

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

+ **RSA No. 348/2016 & CM No. 43284/2016 (stay)**

% **3rd May, 2017**

SARTAJ MOHD. @ ABDULLA & ANR. Appellants

Through: Mr. Tabrez Ahmad, Advocate.

versus

PRABHA DEVI AND ANR. Respondents

Through: Mr. Koushik Gole, proxy
counsel for R-1.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugning the judgment of the First Appellate Court dated 24.8.2016. The first appellate court has set aside the judgment of the Trial Court dated 16.11.2013 dismissing the suit of the appellants/plaintiffs for possession and injunction. The first appellate court granted the relief of injunction to the appellants/plaintiffs against the respondent no.1/defendant by ordering that the respondent no.1/defendant would not raise any construction or part with the possession of the suit property, but the relief for

possession was rejected by the first appellate court on the ground that the respondent no.1/defendant was a tenant in the suit property.

2. The facts of the case are that the two appellants were the plaintiff nos. 1 and 3 in the suit. Plaintiff no. 2 in the suit is now represented by his legal heirs who are impleaded as respondent nos. 2(i) to 2(viii) in the appeal and who are proforma respondents. The subject suit was filed for possession and injunction pleading that all the three plaintiffs were the owners of the suit property bearing no. A-520, Transit Camp, Govind Puri, New Delhi – 19 inasmuch as the property was allotted to their father Sh. Khurshid Ali, and after the death of Sh. Khurshid Ali on 21.1.1989, the appellants/plaintiffs being the legal heirs of Sh. Khurshid Ali became the owners of the suit property. It was pleaded that the respondent no.1/defendant is a clever lady who broke open the lock of the suit property and illegally occupied the suit property. Since the respondent no.1/defendant was pleaded by the plaintiffs only to be trespasser, hence the subject suit for possession and injunction was filed.

3. Respondent no.1/defendant contested the suit initially by generally denying everything which was stated in the plaint. However, thereafter the written statement was amended to claim that the respondent no.1/defendant had purchased the suit property from the

appellants/plaintiffs and that prior to purchase of the suit property by the respondent no.1/defendant she was a monthly tenant of Rs.150 per month since January 1992 under the appellants/plaintiffs. The agreement to sell for purchase of the property is said to be of May 1993 with consideration of Rs.16,000/-.

4. Both the courts below have held that the respondent no.1/defendant has failed to prove the alleged documents of May 1993 by which the appellants/plaintiffs allegedly sold to her the suit property for a consideration of Rs.16,000/-. This finding of the courts below has become final and I agree with the same because no documentary evidence whatsoever has been filed by the respondent no.1/defendant to prove that either in May 1993 or at any point of time documents transferring rights in the suit property were executed by the appellants/plaintiffs in favour of the respondent no.1/defendant.

5. The only issue to be considered is that whether the first appellate court has rightly held that the respondent no.1/defendant was a tenant and not a trespasser and hence the appellants/plaintiffs are not entitled to the relief of possession. This aspect is held in favour of the respondent no.1/defendant by the first appellate court in terms of paras 17 to 23 of the impugned judgment, and which paras read as under:-

“17. On the other hand, the defendant/respondent no.1 had established that her possession was as a tenant and not tress-passer. Attention has been drawn to the Ex.PW2/D1, document Mark H, document Mark G and the letter Ex.DW1/1. On the basis of these documents, the Ld. Counsel for the respondent no.1 submitted that the defendant had established her possession since the year 1993 through documents falsifying the case of the plaintiffs that she had trespassed into the premises in the month of February 1995. The Ld. Counsel also submitted that the suit was filed on 23.04.1996 on the basis of an alleged incident of February 1995, which itself established the frivolous nature of the suit. Hence, Ld. Counsel has submitted that the appeal be dismissed.

18. The defendant has not chosen to file any appeal in respect of the finding that she had failed to establish her title to the suit premises. Therefore, the ownership of the premises by the plaintiff is not in question or doubt. All the plaintiffs needed to establish was their case namely, that the defendant/respondent no.1 had tress-passed into the premises in February 1995 to be able to seek possession of the suit premises from her. It is no doubt true that the plaintiffs are not obligated to seek a declaration of their ownership as it is not under question or cloud. The nature of the occupancy of the defendant was certainly a matter in question, as plaintiffs have alleged that she is trespasser whereas she claimed her position initially as a tenant and subsequently as an owner. Having failed to establish her title to the suit premises, her challenge to the title of the plaintiffs fails and even without a declaration, the plaintiffs would be able to exercise their rights as owners of the premises bearing no.A-520, Transit Camp, Govindpuri, Kalkaji New Delhi.

19. It is an admitted position that the defendant/respondent no.1 had filed a suit for injunction against forcible dispossession of the plaintiff had made a statement to the court that they would not dispossess her save with due process of law. If the defendant was a trespasser, the present suit would have sufficed as due process of law. However, the evidence that has come on record shows that the entry of the defendant/respondent no.1 into the suit premises has been with permission and that too, before 1995. The defendant claims to be a tenant. The plaintiffs do not even call her a licensee. The document Mark G is the complaint that the defendant had registered with the police station Govind Puri on 18.01.1993 regarding the missing of her husband wherein she has mentioned the suit premises as her address. Mark H is the certificate of Syndicate Bank, opening an account in her name in February 1994. These documents could not have been manufactured by the defendant/respondent no.1.

20. However, what is more significant is the admission of the appellant no.2 in her cross-examination that she had made the statement before the SDM on oath in proceeding under Section 107/151 Cr.P.C that the premises had been let out on rent to the defendant/respondent no.1 and that this had happened on 28.12.1994. The proceeding under Section 107/151 Cr. P.C was also a quarrel on the question of payment and vacation of premises. The plaintiff no.2/appellant no.2 as PW2 has affirmed that whatever has been recorded in Ex.PW2/D1 is correct.

21. In these circumstances, the Ld. Trial Court was right in concluding that the plaintiffs have failed to establish a case of tress-pass. The Ld. Trial

Court has not discussed the evidence in respect of the second relief claimed of an injunction against construction. The plaintiffs have alleged a complaint against illegal construction on the suit property vide Ex.Pw3/8 and that no particular action was taken on that complaint.

22. Given the evidence that has come on record, the plaintiffs/appellants have failed to establish that the defendant/respondent no.1 has trespassed in to the suit property, and having undertaken before the court of law that they would dispossesses the defendant/respondent no.1 only with due process of law, clearly, the plaintiffs/appellants have to adopt other legal proceedings to recover possession. The Issue No.3 has therefore to be answered against the plaintiffs/appellants and in favour of the defendant/respondent no.1. The Issue No.4 relating to injunction has therefore to be answered in favour of the plaintiffs/appellants and against the defendant/respondent no.1.

23. The evidence brought on record by the defendant while not establishing her title to the suit premises delimits her position as a tenant in the premises and on her admission that the rent is Rs.150/- per month, though she has never claimed to have paid any part of the rent to the plaintiffs, the plaintiffs/appellants would be entitled to initiate proceedings against her as per law in the capacity as a tenant.” (underlining added)

6. For the purpose of disposal of this second appeal, the following substantial questions of law are framed:-

“(i) Whether the first appellate court by its impugned judgment dated 24.8.2016 has not committed a complete illegality and perversity in holding the respondent no.1/defendant is a tenant, although no evidence whatsoever; more particularly documentary evidence; was led by the respondent no.1/defendant of creation of tenancy in her favour and that simply because the documents filed by the respondent no.1/defendant only showed her possession prior to February 1995, the month of trespass as alleged by the plaintiffs in the plaint, the same is not enough to hold creation of tenancy in favor of the respondent no.1/defendant.

(ii) Whether the first appellate court has proceeded on a complete misreading and thus amounting to perversity, of the

document Ex.PW2/D1; and which is a statement of the appellant no.2 in the proceedings under Section 107/151 Cr.P.C before the SDM; inasmuch as this document being the statement of appellant no.2 does not in any manner admit the respondent no.1/defendant to be a tenant?

7. Let me take the second question of law framed above first and for this purpose this Court has gone through the statement of the appellant no.2/Smt. Amir Banu before the SDM recorded on 12.12.1996. As per the first appellate court this statement is an admission of appellant no.2/Smt. Amir Banu that the respondent no.1/defendant was inducted as a tenant. I cannot agree inasmuch as this statement of appellant no.2/Smt. Amir Banu only says that the respondent no.1/defendant approached her on 28.12.1994 stating that she is like a younger sister and since respondent no.1/defendant has been divorced she should be kept in the suit property and that respondent no.1/defendant will search for a job and thereafter will start paying rent to the appellants/plaintiffs. This statement of appellate no.2/Smt. Amir Banu further records that respondent no.1/defendant was kept in the suit premises because of humanitarian consideration and her being divorced from her husband and that whenever the appellants/plaintiffs wanted the respondent no.1/defendant will vacate the suit premises. Therefore, in the opinion of this Court the statement

of the appellant no.2/Smt. Amir Banu before the SDM does not in any manner show that tenancy has been created in favour of the respondent no.1/defendant and all that is recorded is that respondent no.1/defendant stated that if she gets a job she would pay rent, and which statement cannot be taken as an admission of creation of tenancy by the appellants/plaintiffs of the respondent no.1/defendant in the suit property. This is all the more so because the first appellate court has given a finding as per para 23 of its judgment that the respondent no.1/defendant never claimed payment of any rent to the appellants/plaintiffs.

8. Accordingly, the second substantial question of law is answered in favour of the appellants/plaintiffs and against the respondent no.1/defendant holding that there is complete misreading of Ex.PW2/D1 and this document being the statement of appellant no.2/Smt. Amir Banu does not admit creation of tenancy in favour of the respondent no.1/defendant.

9. So far as the first substantial question of law of creation of tenancy is concerned, admittedly even a single document has not been filed by the respondent no.1/defendant of creation of tenancy either in the form of a rent agreement or any rent receipts or any other document whatsoever. The respondent no.1/defendant has even failed to prove by

documentary evidence the payment of rent by the respondent no.1/defendant to the appellants/plaintiffs and this is the conclusion even of the first appellate court as per para 23 of its judgment as already stated above. At best the evidence of the respondent no.1/defendant shows her in possession from 1993, but mere possession will not amount to a status of creation of tenancy, and the first appellate court has thus committed a complete perversity in holding that possession is equivalent to creation of tenancy. Accordingly, the finding of the first appellate court with respect to creation of tenancy by the appellants/plaintiffs in favour of the respondent no.1/defendant being completely and absolutely grossly illegal and perverse is set aside. The first substantial question of law is also answered in favor of the appellants/plaintiffs.

10. In view of the above, this regular second appeal is allowed and the suit of the appellants/plaintiffs will stand decreed not only with respect to the relief of injunction as granted by the first appellate court's judgment dated 24.8.2016, but the suit is also decreed for possession in favour of the appellants/plaintiffs and against the respondent no.1/defendant with respect to the suit property bearing no. A-520, Transit Camp, Govind Puri, New Delhi - 19. Decree sheet be prepared. Parties are left to bear their own costs.

MAY 03, 2017/ib

VALMIKI J. MEHTA, J