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

+ **Date of Decision: 10.08.2015**

% **RSA 54 OF 2012**

JAI KUNWAR

..... Appellant

Through: Mr. Gurmehar Singh Sistani,
Advocate with Mr. R.K.Sharma, Ms.
Dezy Gaur & Md. Syed Mohd Mehdi,
Advocates

versus

DHARAM DEVI

..... Respondent

Through: Mr. Virender Singh, Advocate

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. I have heard learned counsel for the parties. The following substantial question of law arises for consideration:

Whether the judgments of the courts below suffer from any error of fact or law?

2. With the consent of the parties, I proceed to dispose of the present appeal. The Trial Court record has already been requisitioned and has been referred to.

3. The appellant has preferred this second appeal to assail the judgment and decree passed by the First Appellate Court dated 06.01.2012, namely, the Additional District Judge-01, North East, Karkardooma Courts, Delhi, in RCA No. 31/11. By the impugned judgment, the first appeal preferred by the appellant-defendant (RCA No.31/11) against the judgment of the Trial Court , namely, Senior Civil Judge in Civil Suit No. 59/2003 filed by the respondent-plaintiff, has been dismissed, and the First appeal (RCA No. 33/11) preferred by the respondent-plaintiff has been allowed. The respondent-plaintiff had preferred a suit for possession and recovery of damages/mesne profit/rent against the appellant-defendant on the premise that the appellant-defendant was a tenant of the respondent-plaintiff in respect of a shop forming part of premises No. 11-B, West Jyoti Nagar, Delhi-110094 since March, 1988, falling in the revenue estate of village Sikdarpur, Delhi, on a monthly rent of Rs. 300/- excluding electricity charges. The respondent-plaintiff claimed that the tenancy had been created through a written document dated 05.03.1988 (which was led in evidence and proved as Ex.PW1/5). The plaintiff claimed that the defendant did not make payment of rent since March, 1990. The plaintiff claimed that the tenancy of the defendant was terminated by a legal notice dated 02.11.2000 (Ex.PW1/6). The plaintiff vide this notice sought arrears of rent of Rs. 10,800/- for a period of three years, apart from calling upon the defendant to handover vacant and peaceful possession of the suit to the plaintiff on or before 30.11.2000.

4. The said suit was contested by the appellant-defendant. On the pleadings of the parties, the following issues were framed:

- (i) Whether the suit of the plaintiff is not maintainable since it is without any cause of action? OPD
- (ii) Whether the suit of the plaintiff is not maintainable as the plaintiff has not approached the court with clean hands? OPD
- (iii) Whether the plaintiff is entitled for the reliefs as prayed for? OPP
- (iv) Whether the suit of the plaintiff is not maintainable as she is neither the owner nor relationship of landlord and tenant exists between the parties? OPD
- (v) Whether the defendant has become the owner of the suit property by adverse possession? OPD
- (vi) Whether the suit is barred by the law of limitation? OPD
- (vii) Whether the suit is not maintainable as the proper court fees has not been affixed on the plaint as per market value? OPD
- (viii) Whether the suit is barred by Delhi Rent Control Act? OPD
- (ix) Relief.

5. The plaintiff examined herself as PW1, one Shri Hari Kishan, Head Clerk/ZI, House Tax Department, Shahdara North Zone as PW2, and Shri Virender Singh, Advocate, as PW3. The defendant examined himself as DW1 and one Shri Gyan Chand as DW2. Thereafter, the plaintiff examined PW4-Chander Prakash, Record-in-Charge, BSES Yamuna Power Ltd., Nand

Nagri Division in rebuttal evidence. The plaintiff in her examination-in-chief on affidavit (Ex.PW1/A) brought on record the notices issued by House Tax Department, MCD as Ex.PW1/1 to Ex.PW1/3, the site plan as Ex.PW1/4, the rent agreement as Ex.PW1/5, the legal notice as Ex.PW1/6, the postal receipt and UPC as Ex.PW1/7 and the AD card as Ex.PW1/8. PW2 proved the copy of the assessment made by the MCD in the year 1985-86 as Ex.PW2/1, the assessment made in the year 1985 as Ex.PW2/2, the objection to the assessment filed by the plaintiff as Ex.PW2/3, copy of the GPA as Ex.PW2/4, agreement to sell as Ex.PW2/5 and receipt Ex.PW2/6. In rebuttal evidence, PW4-Chander Parkash produced the record of electricity connection K. No. 614-157978 in the name of Jai Kumar-the defendant, installed at the premises in question. He provided the copy of the meter slip as Ex.PW4/A, the application-cum-agreement as Ex.PW4/B and the cash memo of purchase of electricity meter as Ex.PW4/C, the application form and agreement executed by the consumer as Ex.PW4/D and indemnity bond as Ex.PW4/E. The affidavits filed by the defendant were proved as Ex.PW4/F-1 to Ex.PW4/F-3 and the deposit slip as Ex.PW4/G. From the said record, photo copies of agreement to sell, receipt and GPA, all purporting to be dated 06.07.1998 were also produced and marked as Mark X. I may note that according to the plaintiff, these documents had been forged by the defendant so as to obtain the electricity connection. Copy of the energisation report of the connection is Ex.PW4/H.

6. The defendant, who examined himself as DW1 tendered his examination-in-chief on affidavit as Ex.DW1/1. He proved the site plan of property Ex.DW1/1 and deposed on the lines of his defence taken in his

written statement. DW2 Gyan Chand filed his affidavit of evidence towards examination-in-chief Ex.DW2/A. He deposed that the defendant himself constructed the suit property in January, 1978. He claimed that the suit property had been built on government/custodian land, and that the plaintiff had nothing to do with the said property. He claimed that the defendant is in continuous occupation of the same as owner, and is carrying out his business of building material by using the said property as his office.

7. The Trial Court decided all the issues, except issue No. 8, in favour of the plaintiff. The Trial Court held that the suit was barred under Section 50 of the Delhi Rent Control Act. Consequently, the Trial Court while holding that relationship between the plaintiff and the defendant was that of the landlord and tenant, and that the plaintiff is entitled to rent at the rate of Rs. 300/- per month, decreed arrears of rent for three years amounting to Rs. 10800/- along with interest @ 15% per annum.

8. The plaintiff filed a first appeal (RCA No. 31/11) insofar as the finding was returned that the tenancy was protected under Delhi Rent Control Act and the suit was barred under Section 50 of the said Act.

9. On the other hand, the appellant also filed a first appeal (RCA No. 33/11) assailing the findings returned by the Trial Court on the other issues which were decided against the appellant-defendant. By the impugned judgment, both the first appeals have been decided. The First Appellate Court has dismissed the appeal preferred by the appellant-defendant i.e. RCA No. 33/11 and allowed the appeal preferred by the respondent-plaintiff i.e. RCA No.31/11 on the issue whether the suit is barred by Section 50 of

the Delhi Rent Control Act. The First Appellate Court held that since the appellant-tenant had set up a title adverse to that of the respondent-plaintiff, he had forfeited his tenancy and was, therefore, not entitled to the protection of the Delhi Rent Control Act. In this regard, the First Appellate Court placed reliance on the judgment of this Court in *S.Makhan Singh Vs. Smt. Amarjeet Bali* 154(2008) DLT 211.

10. The submission of Mr. Sistani, learned counsel for the appellant is that the suit itself was barred by limitation. In this respect, he submits that even according to the plaintiff, the cause of action as pleaded by the plaintiff was stated to have arisen in March, 1990, when the defendant allegedly stopped making payment of the rent of the suit premises. He has referred to para 10 of the plaint in this respect. Learned counsel submits that if the cause of action arose in March, 1990, the possession of the appellant-defendant became adverse to that of the respondent-plaintiff, and the suit should have been preferred within a period of 12 years from the said date. He submits that the suit was actually preferred sometime in October, 2002, since the verification in the amended plaint is of 31.10.2002.

11. However, I may observe that from the judgment of the Trial Court, as also from the original record, it is seen that the suit was originally filed on 31.01.2001. The plaint, it appears, was amended on 31.10.2002 and that is how the said date finds mention in the amended plaint. In fact, the amended plaint at the top of the first page clearly mentions that the same is the amended plaint. The original Vakalatnama given by the plaintiff in favour of the counsel is also dated 31.01.2001. It is, therefore, absolutely clear from the record that the suit was filed on 31.01.2001, and not in October,

2002, as claimed by the appellant. This submission of learned counsel for the appellant, therefore, in any event, does not survive, since the suit has been filed within the period of 12 years from the date when cause of action first arose in March, 1990. In any event, I do not find any merit in this submission. The aspect of limitation has been dealt with by the learned Trial Court . The onus to prove the said issue was placed on the defendant. The defendant did not lead any evidence on the said aspect. From the judgment of the Trial Court , it appears that no argument was advanced on the said aspect. Even if one were to fall back on Section 3 of the Limitation Act to say that the Court was itself duty bound to examine the aspect of limitation, on the face of the record, it was clear that the suit was not barred by limitation. The plaintiff had filed the suit premised on the relationship of landlord and tenant. The reliefs had been sought on the basis of the legal notice dated 02.11.2000 (Ex.PW1/6), by which the tenancy was terminated. The claim for rent has been restricted to the last three years. The appellant/defendant had not set up a title adverse to that of the plaintiff after the execution of Ex.PW1/5, in a manner so as to challenge the title of the plaintiff.

12. Moreover, it is seen that at the first appellate stage, the aspect of limitation was not even argued by the appellant. In these circumstances, when a finding of limitation has been returned by the Trial Court, and it does not appear on the face of the record that the suit was barred by limitation, the First Appellate Court was not obliged to deal with the said objection of limitation once again at the appellate stage suo motu, when it was not even urged at the time of arguments. Had the said aspect been

argued by the appellant at the appellate stage, certainly, the First Appellate Court would have had gone into the said issue, and dealt with the same. The obligation cast on the Court to examine the aspect of limitation on its own does not mean that the court should necessarily record a finding on the said issue, even when-on the face of it, the suit does not appear to be barred by limitation. Such an exercise would be an empty formality.

13. Learned counsel for the appellant further submits that the rent agreement Ex.PW1/5 was a contingent contract. Ex.PW1/5 describes the plaintiff-respondent as the first party and the appellant-defendant as the second party. It recites that the second party i.e. the defendant has advanced a sum of Rs. 60,000/- to the first party i.e. the plaintiff. It further recites that the first party-plaintiff shall within a period of two years return Rs. 40,000/- to the second party i.e. the defendant, and thereafter, the second party i.e. the defendant shall start paying Rs. 300/- per month towards rent to the first party-plaintiff. It further records that till the amount is not returned, the first party shall not charge any rent from the second party.

14. Since the findings with regard to execution of Ex.PW1/5 rendered by the Trial Court and the First Appellate Court are consistent, learned counsel for the appellant has not advanced any submission in regard to the validity and genuineness of the said instrument. I may observe that the appellant-defendant had sought to disown the signatures on the said instrument. However, the courts below have consistently believed the said instrument relied upon by the plaintiff, and held that the signatures attributed to the appellant-defendant are those of the appellant-defendant, by comparing the same with his signatures executed on other undisputed documents.

15. The submission of Mr. Sistani is that the respondent-plaintiff did not even make an averment in the plaint that the amount of Rs. 40,000/- was ever returned to the appellant-defendant. In his cross-examination, the plaintiff (PW1) had stated that, *'the defendant never paid me rent on the plea that when I would return the money amounting to Rs. 40,000/ to the defendant, then he will pay me the rent'*. PW1 had stated that the amount of Rs. 40,000/- was towards security amount for renting of the disputed shop. She claimed that her husband had returned back the said amount to the defendant. She stated that no receipt regarding repayment of amount was issued by the respondent. The suggestion given by the appellant-defendant to this witness that the amount of Rs. 40,000/- was not towards security, was denied by her.

16. On the aforesaid basis, Mr. Sistani submits that the amount of Rs. 40,000/- not having been returned, the obligation to pay the rent did not come into being and, therefore, there was no rent agreement between the parties. He submits that the courts below have proceeded on the basis that the relationship between the parties was that of landlord and tenant and by invoking Section 116 of the Evidence Act, the respondent-plaintiff has not been required to establish his title to the suit property.

17. Mr. Sistani further submits that since the obligation to pay rent of Rs. 300/- per month did not commence, no cause of action arose in favour of the plaintiff. He submits that the legal notice Ex.PW1/6 is premised on the alleged failure of the appellant-defendant to make payment of rent at the rate of Rs. 300/- per month from March, 1990. However, since the said

obligation did not arise, there was actually no cause of action subsisting in favour of the plaintiff.

18. On the other hand, the submission of learned counsel for the respondent is that the relationship of landlord and tenant has been duly established by the respondent. In this regard, he has referred to the discussion found in the impugned judgment. Learned counsel for the respondent submits that in the cross-examination of PW1, there is not even a suggestion given that the amount of Rs. 40,000/- had not been returned to the defendant. On the other hand, PW1 had deposed that the said amount had been returned by her husband to the defendant.

19. In order to arrive at its finding on the landlord and tenant relationship between the plaintiff and the defendant, the Ld. Trial Court had compared the signatures of defendant on Ex.PW1/5 i.e. rent agreement dated 05.03.1988, with the signatures of the defendant on the documents produced by PW-4 witness from BSES, Yamuna Power Ltd with the application form for grant of electricity connection made by the defendant to the then DVB. The defendant had categorically denied his signatures on Ex.PW1/5. Ex.PW1/5 is a document typed in Hindi on stamp paper of Rs.5/-. On the back side of the same name of the purchaser is mentioned as Sh. Jai Kunwar i.e. the appellant/defendant. Signatures of defendant are at point C. PW-4 had produced the application form of Sh. Jai Kunwar for sanction an electricity connection along with the same. This witness had also produced copies of certain title documents furnished by Sh. Jai Kunwar with the Delhi Vidhyut Board which contained, amongst others, an agreement to sell, receipt, General Power of Attorney, indemnity bond and affidavits. The

agreement to sell Marked X bears the signatures of Sh. Jai Kunwar as second party. Ex.PW4/E is the indemnity bond executed by Sh. Jai Kunwar and his three affidavits are Ex.PW4/F-1 to F-3. The signatures of Sh. Jai Kunwar in these documents have not been denied by him. The same are also in Hindi. Signature of Sh. Jai Kunwar on Ex.PW1/5 is also in Hindi. Ld. Trial Court has compared the signatures of Sh. Jai Kunwar on Ex.PW1/5 with his signatures on the documents produced by PW-4 and found that the same are similar. This Court has also compared the signatures of the defendant on these documents found them to be similar with the signatures found on Ex.PW1/5.

20. During the course of his cross-examination, DW-1 has categorically has stated that he never affixed his signatures in Hindi. He further stated that he did not submit any papers for sanction of electricity connection. He voluntarily stated that his signatures were obtained from him by electricity department and the officials of the electricity department took his signatures in English. The evidence of PW-4 and the documents produced by him regarding the electricity connection, application and documents annexed thereto, clearly falsifies the stand of the defendant that he never affixed any signatures in Hindi. The testimony of the defendant on this aspect is dishonest and false to his knowledge. Findings of the Ld. Trial Court that the signatures of the defendant exist in the document Ex.PW1/5 do not call for any interference.

21. It was contended that the document Ex.PW1/5 not being registered, could not be looked into in evidence. Even the terms of the same did not constitute a rent agreement. In the case of *Bondar Singh v. Nihal Singh*,

reported in (2003) 4 SCC 161, the Supreme Court was pleased to observe as under:-

“5. The main question, as we have already noted, is the question of continuous possession of the plaintiffs over the suit lands. The sale deed dated 9-5-1931 by Fakir Chand, father of the defendants in favour of Tola Singh, the predecessor-in-interest of the plaintiffs, is an admitted document in the sense its execution is not in dispute. The only defence set up against the said document is that it is unstamped and unregistered and therefore it cannot convey title to the land in favour of the plaintiffs. Under the law a sale deed is required to be properly stamped and registered before it can convey title to the vendee. However, legal position is clear law that a document like the sale deed in the present case, even though not admissible in evidence, can be looked into for collateral purposes. In the present case the collateral purpose to be seen is the nature of possession of the plaintiffs over the suit land.”

(Emphasis supplied)

22. In view of the judgment of the Supreme Court, even if Ex.PW1/5 was not registered, the same could be looked into to ascertain nature of the possession of the defendant. The plaintiff has proved that the defendant has executed the said document by proving his signatures on the same. The terms of this document state that the plaintiff has handed over the suit premises after construction to the defendant in the form of an office. The defendant described as the second party, would pay Rs.60,000/- to the plaintiff, described as the first party. The first party would return Rs.40,000/- to the second party within two years and, after return of this amount the second party would pay rent at the rate of Rs.300/- per month to the first party. The defendant in this matter has denied executing this document.

Execution of the same has been proved by the plaintiff. Terms of the same show that the relationship between the parties was that of landlord and tenant. The plaintiff has not sold the suit property to the defendant. Hence, Ex.PW1/5 is a rent agreement, and the relationship between the parties of landlord and tenant.

23. The claim of the appellant to have become owner of the suit property by adverse possession has been rejected by the First Appellate Court while discussing issue No. 5. The defendant had claimed that he was in possession of the suit premises since January, 1978, and that he had built upon the said premises from his own funds. The courts below observed there was no documentary or credible evidence placed on record by the defendant to say that he was in possession of the suit premises since January, 1978, as claimed by him. The evidence led by the plaintiff in rebuttal through the record keeper of M/s BSES Yamuna Power Ltd., who produced the record of K. No. K. No. 614-157978 installed in the suit premises, established that the said electricity meter was installed in the name of the defendant. The application form and agreement executed by the defendant with the power supply company was exhibited as Ex.PW4/D. The record produced by PW4 showed that the electricity connection was sanctioned only in the year 2000 in favour of the defendant.

24. Having heard learned counsels and perused the record, I am of the view that there is no merit in the present appeal. The Trial Court as well as the First Appellate Court have returned consistent findings of fact with regard to the execution of Ex.PW1/5, which acknowledges the status between the parties as that of landlord and tenant i.e. the plaintiff has been

acknowledged as the landlord and the defendant-appellant as the tenant. The mere fact that the obligation to make payment of monthly rent was to commence only after return of Rs. 40,000/- by the plaintiff to the defendant does not take away the very nature of occupation of the defendant-appellant in the suit premises. Only the liability to make payment of rent was postponed by the said agreement. Even if one were to assume that amount of Rs. 40,000/- was not refunded by the respondent-plaintiff to the appellant-defendant within the period of two years, it only meant that the obligation to make payment of monthly rent of Rs. 300/- did not commence. The agreement Ex.PW1/5 does not provide for payment of interest on the amount of Rs. 60,000/- advanced by the appellant-defendant to respondent-plaintiff. Thus, it can be inferred that the understanding between the parties was that since the plaintiff had advanced a sum of Rs. 60,000/- the rent would not be paid till Rs. 40,000/- was refunded, as the rent would be taken to have been adjusted from out of the interest that may accrue on the amount of Rs. 60,000/-.

25. The plaintiff has not pleaded in the plaint that amount of Rs. 40,000/- was ever refunded to the defendant-appellant. Thus, the defendant-appellant had no occasion to make a definite averment with regard to the return of the said amount. It was for the plaintiff to positively make an averment that the amount of Rs. 40,000/- has been returned before March, 1990 and, consequently, the obligation to pay rent had commenced. The plaintiff did not produce any receipt of repayment of the said amount to the defendant. Consequently, it cannot be said that the obligation to make payment of the rent started against the appellant-defendant and in favour of the respondent-

plaintiff. Even so, since the relationship between the parties was that of landlord and tenant, the plaintiff was entitled to serve a notice terminating the tenancy, and requiring the appellant to vacate the suit premises. The said right of the landlord, in respect of a monthly tenancy, is not dependent on a breach of any material term of the tenancy by the tenant. The notice Ex.PW1/6 clearly called upon the appellant to vacate the suit premises, and handover peaceful and vacant possession to him. It was not a notice simpliciter to seek payment of arrears of rent. Thus, it cannot be said that no cause of action arose in favour of the plaintiff to file the suit in question. The defendant-appellant having set up a title to the suit premises, has rightly been held by the First Appellate Court to have forfeited his tenancy, and his right to claim protection under the Delhi Rent Control Act. This is the settled position in law as held by this Court in *S.Makhan Singh* (supra).

26. Since the plaintiff has not been able to establish the repayment of Rs. 40,000/-, the said obligation of the plaintiff remains outstanding. Consequently, the judgment and decree of the courts below is modified to the extent that obligation to pay rent could not be said to have commenced since there is no evidence led by the plaintiff to establish repayment of Rs. 40,000/- to the appellant-defendant. The decree for a sum of Rs. 10,800/- along with interest is, therefore, set aside. It is further held that the appellant shall be entitled to retain possession of the suit premises until the plaintiff makes payment/tender, or deposit the amount of Rs. 40,000/- in favour of the appellant-defendant. However, once the said amount is tendered, paid or deposited, the respondent shall be entitled to execute the decree for possession/ejectment passed in favour of the plaintiff-defendant.

27. The appeal stands disposed of in the above terms.

VIPIN SANGHI, J

AUGUST 10, 2015

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