

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

+ **RSA No.247/2017**

% **17th October, 2017**

SH. SATISH KUMAR Appellant

Through: Mr. N.K. Singh, Advocate.

versus

SMT. KUSUM Respondent

Through: Mr. Sushil Kumar Rai,
Advocate.

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 under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the concurrent judgments of the courts below; of the Trial Court dated 31.3.2017 and the First Appellate Court dated 7.9.2017; by which the courts below have decreed the suit for possession and *mesne* profits filed by the respondent/plaintiff against the appellant/defendant with respect to one shop in property bearing no.487/38, National Market, Peera Garhi, Delhi.

2. The facts of the case as pleaded by the respondent/plaintiff are that the suit property was owned by her late husband Sh. Khem Chand and who had let out a portion of the suit property to the appellant/defendant comprising of one room, common latrine and bathroom at Rs.750/- per month. Appellant/defendant however along with another tenant Sh. Nand Kishore besides his tenanted area illegally occupied the suit shop, and therefore, the subject suit came to be filed for evicting the appellant/defendant from the shop in the illegal possession of the appellant/defendant.

3. The appellant/defendant contested the suit by pleading that the respondent/plaintiff is not the owner and she has been acting as the landlord only. It was pleaded by the appellant/defendant that he was the tenant with respect to one room, verandah and kitchen besides common latrine and bathroom and also of the suit shop.

4. Trial court after pleadings were complete framed the following issues:-

- “1. Whether the plaintiff is entitled to decree for the suit? OPD
2. Whether the plaintiff is entitled to decree for damages? If yes, at what rate and for what period? OPP
3. Whether the plaintiff has suppressed material facts? OPD
4. Whether the suit is barred by section 50 of DRC Act? OPD
5. Whether the suit is bad for non joinder of necessary parties? OPD”

5. Parties thereafter led evidence and these aspects are noted in paras 5 to 8 of the judgment of the trial court and which paras read as under:-

“ 5. Plaintiff had examined himself as PW-1 by evidence of affidavit Ex.PW-1/A as witnesses and had relied upon the following documents:

1. Ex.PW1/1 i.e. Site plan.
 2. Ex.PW1/2 i.e. Postal Receipt.
 3. Mark-A i.e. copy of Khatoni of the year 1985-86.
 4. Mark-B i.e. copy of house tax assessment.
 5. Mark-C i.e. copy of house tax receipts (colly),
 6. Mark-D i.e. copy of complaint, copy of legal notice dated 26.04.2005.
 7. Mark-E i.e. copy of legal notice dated 29.03.2012 (colly) respectively.
6. Plaintiff had examined other witness Sh. Balbir Singh as PW-2 and PW-2 Sh. Balbir Singh has been tendered his evidence by way of affidavit Ex.PW2/A.
7. Plaintiff had examined another witness Sh. R.P. Sharma, Office of SDM Punjabi Bagh as PW-3. Sh. R.P. Sharma has been tendered his evidence by way of affidavit Ex.PW-3/A. He was a summoned witness and proved the original Khatoni of the year 1985-86 i.e. Mark-A in the evidence of PW-1 is now exhibited as Ex.PW3/1(OSR)
8. Defendant had examined himself as witness as DW-1 and tendered his evidence by way of affidavit Ex.DW1/A witnesses.”

6. As regards issue no.1, courts below have held this issue in favour of the respondent/plaintiff by holding that admittedly the appellant/defendant is in possession of the suit shop but appellant/plaintiff has failed to show his entitlement or capacity for possession of the suit shop. Though appellant/defendant's case was that the suit shop was let out, however, he did not tell the date when the shop was let out to him and no corroborating evidence was filed

with respect to letting out of the suit shop. I do not find any illegality and perversity in the concurrent judgments of the courts below because the appellant/defendant was a tenant with respect to one room, verandah, kitchen with common latrine and bathroom however he has failed to prove any entitlement, much less by any documentary evidence or by any proof whatsoever, with respect to his being a tenant of the suit shop besides the portion admittedly in his tenancy of one room, verandah, kitchen with common latrine and bathroom.

7. No substantial question of law arises, and therefore, there is no merit in this appeal.

8. Counsel for the appellant/defendant argues that the respondent/plaintiff is not the wife of late Sh.Khem Chand, however, it is noted that there was no such issue got framed before the trial court that respondent/plaintiff was not the owner on the ground that she was not the wife of late Sh. Khem Chand. In fact, counsel for the appellant/defendant could not point out to me any pleading in the written statement of the appellant/defendant that the respondent/plaintiff is pleaded not to be the wife of late Sh. Khem Chand. Accordingly, this argument urged on behalf of the appellant/defendant that

respondent/plaintiff is not the wife of late Sh. Khem Chand and hence is not the owner being beyond pleadings and evidence and no issue got framed is accordingly rejected.

9. Another argument which was urged on behalf of the appellant/defendant was that the court had no pecuniary jurisdiction, however, once again it is seen that no issue of lack of pecuniary jurisdiction of the civil court was got framed and once no such defence is pleaded by getting an issue framed, then, by virtue of Section 21 CPC such a defence of pecuniary jurisdiction is deemed to be waived. Appellant/defendant therefore could not have been permitted in the first appeal or can be permitted in the present second appeal to raise any challenge to the lack of pecuniary jurisdiction of the civil court to try the suit.

10. In view of the above discussion, not only no substantial question of law arises. It is seen that appeal is filed by a dishonest person who has illegally occupied one shop belonging to the owner/landlord, and therefore, this appeal is dismissed with costs of Rs.25,000/-. Costs shall be paid within six weeks from today to the respondent/plaintiff.

OCTOBER 17, 2017
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VALMIKI J. MEHTA, J