

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

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Date of decision: 24th February, 2016

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RFA.No.422/2015

MRS. KAVITA MOIN JAKHMOLA

..... Appellant

Through: Mr. Rohit Kumar, Adv.

Versus

DR. ANIL SETHI

..... Respondent

Through: Mr. Anup J. Bhambhani, Sr. Adv.
with Mr. Nagesh, Adv.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This first appeal under Section 96 of the Code of Civil Procedure 1908 (CPC) impugns the judgment and decree, dated 7th April, 2015 of the Court of Additional District Judge, Central - 14, Delhi in original Suit No. 428/2004, new Suit No.559/2014, of ejectment of the appellant from the premises earlier in her tenancy and for recovery of arrears of the rent of *mesne* profits.

2. The appeal came up first for admission on 7th July, 2015 when the counsel for the respondent appeared on Caveat and considering the limited nature of controversy therein, with the consent of the counsels, the appeal was

finally heard, trial court record requisitioned and judgment reserved. The trial court record has been received and perused.

3. The respondent, on 10th December, 2004 instituted the suit from which this appeal arises, pleading (i) that he had in December, 2000 let out a portion of ground floor of property comprising of one drawing room, one kitchen, one dining space, two bed rooms at the rear, whole of backyard including one servant room in the backyard of his property No. C-49, Pamposh Enclave, New Delhi to the appellant/defendant at a rent of Rs.5500/- per month besides electricity and water charges; (ii) one study/room in the front of the ground floor was not let out to the appellant/defendant; (iii) the front lawn and the porch were meant for common use and never let out to the appellant/defendant; (iv) that the letting the appellant/defendant was at the behest of her husband who was a friend of the respondent/plaintiff and who represented that the appellant/defendant on account of his back injury was in need of a premises at ground floor and for this reason only the premises were let at a concessional rent of Rs.5,500/- per month as against the then prevalent rent of such premises of Rs.12000/- to Rs.18000/- per month; (v) that there was no agreement in writing; (vi) that the appellant/defendant was irregular in payment of rent and had not paid any rent since October, 2001 inspite of repeated demand; (vii) to

placate the respondent/plaintiff, the appellant/defendant w.e.f. January, 2004, offered to increase the rent to Rs.8000/- per month; (viii) that the respondent/appellant was then stationed at Japan and on returning in April, 2004 called upon the appellant/defendant to pay the arrears of rent; (ix) instead, the appellant/defendant on 23rd August, 2004 unlawfully trespassed into the room in the front of the ground floor which was retained by the respondent/plaintiff for his own use; (x) that the tenancy of the appellant/defendant was determined vide legal notice dated 5th September, 2004. Accordingly, the reliefs of ejectment of the appellant/defendant, for recovery of Rs.2,71,550/- as arrears of rent with interest, for recovery of Rs.68,350/- towards *mesne* profit/damages for use and occupation and for recovery of future *mesne* profits at the rate of Rs.1000/- per day with interest were claimed.

4. The appellant/defendant contested the suit by filing a written statement pleading (a) that she is a tenant since December, 2000 in respect of the entire ground floor at the rent of Rs.3000/- per month; (b) that the respondent/plaintiff let out the premises to the appellant/defendant as the husband of the appellant/defendant was known to the respondent/plaintiff; (c) that no written agreement was executed and no rent receipt issued by the respondent/plaintiff

stating that if he did so he will have to pay a higher house tax for the property; (d) that the appellant/defendant has been residing in the premises with her child as her husband is working in Singapore; (e) that it was the respondent/plaintiff who during his visit to India in April, 2004 had asked the appellant/defendant to allow him use of the front room in the tenancy of the appellant/defendant; (f) that the respondent/appellant had been asking the appellant/defendant to increase the rent and in lieu thereof the appellant/defendant paid full one year's rent in advance in cash and the respondent/plaintiff also issued a receipt of the same; (g) that the respondent/plaintiff in the notice dated 5th September, 2004 stated the rent to be Rs.7000/- per month when the rent was Rs.3000/- per month and stood paid for the period from 1st July, 2004 to 30th June, 2005; (h) that the suit is barred by Section 50 of the Delhi Rent Control Act, 1958.

5. Though there is a replication on file of the Trial Court but a perusal of the order-sheet of the Trial Court shows that the replication was not permitted to be taken on record and CM(M) No.115/2005 preferred by the respondent/plaintiff thereagainst was dismissed on 25th April, 2006.

6. On the pleadings of the parties, on 15th March, 2005 the following issues were framed:

- “1. What is the extent of tenancy premises? Onus of proof on parties.*
- 2. Whether the premises were let out at the rate of Rs.5500/- per month or Rs.3000/- per month? Onus of proof on parties.*
- 3. Whether the defendant agreed to increase rent to Rs.8000/- per month w.e.f. January 2004? OPP*
- 4. Whether the plaintiff is entitled to damages from 25.9.2004 to 10.12.2004, if so at what rate? OPP*
- 5. Whether the plaintiff is entitled to interest, if so, at what rate? OPP*
- 6. Whether the suit is barred U/s 50 of DRC Act? OPD.*
- 7. Relief.”*

7. On an application of the respondent/plaintiff, vide order dated 27th February, 2007, the following additional issue was framed:

“6A. Whether the plaintiff terminated the tenancy of the defendant legally and validly with regard to the suit premises vide notice dated 15th September, 2004, if so its effect? (OPP)”

8. The learned Additional District Judge (ADJ), on the basis of the evidence led before him, has believed the version of the respondent/plaintiff of the rent being Rs.5,500/- per month and the appellant/defendant being in

arrears thereof and has accordingly passed a decree for ejectment of the appellant/defendant from the premises and a decree for arrears of rent for three years prior to the institution of the suit @ Rs.5,500/- per month and a decree for *mesne profits* @ Rs.8,000/- per month from the date of institution of the suit, with effect from January, 2004 till December, 2004 @ Rs.9,000/- per month, from January, 2005 to December, 2005 @ Rs.10,000/- per month and so on.

9. The Civil Courts being competent to pass an order of ejectment of the appellant/defendant from premises in her tenancy only if the premises are not covered by the provisions of the Rent Act i.e. only if the rent thereof is in excess of Rs.3,500/- per month, the counsel for the parties confined their arguments on the said aspect only with the endeavour of the counsel for the appellant/defendant being to establish that the rate of rent has been proved to be Rs.3,000/- per month and the contention of the senior counsel for the respondent/plaintiff being that the rate of rent has been proved to be Rs.5,500/- per month, increased to Rs.8,000/- per month and thereafter reduced to Rs.7,000/- per month.

10. There is admittedly no document recording the terms of letting and no regular payment by cheque to gauge the rate of rent. Besides the oral depositions of the respondent/plaintiff and his witnesses on one hand and the oral deposition of the appellant/defendant on the other, there are some documents with respect to rate of rent and on which the counsels laboured during the hearing, with proof/admission into evidence even thereof being under challenge. I will deal with them one by one.

11. The appellant/defendant in her written statement pleaded that the respondent/plaintiff upon return to India in April, 2004 demanded increase in rent and the appellant/defendant under pressure agreed to pay one full year's rent in advance, which was paid in cash and on appellant/defendant's insistence the respondent/plaintiff finally issued a receipt for the same.

12. However neither were the contents of the said receipt reproduced in the written statement nor was the same or any copy thereof filed along with the written statement or till the framing of issues or till the respondent/plaintiff filed his affidavit by way of examination-in-chief, as the said document in accordance with law should have been.

13. The appellant/defendant, at the fag-end of the cross examination of the respondent/plaintiff put to him photocopy of a typed receipt dated 19th July, 2004 of Rs.36,000/- in cash on account of rent from 1st July, 2004 to 30th June, 2005 @ Rs.3,000/- per month. The respondent/plaintiff denied the suggestion that the same was issued or executed by him or that the same bore his signatures. Opportunity sought by the respondent/plaintiff for re-examination was denied.

14. Though the document thus did not stand proved but Exhibit PW-1/D1 was put on it. I may mention that Exhibit Mark is put on a document only when it stands proved and admitted into evidence.

15. The appellant/defendant even thereafter did not produce the original receipt aforesaid. However in her affidavit by way of examination-in-chief she deposed of the said receipt having been issued by the respondent/plaintiff; even then the reference was to the photocopy on which Exhibit PW-1/D1 was put and original thereof not produced. The said document was not even tendered in evidence when the affidavit by way of examination-in-chief was tendered along with documents Exhibit DW-1/1 to Exhibit DW-1/9 proved therein. The appellant/defendant in her affidavit by

way of examination-in-chief did not even depose that the signature on Exhibit PW-1/D1, which the respondent/plaintiff as aforesaid had denied to be his, were of the respondent/plaintiff.

16. The counsel for the respondent/plaintiff however in cross examination of the appellant/defendant asked the appellant/defendant whether she had the original thereof and the appellant/defendant replied in the affirmative. However the original has not come on record. On further query the appellant/defendant stated that the respondent/plaintiff had not prepared and signed the ‘alleged’ rent receipt dated 19th July, 2004 in her presence but had merely given it to her.

17. The counsel for the appellant/defendant, to contend that the rent receipt aforesaid stands proved, relied on *Abdul Samad Vs. Gunendra Krishna Roy* AIR 1925 Calcutta 452 laying down that where the genuineness of a rent receipt is sworn to by the tenant by whom the rent has been paid, that is legally sufficient to prove the receipt despite the fact that the person whose signature it bears has not been examined.

18. I am unable to agree. In *Abdul Samad* supra the tenant is stated to have “sworn the genuineness of the rent receipt”. The appellant / defendant

herein has not, inspite of the respondent / plaintiff having denied the same. So much so that the appellant / defendant has not even bothered to produce the original bearing the signatures of the respondent / plaintiff. On a photocopy, it is very easy to supplant signatures on one document to another. The appellant / defendant in her affidavit by examination-in-chief merely stated that “The receipt is already exhibited as Ex.PW1/D1” and in cross examination also instead of affirming its genuineness stated that it was not prepared or signed in her presence and the respondent / plaintiff had merely handed it over to her. Not only so, the High Court of Calcutta in judgment supra was also swayed to hold the rent receipt to have been proved because no objection was taken by the landlord to admission thereof into evidence. That is also not so here. I am therefore unable to hold the alleged rent receipt dated 19th July, 2004 to have been proved by the appellant / defendant. Axiomatically, the same cannot be read. The appellant / defendant, upon denial by the respondent / plaintiff, ought to, in her own evidence, have produced the original and identified the signatures of the respondent / plaintiff thereon in accordance with Section 67 of the Indian Evidence Act, 1872. I find the Bombay High Court to have in ***Ramkrishna Girishchandra Dode Vs. Anand Govind Kelkar*** 1998 SCC Online Bom. 492

distinguished *Abdul Samad* supra reasoning that the view therein turned on no objection having been taken to admission into evidence of the rent receipts. The High Court of Gujarat also in *Ahmedabad Municipal Corporation Vs. Hotel Sarita* 2012 SCC Online Guj. 1094 held rent receipts to have been not proved on production only of xerox copy thereof and without evidence of proof thereof.

19. This cat and mouse game which the parties hereto appear to have been indulging in, continued with respect to the other documents also.

20. First of such documents is a handwritten computation/account sheet in original without any signatures which the respondent / plaintiff did not file at the time prescribed for filing documents and did not prove in his own evidence and put to the appellant / defendant for the first time during her cross examination and qua which the appellant/defendant stated:-

“I do not remember if this is one of the statement of accounts that I kept and handed over to the plaintiff. I do not think so that this hand writing is mine. I do not remember writing this.”

Again, Exhibit DW-1/P1 was put thereon though the document did not stand proved and admitted into evidence. The respondent/plaintiff therefrom

purports to explain how the figure of Rs.7,417/- being value of one of the cheques issued by the appellant/defendant/her husband in favour of the respondent/plaintiff in the year 2001 was arrived at and to argue that therefrom the rent is borne out to be Rs.5,500/- per month.

21. However since the document has not been admitted into evidence the question of looking thereat for any purpose does not arise. I may mention that though the respondent / plaintiff could have led rebuttal evidence and proved the same but did not. I have in *Subhash Chander Vs. Sh. Bhagwan Yadav* MANU/DE/3343/2009 held that if a party to a litigation chooses to confront the opposite party with a document in cross examination without filing the same in Court at the time provided therefor and if the opposite party in cross examination does not admit that document and the same is not proved, the party so putting the document can in his evidence / rebuttal evidence prove the same. The respondent / plaintiff has not and cannot thus rely on the said document.

22. The respondent/plaintiff in his affidavit by way of examination-in-chief deposed that pursuant to police complaint by him in August, 2004 of trespass by the appellant/defendant into the front room on the ground floor, a

settlement/compromise was arrived at (in which possession of the room was restored to respondent/plaintiff) as contained in letters proved as Exhibit PW-1/7 and Exhibit PW-1/8 and before finalizing the said letters drafts thereof Exhibit PW-1/9 and Exhibit PW-1/10 were prepared by the appellant/defendant in her own handwriting and containing corrections in hand of respondent/plaintiff and which record the rent to be Rs.7,000/- per month.

23. At the time of tendering of the affidavit by way of examination-in-chief in evidence, Exhibit PW-1/7 was de-exhibited, being a photocopy. However there was no objection to admission into evidence of Exhibit PW1/8 to Exhibit PW1/10.

24. The only cross examination by the appellant/defendant of the respondent/plaintiff with respect to the said documents is by way of suggestion that the appellant/defendant was forced by the respondent/plaintiff and his friends in collusion with police to write the documents PW-1/7 to Exhibit PW-1/10 and which suggestion was denied by the respondent/plaintiff.

25. The appellant/defendant however in her own affidavit by way of examination-in-chief did not depose anything about the circumstances in which she was forced to write the aforesaid letters acknowledging and agreeing to pay the rent @ Rs.7,000/- per month.

26. The only contention of counsel for the appellant / defendant in rejoinder was that the appellant / defendant in her evidence proved as Exhibit DW1/2 – copy of complaint made by her to the Police on 1st September, 2004 of having been forced on 31st August, 2008 to write letters aforesaid recording the rent to be Rs.7,000/- per month and there was no cross examination thereon.

27. I am however unable to hold the same as proof by the appellant / defendant of having been forced to write the letters recording the rent to be Rs.7,000/- per month. All that the appellant / defendant in her affidavit by way of examination-in-chief stated with respect to Exhibit DW1/2 is that the same was a complaint lodged by her with police. The same can be proof only of lodging a complaint but not evidence of being forced to write letters in her own handwriting. The appellant / defendant has filed complaints against the respondent / plaintiff of sexual harassment and ought to have as

proof of force under which she signed the letters, given particulars. In fact objection even was taken by counsel for the respondent / plaintiff of mode of proof of Exhibit DW1/2 and admission thereof into evidence. No records of the police to whom the complaint was claimed to have been made were summoned to prove filing / making thereof. Also, the complaint Exhibit DW1/2 is of the respondent / plaintiff having made the appellant / defendant agree to hand over possession of the front room and the writing of letter recording rent to be Rs.7,000/- per month is merely incidental thereto. The appellant / plaintiff did not even, in the said complaint, state that the rent was in fact Rs.3,000/- per month. I therefore hold the appellant / defendant to have not denied the admission in Exhibit PW1/8 to Exhibit PW1/10 of rent being Rs.7,000/- per month.

28. The appellant / defendant in her cross examination, on being shown Exhibit PW-1/8 (recording rent to be Rs.7,000/- per month) admitted her signatures thereon but produced, literally from her hat, photocopy of another document on which Exhibit DW-1/P3 was put, to contend that the rate of rent mentioned therein is Rs.3,000/- per month. The counsel for the respondent/plaintiff objected to said production but since the cross examination was being conducted by Commissioner appointed by the Court

and who had not authority to reject anything, the document remained. However in my opinion the said document is not legally on record, having not been filed at the time prescribed by CPC for production of documents and cannot be looked at. The said document was not put to respondent/plaintiff also in his cross examination.

29. Thus, from the only document lawfully on record and proved in accordance with law i.e. Exhibit PW-1/8 to Exhibit PW1/10 which the appellant/defendant has admitted to be in her handwriting and signature and which the appellant/defendant has failed to prove that she was forced to write, as was suggested to the respondent/plaintiff in cross examination, the rent is proved to be Rs.7,000/- per month.

30. I even otherwise, on going through oral depositions find it to have been proved, applying the test of preponderance of probability, that the rent, at the time of inception of tenancy was Rs.5,500/- per month as pleaded by the respondent/plaintiff and not Rs.3,000/- per month as pleaded by the appellant/defendant. It is not in dispute that the appellant/defendant and the respondent/plaintiff and their respective spouses shared a friendly relationship since much prior to the inception of the tenancy. It is the

unrebutted evidence of the respondent/plaintiff that the premises were let out to the appellant/defendant at the same rent which the appellant/defendant was paying for the premises at Satya Niketan earlier in her tenancy. The appellant/defendant however evaded to disclose the rent being paid for the premises at Satya Niketan earlier in her/her husband's tenancy and which the appellant/defendant/her husband were required to vacate. Adverse inference is drawn therefrom. Not only so, the appellant/defendant in her cross examination, with respect to a large number of questions relating to payment of rent, replied that it was her husband who used to deal with the same and keep accounts. The husband of the appellant/defendant shied from appearing as the witness and facing cross examination. Again adverse inference has to be drawn that he, owing to his friendly relations with the respondent/plaintiff, did not want to lie that the premises were taken on rent at a rent of Rs.3000/- per month. In fact it is the deposition of the appellant/defendant that it was her husband who had taken the premises on rent from the respondent/plaintiff and thereafter she alongwith her husband moved into the same. In the circumstances, the husband of the appellant/defendant was the best witness to prove the rate of rent and his

non-production is fatal to the defence of the appellant/defendant of the rent being Rs.3000/- per month.

31. There is other evidence also on record to support the plea of the rent at the time of inception of the tenancy being Rs.5500/- per month but in the light of Exhibit PW1/8 to Exhibit PW1/10 aforesaid need to discuss the same herein is not felt. One other fact must however be mentioned. It is again the admitted position that since the respondent/plaintiff from the time of inception of the tenancy till April, 2004 was on a teaching assignment to Japan and the upper floors of the house were lying locked, the appellant/defendant was incurring expenses with respect to the property on behalf of the respondent/plaintiff and adjusting the same in rent. There are other claims/counter claims *inter se* of the parties. In this light of the matter also it was incumbent upon the husband of the appellant/defendant to appear and depose and in this light of the matter the plea of the appellant/defendant of having been forced to sign the documents recording the rent to be Rs.7000/- per month cannot be believed.

32. I thus hold the premises in tenancy of appellant/defendant to be not covered by the Rent Act. It cannot also be lost sight of that the entire city of

Delhi for about half century prior to the amendment w.e.f. 1st December, 1988 of the Delhi Rent Control Act was governed thereby and whereunder irrespective of the expiry of the term for which the premises were let out, the landlord was prevented from evicting the tenant till was able to establish a ground of eviction under the Rent Act to have been made out and which virtually made eviction of tenants an impossibility and allowed a tenant once inducted into the premises to continue therein forever without even any increase in rent to keep pace with the rising costs of immovable property and living. The Act was amended as aforesaid w.e.f. 1st December, 1988 and ceased to apply to premises the rent whereof is in excess of Rs.3500/- per month and even for premises to which it applied, made increase in rent by 10% every three years permissible. The subject premises were let out much thereafter at the end of the year 2000. Experience of the city of Delhi and judicial notice can be taken of the fact that there was hardly any premises available the rent whereof was less than Rs.3500/- per month at that time. The subject premises are situated in a posh South Delhi colony. Had the rent of the premises earlier in the tenancy of the appellant/defendant at Satya Niketan been less than Rs.3500/- per month, it is inconceivable that the appellant/defendant /her husband inspite of protection of Rent Act would

have voluntarily vacated the same. It is not their case that they vacated pursuant to an order of eviction under the Rent Act. In this view of the matter also, the version of the appellant/defendant of the rent being Rs.3000/- per month is unbelievable. Mention may also be made of the fact that more than 15 years have passed since the letting of the said premises to the appellant/defendant. Even with a 10% increase every three years, the rent of the premises would have been in excess of Rs.3500/- per month taking the premises outside the purview of the Rent Act.

33. The counsel for the appellant/defendant also half heartedly contended that there was variation between the pleadings and the evidence of the respondent/plaintiff and that the impugned judgment and decree in any case is liable to be set aside for the reason of the learned Additional District Judge having not rendered any decision on Issue No.6A framed subsequently. However no merit is found in the said contentions. I am unable to find any such inconsistency in the pleadings and the evidence of the respondent/plaintiff as to have a bearing on the decision of the appeal. As far as the contention with respect to Issue No.6A is concerned, the same was with respect to the determination of the tenancy of the appellant/defendant; however in view of the dicta of the Supreme Court in

Nopany Investment (P) Ltd Vs. Santokh Singh (HUF) (2008) 2 SCC 728

laying down that institution of a suit for ejectment itself is notice of determination of tenancy and which view has been consistently followed by this Court, the said issue in any case was redundant and the error of the learned District Judge in not rendering any finding thereon can again not be fatal to invite setting aside of the judgment and decree.

34. As far as the aspect of extent of the tenancy premises is concerned, in view of the compromise arrived at between the parties pursuant to the police complaint aforesaid at the time of return of the respondent/plaintiff from Japan, the same has lost any relevance. Admittedly at the time of institution of the suit from which this appeal arise, the front room of the ground floor was in the possession of the respondent/plaintiff and not in possession of the appellant/defendant and thus there was no need for the respondent/plaintiff to seek ejectment of the appellant/defendant therefrom.

35. No other argument was made.

36. There is thus no merit in the appeal. The same is dismissed.

37. The appellant / defendant having cooperated in expeditious disposal of appeal, no costs.

Decree sheet be drawn.

RAJIV SAHAI ENDLAW, J.

FEBRUARY 24, 2016
'M/bs'..