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HIGH COURT OF DELHI AT NEW DELHI

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R.S.A. No.78/2015 & C.M. No.3162/2015

Decided on : 8th April, 2015

ASHOK KUMAR LAYA

..... Appellant

Through: Mr. K. Sunil & Mr. Apurv Chandola,
Advocates.

Versus

TILAK RAJ SHARMA

..... Respondent

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (ORAL)

1. This is a regular second appeal filed by the appellant against the judgment dated 9.12.2014 passed by Ms. Ina Malhotra, the learned District & Sessions Judge, South-East, Saket Courts, New Delhi in first appeal bearing R.C.A. No.60/2014 titled *Ashok Kumar Laya vs. Tilak Raj Sharma* upholding the judgment and decree dated 07.06.2014 passed by Ms. Pooja Aggarwal, the learned Civil Judge, South District, Saket Court, New Delhi.

2. Before dealing with the submissions made by Mr. K. Sunil, the learned counsel for the appellant raising the purported substantial question of law, it may be pertinent here to give brief facts of the case.

3. The respondent/plaintiff filed a suit for possession bearing No.758/2010 against Tanu Laya and Ashok Kumar Laya, wife and husband in respect of the ground floor of property No.N-25, Old Double Story, Lajpat Nagar-IV, New Dehli and also for recovery of Rs.41,000/- towards the arrears of rent/damages @ Rs.1,000/- per day along with interest @ 18 per cent from 22.3.2009. Ms. Tanu Laya was deleted from the array of parties during the pendency of the suit on 14.1.2011 by the learned Civil Judge.

4. The case which was setup by the respondent/plaintiff was that he had entered into a lease agreement initially with Tanu Laya on 30.7.2003 in respect of the ground floor of the suit property consisting of three rooms, kitchen, *latrine*, bathroom for a period of 11 months starting from 21.7.2003 at a monthly rent of Rs.4,500/- excluding all water and electricity charges. The premises were to be used for residential purposes. It has been alleged that after expiry of 11 months, the tenancy continued on month to month basis on the same terms and conditions. It is alleged

that on 23.8.2004, defendant No.2 (appellant herein) undertook on behalf of both the defendants to vacate the premises on 1.9.2004 along with clearance of arrears of rent for a period of four months but neither he vacated the premises nor paid the arrears of rent. In effect, the case of the respondent/plaintiff was that after expiry of period of 11 months, the appellant/defendant No.2, Ashok Kumar Laya was the tenant and since they had failed to vacate the premises and clear the rent/damages in terms of the settlement, therefore, the suit for possession, etc. was filed. The appellant/defendant contested the suit and took the plea that the rent of the premises was Rs.2,200/- and not Rs.4,500/- and therefore, he was protected by the Rent Act and the civil court did not have the jurisdiction. Various other objections were also raised which are not very important to be considered by this court.

5. Suffice it would be here to mention that on the pleadings of the parties following issues were framed :-

”(1) Whether the plaintiff is entitled to a decree of possession? OPP

(2) Whether the plaintiff is entitled to decree of recovery? OPP

(3) Whether the suit of the plaintiff is barred under provisions of Delhi Rent Control Act? OPD

(4) Relief.”

6. The parties adduced their respective evidence and the learned Civil Judge came to the conclusion that the suit is not barred under the provisions of the Delhi Rent Control Act. For the purpose of returning a finding that the suit is not barred by Section 50 of the Delhi Rent Control Act, the learned Civil Judge analyzed the evidence by both the sides and held that the appellant/tenant had failed to discharge the onus of proving by any credible evidence that the rent of the premises was Rs.2,200/-. In this regard, the court had also noted that the answers in cross-examination of the appellant/tenant were evasive. Moreover, he had only shown the proof of having paid Rs.2,200/- only after filing of the suit which, one could conveniently consider to be an act of trying to manufacture evidence so as to bring the matter outside the jurisdiction of the court. It will be more pertinent here to reproduce the finding returned by the Civil Judge with regard to issue No.3.

“16. This issue is being decided prior to the issue no.1 and 2 as it has material effect on the jurisdiction of this court. The onus to prove this issue was on defendant no.2. As DW2/1, the defendant no.2 has deposed in Ex. DW2/A that

the rate of rent was Rs. 2,200/per month. During his cross-examination, he has denied the rate of the rent to be Rs. 4,500/and has deposed that before the filing of the suit, he used to pay the rent to the plaintiff and went on to evasively depose that may be the payments in the year 2005-2006 were made by the cheques. He also went on to depose evasively as to the amount of the cheques and denied remembering the same. He has gone on to depose that one cheque was passed and the other cheque was not passed. For reasons best known to the defendant no.2 he chose not to produce the records pertaining to the cheque which would have been the best evidence to prove the quantum of the rent, thereby leading to an adverse inference that the cheque records if produced would not have supported the case of the defendant no.2.

17. DW2/1 has also relied upon the certificates issued by the Department of Post as also on the money orders Ex.DW2/9 to Ex.DW2/23. However, the same pertain to the period subsequent to the institution of the suit and hence cannot be relied upon to determine the rate of rent between the parties at the time of institution of the suit.

18. DW2/2 Sh. Ashwani Kumar has also deposed as to the rent of the suit premises being Rs. 2,200/per month and as per the verification para of the affidavit, he has deposed on the basis of "own knowledge". However, during his cross examination, he has admitted that the rent of the premises was not agreed before him and he has also admitted that he had come to the court on the asking of the defendant no.2. Accordingly the testimony of DW2/2 being hearsay does not inspire confidence and hence cannot be relied upon.

19. On the other hand, the plaintiff as PW1 has deposed in para 5 of Ex. PW1/X that the defendant had continued in possession of the suit property at the rate of Rs. 4,500/per month. In the entire cross examination no suggestion was

put to PW1 as to falsity of this aspect of his testimony of PW1. Only a suggestion was put to the PW1 as to the defendant no.2 being the sole tenant @ monthly rent of Rs.2,200/-. However, in the absence of any material fact having been averred by the defendant no.2 as to the date when such tenancy was created and in view of the defendant failing to discharge the onus cast upon him in respect of the rent being Rs.2,200/ per month, the mere putting of the suggestion does when read in conjunction with the entire evidence on record, is not of much significance.

20. It is also to be borne in mind that with the defendant no.2 denying his signatures on rent receipts Ex. PW1/D to Ex. PW1/H during his cross examination and in the absence of any signatures of the plaintiff on Ex. PW1/D to Ex. PW1/H, it was for the plaintiff to prove the receipts by corroborative evidence. During the cross examination, PW1 has admitted that Ex. PW1/D was issued on 16.09.08 was for the period from 21.09.07 to 21.10.07 and that on 16.09.08, the rent from 21.10.07 till 16.09.08 was in arrears. He has gone on to depose that as on 16.09.08, rent of about 21 months was due. The testimony of PW1 being contradictory in respect of the outstanding arrears as on 16.09.08 also does not inspire confidence in view of the the deposition of the PW1 that whenever payment was made by the defendant no.2, it was adjusted towards the arrears and were not taken as rent for the current month which testimony if read in conjunction with Ex. PW1/D, it would have implied that the payment made on 16.09.08 should have been adjusted towards the alleged arrears existing prior to 21.09.2007 and not for 21.09.2007. Further it has not been explained in the testimony of PW1 as why in the receipts Ex. PW1/D to EX PW1/H consistently it has been mentioned that the last balance was nine month's rent instead of the balance as on the date of the receipt.

21. PW1 has also admitted that on Ex. PW1/D to EX PW1/H it is not written that the balance of nine months is due of the months prior to the month of which rent receipt is issued and hence the oral testimony of the plaintiff in respect of the rent being towards due of a period prior to that of which the receipt is issued does not inspire confidence and appears to be afterthought even more so when the plaintiff for reasons best known to him did not produce the original rent receipt book in the court containing the other counter foils of the rent receipts thereby leading to adverse inference as to existence of such rent receipt book. With the same inconsistency being reflected in Ex. PW1/D to Ex. PW1/H, the rent receipts cannot be said to have been duly proved by the plaintiff.

22. Be that as it may, it cannot be lost sight of that the agreement Ex. PW1/B has been duly proved by the plaintiff as per which the rate of rent was Rs. 4,500/per month and the testimony of PW1 in respect of the defendant continuing in the premises @ Rs. 4,500/ has gone un rebutted, thereby on the basis of preponderance of probabilities the plaintiff has discharged the onus cast upon him.”

7. Thus, on all the three issues, a finding was returned in favour of the respondent/plaintiff and a decree of eviction was passed. The appellant felt aggrieved and filed an appeal before the court of District & Sessions Judge where also the finding returned by the learned Civil Judge was affirmed. Relevant observations of the first appellate court in this regard were as under:-

“I find no infirmity in the order of the learned Trial Court that warrants interference. The tenant landlord relationship

has not been denied and has been duly terminated in accordance with law. Merely because the appellant denied any relationship with Ms. Tanu Laya, he cannot wriggle out of his obligation to pay rent @ Rs.4,500/- per month by alleging the lease agreement as a fabricated document, as other corroborative evidence has also been taken into consideration. Moreover the onus to prove that the rent was Rs.2,200/- per month was squarely placed on the appellant, which he failed to discharge. The rent has been correctly concluded as being Rs.4,500/- per month on the basis of the evidence on record. Given these facts, the respondent was entitled to a decree for possession.”

8. Still not feeling satisfied, the present regular second appeal has been filed and the contention of Mr. K. Sunil, the learned counsel for the appellant is that the present appeal raises a substantial question of law with regard to the onus of proof. It has been contended that the onus of proof to prove that the rent of the premises in question was less than Rs.4,500/- was wrongly put on the appellant/tenant as it tantamounted to proving in negative and the onus ought to have been put on the respondent/plaintiff to prove positively that the rent which was payable by the appellant/tenant was Rs.4,500/- which brought the case of the respondent/plaintiff outside the purview to Section 50 of the Delhi Rent Control Act.

9. The learned counsel for the appellant has also placed reliance on two judgments; one of the Apex Court in *Rangammal vs. Kuppuswami & Anr.*; AIR 2011 SC 2344 and the other of Jharkhand High Court in *Yamunadas Sarda vs. Smt. Rita Lal & Others.*; 2012 (4) J.L.J.R. 160.

10. I have gone through both these judgments. There is no dispute about the preposition of law laid down in the said cases in the light of the facts reiterated therein. The question which arises for consideration is as to whether there has been any substantial question of law involved in the present matter with regard to onus of proof which has resulted in miscarriage of justice or perversity in the finding returned by the two courts below.

11. The provisions of burden of proof and the exceptions therein are contained in Section 101 to 111 of the Indian Evidence Act. The basic dictum is contained in Section 101 of the Evidence Act which is that 'one who asserts must prove'. In the instant case, no doubt the case which has been setup by the respondent/plaintiff is that the rent of the premises is Rs.4,500/-. The said initial burden and not onus has to be discharged by the respondent/plaintiff which, in my view, he has discharged in ample measure inasmuch as not only he has made an averment but he has stated

on oath before the trial court that the rent at which the appellant/defendant was inducted as a tenant in respect of three rooms in the year 2003 was Rs.4,500/- He has been subjected to cross-examination and he withstood the same. Therefore, in my considered opinion, the initial burden has been discharged by the respondent/plaintiff, meaning thereby that the onus to prove to the contrary shifts on to the appellant/defendant.

12. Section 106 of the Evidence Act clearly lays down that the fact which is especially within the knowledge of a party has to be proved by him. In the instant case, the appellant/defendant has said that the rent of the premises was only Rs.2,200/-, therefore, this was a fact which was specially within his knowledge and he had setup this defence, so there was nothing wrong in putting the onus of proving that the rent was Rs.2,200/- on him.

13. The court below have concurrently noted that the appellant/defendant has miserably failed to prove that the rent of the premises in question is Rs.2,200/-. That being the position, obviously the decree of possession was to follow against him. I have already reproduced as to how the two courts concurrently have analyzed the entire evidence produced by the

parties on this aspect and returned their finding after appreciating the same. The learned counsel for the appellant cannot, under the garb of so-called substantial question of law, impel the court to re-appreciate the evidence and return a finding which is contrary to the concurrent one returned by the two courts below.

14. For the above mentioned reasons, I feel that there is no substantial question of law involved in the present appeal. Accordingly, the appeal is totally misconceived and the same is dismissed.

V.K. SHALI, J.

APRIL 08, 2015
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