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

+ **Date of Decision: 06.10.2015**

% **RSA 95/2015**

JAMUNA SINGH

..... Appellant

Through: Mr. Rakesh Kakar, Advocate

versus

SANGRAM SINGH

..... Respondent

Through: Mr. Anand Yadav, Advocate

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. The present second appeal is directed against the judgment and decree dated 19.12.2014 passed by the learned ADJ-06 (South Distt.), New Delhi acting as the First Appellate Court in RCA No.15/2014, whereby the first appeal of the respondent/defendant was partially allowed and the decree passed by the Trial Court, namely, the Civil Judge-04, Saket Courts in C.S. No.141/2014 was partially modified.

2. The appellant/plaintiff had filed the said suit to seek a permanent injunction against the respondent/defendant by claiming that he is a tenant of the defendant in the premises consisting of one room, small bathroom and verandah in property bearing no.B-106, Krishna Nagar, Safdarjung Enclave,

New Delhi. The said property was shown in red ink in the site plan filed by the plaintiff/appellant. The suit was defended by the respondent/defendant by filing his written statement, who stated that the plaintiff was a tenant only in respect of one room admeasuring 10 ft x 10 ft.

3. The Trial Court framed issues on 09.09.2011 including the issue whether the plaintiff is a tenant of one room, small bathroom and verandah of the suit property as shown in red colour in the site plan filed by the plaintiff. The parties led their respective evidence. The site plan filed by the plaintiff was exhibited as Ex. PW-1/A. The plaintiff only examined himself as PW-1. The defendant examined himself as DW-1 and, inter alia, exhibited the site plan filed by him as Ex. DW-1/1. He also exhibited the notice issued on 17.03.1986 to Sh. Durga Prasad – the predecessor in interest of the appellant/plaintiff as Ex. DW-1/2.

4. It appears that during the course of evidence, the plaintiff also sought to lay a claim that he was in possession of small kitchen. The Trial Court rejected the said claim as it was not founded on a pleading. The Trial Court held that the defendant had admitted the plan filed by the plaintiff Ex. PW-1/A as correct. Thus, it was held that the plaintiff was a tenant in respect of the room, verandah and the toilet. So far as the toilet is concerned, it was held that since the plaintiff was residing in the room, it is natural that he would have the facility of toilet. The room opens in the verandah (which was described as a courtyard by the plaintiff in his evidence), and that since the room opens into the verandah, it was held that the plaintiff is a tenant in respect of the said common verandah.

5. In the appeal preferred by the respondent-defendant, the first appellate

court held that the onus to prove the extent of tenancy was on the plaintiff. It was held that the plaintiff had failed to establish his claim qua his exclusive tenancy rights in the veranda (which was described as a common courtyard in his cross-examination by the plaintiff). The discussion found in the impugned judgment passed by the first appellate court on issue No. 1 reads as follows:

“14. The burden of proving this issue was upon the plaintiff but except a bald allegation in the plaint that the suit property consisted of one room, varandah and bathroom, nothing else in the form of any document is proved on record by the plaintiff. It is pertinent to mention here that the extent of tenancy was specially denied by the defendant in his WS especially in para 2 of Preliminary Objection wherein defendant provided the details of eviction petition also. But while replying these contentions, the plaintiff in his replication denied the same in general and the plaintiff did not bother to reply the same specifically in reference to the details given in eviction petition. He nowhere stated that the facts alleged by the defendant about the eviction petition and its contents about the extent of tenanted premises are false. Needless to say that general and evasive denials are no denials in the eyes of law rather they are considered to be admission of the facts in question. It is pertinent to mention here that when PW1 was cross-examined and a question was asked as to whether he is aware about the eviction petition filed by the defendant against his father, he stated that he is not aware but no such lack of awareness was mentioned in the replication. It is pertinent to mention here that plaintiff in his affidavit which was tendered in examination-in-chief did not mention about the extent of tenanted premises at all despite being specifically denied in the WS by the defendant. It is also pertinent to mention here that in

his cross examination he stated that he is in possession of one room, common courtyard, one kitchen and bathroom, though, in his plaint he had mentioned the word “Varandah” and not common courtyard. Common courtyard cannot be said to be in exclusive possession of the plaintiff. In plaint he nowhere mentioned about any kitchen but he improved his allegation in evidence. All these facts shows that plaintiff is not defining the suit property properly in the plaint and in the absence of any allegation in that regard in his examination-in-chief, there is nothing to presume in his favour. In these circumstances, the inference goes against the plaintiff and it can be safely said that he has failed to discharge his burden. Hence this issue is decided against the plaintiff.”

6. Resultantly, the first appellate court modified the judgment and decree of the trial court and restrained the respondent-defendant from forcibly dispossessing the plaintiff from one room admeasuring 10’x10’ of the suit property bearing No. B-106, Krishna Nagar, Safdarjung Enclave, New Delhi-110029 (as shown in the site plan Ex.DW1/1). Thus, the first appellate court accepted the plan Ex.DW1/1 filed by the defendant and granted injunction in terms thereof and not in terms of Ex.PW1/A-the plan filed and relied upon by the appellant-plaintiff.

7. The submission of learned counsel for the appellant-plaintiff is that the first appellate court has seriously erred in rejecting the evidence of the plaintiff on the aspect of the extent of tenanted premises. Learned counsel submits that the trial court had decided the issue No. 1 in favour of the plaintiff on the basis of the admission made by the defendant qua the site plan Ex.PW1/A.

8. Having heard learned counsels and perused the record, it is seen that the trial court while dealing with issue No. 1, without any basis, recorded that the defendant had admitted as correct the site plan Ex.PW1/A. The entire evidence of the defendant has been read out and at no stage, the defendant admitted the site plan Ex.PW1/A as correct. On the contrary, the defendant categorically disputed the extent of tenanted premises claimed by the plaintiff as also the site plan Ex.PW1/A, and led in evidence his own site plan Ex.DW1/A. Pertinently, the extent of tenancy was described by the defendant in the legal notice issued way back on 17.03.1986 to Shri Durga Prasad i.e. the predecessor-in-interest of the appellant-plaintiff i.e. Ex.DW1/2. In the said notice, the extent of tenanted premises had been described by the defendant-respondent as ‘one room of the size of 10’x10’ in premises No. B-106, Krishna Nagar, New Delhi’.

9. The submission of learned counsel for the respondent is that the claim made by the plaintiff-appellant was belied by the fact that even in the plaint, the plaintiff-appellant did not lay a claim with regard to the existence of a kitchen. However, while leading his evidence, the plaintiff claimed to be in possession of the kitchen as well. Thus, the plaintiff stood discredited. The further submission is that the plan filed by the plaintiff, Ex.PW1/A, discloses a veranda in front of the plaintiff’s room. It is bounded in red colour and the claim of exclusive tenancy rights in the verandah (which is also described as common courtyard by the plaintiff) is dishonest since there are other tenants in the premises who use the common courtyard or verandah.

10. Learned counsel further submits that the defendant is not denying the

right to access the tenanted premises, namely, the room admeasuring 10' x 10' through the common courtyard, to the plaintiff.

11. During the course of arguments, on account of the contradictory statements made by the parties with regard to the existence of the bath room, this Court suggested that Court could send a local commissioner to report with regard to the existence of the common toilet. However, the appellant expressed his inability to share the fee as he is a small time vegetable vendor.

12. The trial court fell in patent error in repeatedly observing that the defendant had admitted the correctness of Ex.PW1/A. It is also not in dispute that the claim for a kitchen was rejected by the trial court. The same was not claimed to be a part of the tenanted premises in the plaint but the plaintiff sought to improve his case at the stage of evidence. Therefore, the first appellate court was justified in accepting the version of the defendant with regard to the verandah/courtyard being available to the plaintiff only for the purpose of ingress and egress into the tenanted premises, namely, the room admeasuring 10' x 10'.

13. Ex. DW1/1 does not show the existence of a bathroom. The trial court has held that since the plaintiff is residing in one room in his occupation, it is but natural that the plaintiff would have access to the toilet in the courtyard. Pertinently, it is not the case of the respondent that though a toilet exists in the courtyard, the plaintiff has no access to it. According to the defendant, there is no toilet in existence at all in the courtyard, as none has been shown in Ex. DW-1/1. This being the position, I am of the view that the plaintiff would be entitled to the use of the toilet, if it exists in the

courtyard, however, if no toilet exists in the courtyard, the plaintiff would not be entitled to now construct one on the strength of this judgment.

14. The present appeal stands disposed of in the aforesaid terms leaving the parties to bear their respective costs.

VIPIN SANGHI, J

OCTOBER 06, 2015

sr/sl