; (ii) that the appellant/defendant had paid rent till May, 2011 and had thereafter locked the shop and stopped paying the rent and opened a shop in property no.43, Gali Paranthi Wali, Chandni Chowk, Delhi; (iii) that the respondent/plaintiff had terminated the tenancy of the appellant/defendant vide notice dated 18th December, 2012 and to which a false reply was given by the counsel for the appellant/defendant; (iv) that the prevalent letting value of the premises was Rs.12,000/- per month; and, (v) that after the demise of the mother of the respondent/plaintiff the respondent/plaintiff was the landlord.

6. The appellant/defendant contested the suit by filing a written statement pleading, (i) that the suit was beyond the pecuniary jurisdiction of the Court of the Civil Judge as the market value of the property was Rs.40,00,000/-; (ii) that the appellant/defendant was never a tenant and had never paid rent of the premises; (iii) that the appellant/defendant was in exclusive possession of the premises since 2004; (iv) that the appellant/defendant had come into possession of the property under an Agreement by the respondent/plaintiff to sell the same to the appellant/defendant for a consideration of Rs.2,00,000/-

and out of which Rs.1,00,000/- was paid by the appellant/defendant to the respondent/plaintiff and the remaining Rs.1,00,000/- was to be paid at the time of registered Sale Deed; (v) that though the appellant/defendant requested the respondent/plaintiff and his mother to execute the sale documents but they avoided the same on the pretext of a family dispute; (vi) that in the year 2009, the premises were going to be sealed and the respondent/plaintiff got signatures of the appellant/defendant on some documents in English language and which the appellant/defendant was unable to read; and, (vii) that though the mother of the respondent/plaintiff had executed a receipt of Rs.2,00,000/- in favour of the appellant/defendant but unfortunately that receipt was not traceable.

7. On the pleadings aforesaid of the parties, the following issues were framed in the suit:-

- “1. Whether plaintiff is entitled to the decree of recovery of possession of the shop on the ground floor of the suit property as shown in Red color in the site plan? OPP*
- 2. Whether plaintiff is entitled to the decree of recovery of arrears of rent @ Rs.3600/- per month w.e.f. 01.06.2012 till the filing of the suit as prayed for? OPP*
- 3. Whether plaintiff is entitled to the decree of mesne profits @ Rs.12,000/- per month from the date of filing of the suit till the handing over the vacant physical possession of the suit property by the defendant to the plaintiff? OPP*
- 4. Whether the defendant has purchased the suit property from the plaintiff and the defendant is not occupying the suit property as a tenant of the plaintiff? OPD*
- 5. Relief.”*

8. The Suit Court, on the basis of evidence led by the parties found/observed/held, (i) that the respondent/plaintiff, in cross-examination, admitted that he did not have Sale Deed or General Power of Attorney (GPA) with respect to the property in his name; (ii) that the Agreement to Sell, GPA, Property Tax Receipt, receipts of deposition of water tax and electricity bill proved by the respondent/plaintiff reflected that the premises were in the name of the mother of the respondent/plaintiff; (iii) that the respondent/plaintiff did not prove any document to show transfer/mutation of the property after the demise of his mother in his own name; (iv) thus the respondent/plaintiff could not be held to be the owner of the property; (v) the respondent/plaintiff had also not filed any proof regarding payment of initial rent @ Rs.2,500/- per month or proof regarding increase in rent from time to time or to Rs.3,600/- per month from January, 2001; (vi) the respondent/plaintiff did not prove any Rent Agreement entered into by his deceased mother with the appellant/defendant; (vii) the respondent/plaintiff thus failed to prove that any tenancy of the property was created in favour of the appellant/defendant by the mother of the respondent/plaintiff; (viii) the document marked 'B', on which the respondent/plaintiff relied, was an application form for grant of *ad hoc* registration of traders under scheme 2006 which was filed by the appellant/defendant and in which the appellant/defendant had described himself as a tenant in the property; (ix) however the said document did not reveal the respondent/plaintiff to be the landlord of the appellant/defendant; (x) the respondent/plaintiff had thus failed to prove that he was the owner and landlord; (xi) it was also inexplicable as to why the respondent/plaintiff did not take any action for about two and a half years since when the premises were lying locked and no

rent thereof was being paid; and, (xii) that the appellant/defendant also had failed to place any document whatsoever on record of purchase of the property from the mother of the respondent/plaintiff and thus the claim of the appellant/defendant in that regard was also false.

10. The First Appellate Court, on appeal having been preferred by the respondent/plaintiff, allowed the appeal and passed a decree for ejectment and *mesne* profits, reasoning (i) that the appellant/defendant had failed to prove his claim, of being in possession of the property as an agreement purchaser; (ii) on the contrary the respondent/plaintiff had proved Agreement to Sell, GPA and other such documents with respect to the property in favour of his mother; (iii) that as per the dicta dated 2nd August, 2016 of this Court in RSA No.13/15 titled ***Shashi Bala Nagpal Vs. Rama Kant Shah***, the respondent/plaintiff had proved a better title than the appellant/defendant to the property; and, (iv) that the relationship of the respondent/plaintiff and his mother was not in dispute.

11. The contention of the counsel for the appellant/defendant is, that the onus of proof of the relationship of landlord and tenant was on the respondent/plaintiff and which the respondent/plaintiff failed to discharge before the First Appellate Court and therefore the First Appellate Court ought not to have passed a decree for ejectment of the appellant/defendant as a tenant from the property.

12. Unfortunately, the First Appellate Court has not given any reason for holding or discussed any evidence which proves, the relationship of landlord and tenant between the parties and/or the rate of last paid rent being Rs.3,600/- per month.

13. I have however enquired from the counsel for the appellant/defendant,

(a) the appellant/defendant having contested the suit by admitting to have been put into possession of the property by the respondent/plaintiff/his mother and at the same time as claimed by the respondent/plaintiff i.e. in the year 2004; (b) the appellant/defendant having claimed to have so been put into possession of the property by the respondent/plaintiff/his mother in a capacity, not as a tenant, but as an agreement purchaser; (c) the appellant/defendant having utterly failed to establish his said defence by any evidence whatsoever; and, (d) the appellant/defendant having not challenged the finding of the Suit Court in this regard which were against him, before the First Appellate Court, by filing an independent appeal or by preferring cross-objections, why should the case, with which the respondent/plaintiff had come to the Court, be not accepted.

14. In my opinion once the (i) time of coming into possession is not in dispute; (ii) it is not in dispute that the appellant/defendant was put in possession by the respondent/plaintiff/his mother; and, (iii) the appellant/defendant had failed to prove having been put in possession as agreement purchaser, the First Appellate Court cannot be faulted or the judgment thereof be interfered with for presuming that in such circumstances, the putting into possession of the premises of the appellant/defendant by the respondent/plaintiff/his mother was as a tenant and at a rent as claimed by the respondent/plaintiff, particularly when the appellant/defendant was claiming the value of the property to be over Rs.40,00,000/-. Section 114 of the Indian Evidence Act, 1872 empowers the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to common course of natural events, human conduct and public and private business, in their relation to facts of the

particular case. Once the putting into possession of the premises was admitted to be contractual, for consideration, and the appellant/defendant did not challenge the finding against him, of agreement purchaser, the only other contract between appellant/defendant and respondent/plaintiff/his mother, could be of tenancy. Significantly, not only did the appellant/defendant not challenge the finding of Suit Court against him, but has also not taken any step for enforcing performance by the respondent/plaintiff of the Agreement to Sell. On the anvil of preponderance of probability also, the First Appellate Court was justified in allowing the suit.

15. There is another aspect of the matter.

16. According to the appellant/defendant also, the appellant/defendant agreed to purchase the property from the respondent/plaintiff/his mother in the year 2004. By amendment of the Stamp Act and Registration Act of September, 2001, the benefit of Section 53A of the Transfer of Property Act, 1881 was withdrawn unless the Agreement to sell, in part performance of which the purchaser was put in possession, is registered. Here, what to talk of registration of the agreement, there is no written Agreement to Sell at all. The appellant/defendant was not entitled to continue in possession even as an agreement purchaser in part performance.

17. The Suit Court was clearly in error in dismissing the suit for the reason of respondent/plaintiff having failed to prove ownership of the property. The respondent/plaintiff had sued for ejectment, of appellant/defendant as a tenant and in which suit, title as owner is irrelevant.

18. The counsel for the appellant/defendant, at this stage states that the respondent/plaintiff in his cross-examination admitted that there was a Court case amongst his family members with respect to the subject property. It is

argued that the respondent/plaintiff should not be permitted to take advantage over his other family members by getting possession from the appellant/defendant.

19. The aforesaid shows the appellant/defendant to be acting as a proxy for the other family members of the respondent/plaintiff who may be challenging the exclusive right of the respondent/plaintiff to the property. It is not for the appellant/defendant to protect the right of other family members. In any case, in the event of the respondent/plaintiff getting possession of the property, it will be open to the other family members in the litigation if any, to take appropriate action. Moreover the appellant/defendant by contending so is again admitting the claim of the respondent/plaintiff of title to the property, even if disputed by the other family members of the respondent/plaintiff.

20. The only other argument of the counsel for the appellant/defendant is that a decree for *mesne* profits has been passed without holding inquiry under Order XX Rule 12 of the CPC.

21. There is no merit in the aforesaid contention. It has been held by this Court in ***Israni Telecom Pvt. Ltd. Vs. Akhil Rohatgi*** 2014 SCC OnLine Del 7416 and ***Rajesh Bansal Vs. A.S. Rastogi*** 2014 SCC OnLine Del 152 that where an issue as to the rate of *mesne* profits is framed and evidence with respect thereto is led, there is no need to, after passing of a decree for ejectment, hold any fresh inquiry with respect to rate of *mesne* profits.

22. As far as the challenge to the rate of *mesne* profits on the ground of the same having been awarded on the sole basis of unsubstantiated deposition of one of the witnesses of the respondent/plaintiff is concerned, again, the appellant/defendant did not in its written statement take a plea that the

prevalent letting value was anything less than Rs.12,000/- per month as claimed. Moreover, the appellant/defendant forgets that the appellant/defendant himself in the written statement pleaded the market value of the property to be over Rs.40,00,000/- and considering the valuation given by the appellant/defendant himself, it cannot be said that the rate of *mesne* profits is excessive, for a Second Appeal to be entertained with respect thereto.

23. Supreme Court in ***Hero Vinoth Vs. Seshammal*** (2006) 5 SCC 545 held that a question of law having a material bearing on the decision of the case will be a substantial question of law, if it is not covered by any specific provision of law or settled legal principles emerging from binding precedent and, involves a debatable legal issue.

24. The Second Appeal does not raise any substantial question of law and is dismissed.

No costs.

RAJIV SAHAI ENDLAW, J

AUGUST 07, 2018

‘pp’..