

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

% *Judgment Reserved on: January 03, 2017*
Judgment Delivered on: January 09, 2017

+ **RSA 379/2016**

SHAILJA MANCHANDA Appellant

Through: Mr.S.D. Ansari, Advocate with
Mr.I.Ahmed, Advocate

versus

MUKESH BHATNAGAR Respondent

Through: Mr.Ratan Kumar Singh, Mr.Raghav
Alok & Mr.Nishank Tyagi, Advs.

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT

RSA 379/2016

1. This Regular Second Appeal filed under Section 100 of the Code of Civil Procedure impugns the concurrent judgment of the Courts below of the Trial Court dated 25.04.2016 and of the First Appellate Court dated 16.11.2016 by which Civil Suit No.237/14/10 filed by the respondent/plaintiff has been decreed against the appellant/defendant with respect to property No.151, 2nd Floor, Tagore Park, Delhi as shown red in the site plan, Ex.PW1/2.

2. The respondent/plaintiff instituted the suit against the appellant for recovery of possession and damages/mesne profits and arrears of rent pleading as under:

(i) The appellant/defendant was inducted as tenant in respect of the suit property w.e.f. 25th July, 2005 by Sh.K.N.S.Bhatnagar, father of the respondent/plaintiff vide rent agreement dated 20th July, 2005 initially for a period of 11 months on monthly rent of ₹10,500/-.

(ii) The rent was subsequently increased to ₹11,500 per month w.e.f. 1st August, 2008.

(iii) The land lord Sh.K.N.S.Bhatnagar expired in September, 2009 leaving behind a Will in favour of the respondent/plaintiff bequeathing the property No.151, Tagore Park, Delhi to him.

(iv) The tenancy of the appellant/defendant was terminated by serving notice dated 7th December, 2009 but despite notice she failed to vacate and clear the arrears of rent and pay damages.

3. The appellant/defendant contested the suit by filing written statement taking the plea as under:

(i) The respondent/plaintiff is not the owner of the suit property in question as there are other legal heirs also of deceased Sh.K.N.S.Bhatnagar.

(ii) The rate of rent is ₹3,000 per month hence the jurisdiction of the Civil Court is barred under Section 50 of the Delhi Rent Control Act.

4. On the pleadings of the parties, learned Trial Court framed the following issues:

“1. Whether there exists a relationship of landlord and tenant between the parties? (OPP)

2. Whether the plaintiff is entitled for recovery of possession as prayed for? (OPP)

3. *Whether the plaintiff is entitled for the damages, if yes, at what rate and for what period interest, if yes for what period and at what rate? (OPP)*
4. *Whether the plaintiff is entitled for the arrears of rent? (OPP)*
5. *Relief.”*

5. The respondent/plaintiff examined himself as PW-1. However, the appellant/defendant failed to lead any evidence to substantiate the plea taken in the written statement. Learned Trial Court after considering the oral and documentary evidence led by respondent/plaintiff, passed a decree for possession of the suit property as well decree for arrears of rent, recovery of mesne profits @ ₹11,500 per month w.e.f. October, 2009 till handing over of the possession.

6. The First Appellate Court concurred with the finding of the learned Trial Court for the reasons recorded in para 10 to 12 of the impugned judgment which read as under:

“10. It is pertinent to mention that in the suit for possession and for recovery of arrears of rent, the plaintiff has to prove his cause on three footings:-

- 1) Relationship of landlord and tenant.*
- 2) The rent must be more than ₹3500/- per month and should be out of the purview of Sec.50 of the Delhi Rent Control Act.*
- 3) The tenancy has to be terminated by efflux of time or by served upon notice U/s 106 of Transfer of Property Act and if, all these three requirements have been satisfied ad proved then the Court has no option except to pass the decree of possession and a decree of recovery of arrears of rent and mesne profits and in the suit before the Ld.Trial Court the respondent/plaintiff has proved all the above stated requirements and even if, the Ld.Trial Court grant an opportunity to the appellant/defendant to leave their defendant evidence even then the Ld. Trial Court was bound to pass a*

decree. Moreover, if the application moved by the appellant/defendant to grant an adjournment to lead defendant evidence and was dismissed then the appellant/defendant out to have challenge the order of the Ld. Trial Court to close the defendant evidence before the Hon'ble High Court of Delhi. But the appellant/defendant did not challenge the order dt.14th March 2014 passed by the Ld.Trial Court. Therefore, there is no merit in this appeal.

*11. That, as per the law laid down by **Hon'ble Apex Court of India in Hari Dass Mandal Vs Sahadeb Mandal AIR 1980 Kalkatta 140** wherein it was held that the Court in appeal would not interfere unless there is an application of wrong principles and the Ld. Trial Court has consciously and judiciously with complete application of mind has passed the impugned judgment/order and this Court has no reason to interfere with the impugned judgment & decree of Ld. Trial Court in any manner. And appeal is devoid of merit, hence the appeal is hereby dismissed as no order to cost."*

7. Learned counsel for the appellant/defendant Sh.S.D.Ansari, Advocate has submitted that in the written statement a specific plea was taken by the defendant that jurisdiction of Civil Court to try the suit is barred under Section 50 of the Delhi Rent Control Act. It was specifically pleaded that the rate of rent in respect of the suit property is ₹3,000 per month but despite that neither any issue was framed to the above effect nor this contention has been dealt with. Learned counsel for the appellant has further contended that the respondent/plaintiff claimed his right to suit for possession and mesne profit on the basis of the Will allegedly executed in his favour by his father. However, the Will has not been proved by examining the attesting witnesses to the Will hence the impugned judgment holding the plaintiff entitled to seek possession is perverse.

8. The following substantial question of law was formulated on 3rd January, 2017:

‘Whether the findings of the Courts below suffer from perversity?’

9. Heard, learned counsel for the parties and perused the Lower Court Record. At the outset Mr.S.D.Ansari, Advocate has submitted that the First appellate Court committed an error in observing that appellant/defendant ought to have challenged the order of the learned Trial Court vide which the defence evidence was closed. Mr.S.D.Ansari has relied upon ***Satyadhyan Ghosal & Ors. Vs. Smt.Deorajin Debi & Anr.*** AIR 1960 Supreme Court 941 (V47C167) submitting that non-filing of appeal against an interlocutory order could not have been adversely commented upon by the First Appellate Court. The First Appellate Court has decided the appeal on merits and not on the basis of above observation, hence this contention is noted and rejected.

10. Learned counsel for the appellant has also drawn the attention of this Court to the averments made by plaintiff in the injunction suit wherein she has specifically pleaded that the rate of rent was ₹3,000 per month and that she was forced to sign the rent agreement incorporating the rate of rent to be ₹10,500. He further contended that the learned Trial Court was required to settle an issue on this aspect and decide but the same has not been done which in itself is sufficient to set aside the judgments of the Courts below. Mr.S.D.Ansari has further submitted that unless the Will is properly proved by examining the attesting witnesses, on the strength of Will no right is conferred on the son of the deceased landlord to seek possession from a lawful tenant.

11. Per-contra, learned counsel for the respondent has contended that rent agreement is an admitted document wherein while entering into the agreement on 20th July, 2005 with Sh.K.N.S.Bhatnagar, father of the

respondent/plaintiff, the rate of rent was agreed to be ₹10,500 per month payable in advance on the 26th day of each English calendar month. It has been contended that in the absence of there being any evidence to the contrary led by the appellant/defendant, both the Courts have rightly held the rate of rent to be ₹10,500 per month at the time of induction of the appellant as tenant in the suit property and that being so only the civil Court had the jurisdiction to try the suit for possession and damages.

12. Before dealing with the contention raised on behalf of the appellant it may be highlighted that the Courts below have held that the appellant/defendant has not denied the execution of the rent agreement dated 20th July, 2005 as well service of notice under Section 100 of the Transfer of Property Act whereby her tenancy was terminated.

13. In the written statement vide preliminary objection No.7 she has admitted that she was inducted as tenant by Sh.K.N.S.Bhatnagar, who was the father of the plaintiff. She denied the relationship of landlord and tenant between the parties and questioned the locus standi of the respondent/plaintiff to institute the suit pleading that he wants to establish his sole ownership by defeating the rights of the other legal heirs of the deceased landlord. She expressed her willingness to pay the rent @ Rs.3,000/- to the rightful persons.

14. Perusal of the Trial Court record reveals the following:

- (i) The written statement was not filed by the appellant/defendant within the stipulated period and her defence was struck-off on 2nd June, 2011 but said order was set aside by imposing cost and taking the written statement on record.
- (ii) On 5th May, 2012 on hearing learned counsel for the parties, the applications under Order XXXIX Rule 1 and 2 as well Order XXXIX Rule

10 CPC were disposed of. The issues were settled there and then in the presence of the counsel for the parties and recording that no other issue arises or pressed. Thereafter the case was listed for plaintiff's evidence. At no stage the appellant/defendant filed any application questioning the correctness of the proceedings dated 5th May, 2012 or making a prayer for framing additional issues in respect of the jurisdiction of the Court to try the suit or whether the suit was barred under Section 50 of the Delhi Rent Control Act.

15. Subsequent proceedings also reveal that the defendant was even proceeded ex-parte on 24th December, 2014. This order was set aside subject to cost on 4th July, 2015. Thereafter again on 28th October, 2015 when the application for striking out the defence filed by the respondent/plaintiff was pending, opportunity to cross-examine the plaintiff was allowed subject to cost giving last and final opportunity to the appellant/defendant for the said purpose.

16. After the plaintiff evidence was closed on 21st November, 2015 opportunity was given to the appellant/defendant to lead evidence on 23rd January, 2016 & 29th February, 2016. On failure of appellant/defendant to lead any evidence, the defendant's evidence was closed. Even at the stage of final argument the conduct of the appellant/defendant remained the same and learned Trial Court passed the judgment after giving opportunity to the appellant/defendant to file written arguments. Thus it is a case where the respondent/plaintiff has led detailed evidence both oral and documentary and proved his case but the appellant/defendant did not lead any evidence before the Trial Court.

17. It is worth noting here that the appellant herein filed a civil suit for permanent injunction in the year 2009 certified copy of which has been

proved by the respondent/plaintiff before the learned Trial Court as Ex.PW1/3. Following facts have been pleaded by the appellant herein in the injunction suit which was titled as *Smt.Shailja Manchanda vs. Mukesh Bhatnagar*:

(i) She was inducted as tenant of Sh.K.N.S.Bhatnagar on 20th July, 2005 at rate of rent of ₹2,750 though the rent agreed has been shown in the rent agreement as ₹10,500 and the premises was shown as first floor, however, monthly rent was increased to ₹3,000 and the last paid rent is ₹3,000 per month (Para 1 of the plaint).

(ii) That Sh.K.N.S.Bhatnagar has died in the month of September, 2009 leaving behind the defendant Mr.Mukesh Bhatnagar as his legal heir (Para 2 of the plaint).

(iii) Rent upto September, 2009 was paid to the deceased father of the defendant and the rent from the month of October, 2009 is payable which she tendered to the defendant but he refused to accept saying that the rate of rent is ₹10,500 and not ₹3,000 (Para 3 of the plaint).

(iv) **The plaintiff put signatures on the rent agreement under compelling circumstances. Against every month's payment the rent receipt is being issued.** The prayer made in the suit for injunction was to restrain the defendant Mr.Mukesh Bhatnagar and his associate from dispossessing her from the suit property without adopting due process of law. (Para 4 of the plaint)

18. The contention raised by the appellant questioning the jurisdiction of the civil Court to try the suit for possession is based on the plea that the rent was ₹3,000 per month thus the appellant enjoyed protection under the Delhi Rent Control Act. The respondent/plaintiff pleaded execution of the rent agreement dated 20th July, 2005 between his father/landlord and the

appellant/defendant which mentioned the rate of rent to be ₹10,500 per month. The execution of the above rent agreement has been admitted by the appellant. She has also not disputed that as per the rent agreement the rate of rent was agreed to be ₹10,500 per month. Her plea in the suit is that she was compelled to sign the said agreement. This plea is neither proved nor probable as the rental income is taxable and no landlord would like to record the rate of rent much higher than what he was actually fetching i.e. though getting ₹2,750 towards rent would not mention the rate of rent to be ₹10,500 in the rent agreement and pay income tax on higher rate of rent.

19. In the injunction suit (certified copy of plaint Ex.PW1/3) there is admission on the part of the appellant/defendant about the relationship between parties accepting the respondent/plaintiff as landlord. She pleaded that she tendered rent to Mr.Mukesh Bhatnagar (son of Sh.K.N.S.Bhatnagar) which was not accepted because it was not correct rate of rent. Once she admitted in the injunction suit that she was getting the rent receipts, she could have placed on record some rent receipts issued by Sh.K.N.S. Bhatnagar from the date of her induction as tenant i.e. 1st July, 2005 till his death in September, 2009. But not even a single rent receipt has been filed in support of her plea about the rate of rent. Even during cross-examination of PW-1 - the plaintiff he could have been confronted with such rent receipts showing the rate of rent to be ₹2,750/- initially and enhanced to ₹3,000/-, to belie the contents of the rent agreement about the rate of rent. The appellant/defendant preferred not to even enter in the witness box to prove her defence.

20. It may also be noted that the rent agreement clause 21 records that the tenant deposited a sum of ₹31,500 vide cheque No.082094 dated 20th July, 2005 drawn on Bank of Punjab as security amount with the landlord. This

amount of ₹31,500 ($₹10,500 \times 3 = ₹31,500$) is apparently three months rent furnished as security by the tenant. It is not the case of the appellant that this cheque was taken from her forcibly.

21. The appellant can claim protection under Delhi Rent Control Act only if there is evidence to substantiate the plea that the rate of rent was below ₹3,500 per month. The appellant/defendant was required to prove the same by leading evidence with respect to the rate of rent which onus had to be discharged by her only and could have been dealt under issue No.2.

22. The appellant/defendant admits having executed the rent agreement with father of the respondent/plaintiff. The suit for injunction was instituted by her pleading that the relationship of landlord and tenant between the parties. The security amount tendered by her by cheque is in consonance with the rate of rent mentioned in the rent agreement. Her oral plea in the written statement about the rate of rent to be ₹3,000 per month has been rightly rejected by the Courts below, more so when not even a single rent receipt was filed and proved by her. Once that is so, because of provisions of Section 91 & 92 of the Indian Evidence Act, the appellant cannot take the plea that the suit is barred under Section 50 of the Delhi Rent Control Act or the Civil Court has no jurisdiction to try the suit.

23. The next contention urged on behalf of the appellant/defendant is about the right/locus standi of the respondent/plaintiff to seek possession. Both the Courts below have dealt with this aspect and rightly held that being a tenant she is estopped from questioning the title of the landlord. She herself has admitted the relationship of landlord and tenant between the parties in the injunction suit filed by her. The suit for possession filed against her is a subsequent event. The respondent/plaintiff was not required to examine the attesting witnesses to the Will in a suit for possession against

the tenant whose tenancy has come to an end. Even if Sh.K.N.S.Bhatnagar has left behind more than one legal heir, it is well settled that one of the co-owner can file the suit for eviction of the tenant in the property generally owned by the co-owners. Even in cases where there is litigation between the legal heirs of the deceased landlord, the tenant cannot take advantage of the said litigation as held by this Court in *Mercury Travels (India) Ltd. & Ors. vs. Sh.Mahabir Prasad & Anr.* 89(2001) DLT 440.

24. In my opinion in such a case, as the present one wherein the appellant/defendant has led no evidence and the respondent/plaintiff has proved the case by leading sufficient oral and documentary evidence which includes not only her admission about the relationship of landlord and tenant between the parties but also the execution of the rent agreement in July, 2005 containing rate of rent to be ₹10,500/- per month as well lack of cross-examination of PW1 Mukesh Bhatnagar on vital points, both the Courts below had rightly held that all the three ingredients required to be satisfied in a suit for possession were satisfied thus entitling the respondent/plaintiff to get a decree of possession as well damages from the appellant plaintiff.

25. It is seen that the appellant deliberately filed this frivolous appeal and dragged the litigation just to continue to remain in possession. It is further seen that the present litigation is a clear case of abuse of process of law. Despite the appellant not leading any oral or documentary evidence to prove the rate of rent to be below ₹3500/- per month, has chosen to file this second appeal raising a question of fact about rate of rent and not substantial question of law arising from the judgment and decree appealed against.

26. Therefore, in my opinion, the present is a fit case where while dismissing this second appeal the appellant be also burdened with exemplary cost.

27. The appeal is dismissed with costs of ₹1 lac payable to the respondent.
28. ACR and LCR be sent back along with the copy of this order.

CM No.46093/2016 (Stay)

Dismissed as infructuous.

**PRATIBHA RANI
(JUDGE)**

JANUARY 09, 2017
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