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

Date of Decision: 5th March, 2018

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RFA 386/2016

FARAH

..... Appellant

Through: Ms. Pooja Sarwal & Mr. Roop Ram
Sarwal, Advocates.

versus

SHAHNAZ BEGUM

..... Respondent

Through: None.

CORAM:

JUSTICE PRATHIBA M. SINGH

PRATHIBA M. SINGH, J. (Oral)

1. The present appeal arises out of judgement and decree dated 2nd January, 2016 by which the Trial Court has dismissed the suit for possession and mesne profits on the ground that the Respondent/Defendant (*hereinafter* 'Defendant') is a tenant of the Appellant/Plaintiff (*hereinafter* 'Plaintiff') and the suit is barred under Section 50 of the Delhi Rent Control Act, 1958 (*hereinafter*, 'DRC Act').

2. Admittedly, the Defendant is the aunt (*Mausi*) of the Plaintiff. It is the case of the Plaintiff that she is the rightful owner of the property bearing No.17/17-V, Khasra No.17 & 18, Vijay Park, Maujpur, Delhi-110053, measuring 70 square yards (*hereinafter*, 'suit property'). It is the case of both parties that in 2010, some unwanted elements were trying to take over possession of the suit property. At that stage, the Plaintiff had allowed the Defendant to live in the property as a caretaker. Thereafter, the Defendant's

son was arrested under some criminal complaint and the Plaintiff argues that in order to enable the Defendant to have proof of address and meet him in jail or in Court, a rent agreement dated 20th September, 2011 came to be executed between the parties. Defendant in the written statement, admits that a rent agreement was executed in her favour by the Plaintiff, but denies that her son being in jail was the reason for it.

3. The Defendant was repeatedly asked to vacate the suit premises but did not vacate. On 20th May, 2013 the Plaintiff filed a written complaint with the police against the Defendant. The Defendant then filed a suit against the Plaintiff wherein the Plaintiff gave an undertaking that she would not dispossess the Defendant, except in accordance with law. A legal notice was then issued by the Plaintiff on 25th June, 2013 asking the Defendant to hand over vacant and peaceful possession of the suit property. Due to the Defendant's refusal to vacate the suit property, the present suit came to be instituted for possession, damages and mesne profits.

4. In the written statement, it is the case of the Defendant that the agreement dated 20th September, 2011 specified the monthly rent to be Rs.1,500/- p.m. The Defendant does not place on record any evidence to show that actual rent was ever paid by the Defendant. The so called rent agreement is also not registered.

5. In the Trial Court, the Plaintiff led the evidence of PW-1, herself; PW-2, Smt. Zeenat Zahan; PW-3, Mohd. Sameer; PW-4, Smt. Parveen Begum. In Ex. D-1, the statement of Smt. Shanaz Begum/DW-1, there is no averment that she has ever paid rent to the Plaintiff. In fact, it is admitted in her cross-examination that:

"I am a tenant in the aforesaid address as

mentioned in my affidavit Ex. D.1 since 01/04/2011. It is true that I am regular in payment of rent since beginning. I have not paid the rent for the last four months. Vol., the plaintiff did not receive the rent. However, I sent the rent by way of money order, but the plaintiff refused the same. It is true that I have not filed any money order receipt on record.

.....

Earlier to the non-payment of rent for the last four months, I was paying the rent by way of money order to the plaintiff. It is true that I have not filed any receipt on record regarding payment of rent. I do not remember the exact date, month and year of lastly paid the rent by way of money order."

She, thus, does not deny the ownership of the Plaintiff. She also admits that she has not filed any receipt on record evidencing the payment of rent. It is further admitted by the Defendant that after preparing of the rent agreement, she got all her ID cards, Aadhaar Card, etc. issued on the basis of the address of the suit property.

6. The evidence of DW-2, Sh. Muner Mansouri shows that it is claimed by him that the rent was paid in presence of his mother but he did not remember the exact date when the rent was paid. DW-2 could also not confirm that the rent agreement was prepared in his presence. His deposition is thus, hearsay and not liable to be admitted as evidence.

7. The Plaintiff's witnesses on the other hand confirm that the Defendant was a caretaker of the property for the Plaintiff and no rent was ever paid. A perusal of the pleadings and the record reveals that though there was a rent agreement executed, the relationship of landlord and tenant never existed between the parties. The Defendant was inducted as a caretaker and the rent agreement was merely for the purpose of obtaining ID cards etc., for the

Defendant's family. No rent amount has been paid, no receipts have been placed on record. Thus, the Defendant has not proved the existence of a landlord-tenant relationship. Under similar circumstances, in ***Ashok Kumar and Another Vs. Paramjeet Kaur and anr.*** [RFA 785/2010 decision dated 28th October, 2013], a Ld. Single Judge of this Court held that Section 50 of the Delhi Rent Control Act, 1958 would not be applicable. The ownership of the Plaintiff is not in dispute, as there is an estoppel against challenge to ownership as per Section 116 of the Evidence Act. The Plaintiff's witnesses have all deposed that the Defendant is the aunt of the Plaintiff and was a caretaker.

8. PW 1 in her cross examination categorically states as under:

"It is wrong to suggest that the defendant is residing on the ground floor in the suit property since 01.4.11. It is correct that I had executed the rent agreement in favour of the defendant dated 20.9.11. It is correct that the rent agreement was executed @ Rs.1500/- p.m. in respect of the entire ground floor of the suit property. I have filed the rent agreement executed by me in favour of defendant on the record. Again said, seeing the record I have not filed any rent agreement and same has been filed by the defendant. The photocopy of rent agreement dated 20.9.11 is put to the witness who admits the execution of the same and its contents. The same is Ex. PW1/DX1 (running into 3 pages)(colly). Vol. The reason behind execution the alleged agreement is mentioned in para no. 4 in my affidavit and there were only two pages in the said agreement. I have not mentioned in my affidavit regarding the fact that the agreement was running in two pages. It is wrong to suggest that I had let out entire ground floor to the defendant. But I have given one room without roof as a caretaker to defendant. It is wrong to suggest that I ever received any rent from the defendant. I have

mentioned in my suit regarding the period of giving the suit property to the defendant. I had allowed the defendant to reside in the suit property in the year 2010. It is wrong to suggest that I had never given the permission to reside to the defendant as a caretaker. It is wrong to suggest that the defendant never requested to reside in the suit property as a caretaker. It is wrong to suggest that the defendant had taken the ground floor on rent @ Rs.1500/- p.m. for two years or that I had let out to her and executed the rent agreement.”

9. These facts were reaffirmed by PW 2 who states in her cross examination as under:

“...It is correct that the defendant along with her family is residing in the suit property since April 2011. The plaintiff never executed any rent agreement. It is wrong to suggest that the suit property was let out to the defendant w.e.f. 01.4.11 or that rent agreement was executed by the plaintiff on 20.9.11 in the presence of witnesses of Mohd. Saeed and Mohd. Sameer....”

10. PW3 in his evidence states as under:

*“...It is true that the plaintiff had signed the rent agreement after reading the same. It is further true that the rate of rent was decided as Rs.1500/- per month and I have also signed on the same. It is wrong to suggest that the defendant is the tenant since 01/04/2011 @ Rs.1500/- per month or that the defendant has been paying rent regularly....
...It is further wrong to suggest that the defendant is a lawful tenant in the suit premises under the plaintiff....”*

11. The Plaintiff's mother deposed as PW4 and made a categorical statement in her cross examination to the following effect:

“I had not given suit premises to the defendant on rent. It is correct that agreement of the tenancy in favour of

defendant dated 20.9.11 was executed w.e.f. 01.4.11 by the plaintiff @ Rs.1500/- p.m. vol. the reason behind execution of the said agreement was that the son of the defendant was in jail in some case and the defendant had asked to prepare identity card for meeting to his son in jail on the basis of said agreement and the said agreement was given for the purpose of identity proof....It is wrong to suggest that the defendant is lawful tenant in the suit premises or that she has been paying the rent. It is wrong to suggest that defendant has never asked to the plaintiff for execution of said rent agreement for the purpose of preparing the identity proof for the purpose of meeting to his son. It is wrong to suggest that the agreement of rent was executed between plaintiff and defendant because the plaintiff had let out the premises to the defendant...."

12. Accordingly, on a balance, it appears that the Plaintiff had inducted the Defendant as a caretaker in the suit property and not as a tenant. Clearly the rent agreement has never been acted upon. The settled principle of law is that when there is an agreement in writing, no oral evidence to the contrary is entertained. However, the Supreme Court in **Roop Kumar v. Moham Thedani (2003) 6 SCC 595** while dealing with the Sections 91 & 92 of the Indian Evidence Act, 1872 (*hereinafter, 'Evidence Act'*) held as under:

"19. Sections 91 and 92 apply only when the document on the face of it contains or appears to contain all the terms of the contract. Section 91 is concerned solely with the mode of proof of a document with limitation imposed by Section 92 relates only to the parties to the document. If after the document has been produced to prove its terms under Section 91, provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or subtracting from its terms. Sections 91 and

92 in effect supplement each other. Section 91 would be inoperative without the aid of Section 92, and similarly Section 81 would be inoperative without the aid of Section 91.

.....
22. This Court in *Gaganbai v. Chhabubai and Ishwar Dass Jain v. Sohan Lal* with reference to Section 92(1) held that it is permissible to a party to a deed to contend that the deed was not intended to be acted upon, but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. Oral evidence is admissible to show that document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties.”

13. Thus, if the rent agreement was never to be acted upon, oral evidence can be relied upon in support thereof. Thereafter, relying on ***Roop Kumar (supra)***, the Supreme Court in ***Vimal Chand Ghevarchand Jain v. Ramakant Eknath Jadoo (2009) 5 SCC 713***, held that when the true character of a document is questioned, extrinsic evidence by way of oral evidence is admissible.

14. From the facts and evidence on record, the Plaintiff has been able to establish that the Defendant who is the Plaintiff's aunt was inducted into the property as a caretaker and she never paid any rent to the Plaintiff. In ***Maria Margarida Sequeria Fernandes & Ors. v. Erasmo Jack de Sequeira (2012) 5 SCC 370*** it was held as under:

“101. Principles of law which emerge in this case are crystallized as under:

1. No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person

would not acquire any right or interest in the said property.

2. Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.

3. The Courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.

4. The protection of the Court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or license agreement in his favour.

5. The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession.”

Thus there was no landlord-tenant relationship between the parties.

14. The Defendant has been proceeded ex-parte in this appeal. The counsel for the Plaintiff also submits that possession has been handed over more than a year ago, by the Defendant to the Plaintiff. Under these circumstances, a decree for possession is passed in favour of the Plaintiff. Since the Defendant was in possession of the property as a caretaker, at the request of the Plaintiff, no amount would be payable to the Plaintiff for use and occupation of the property. Decree sheet be drawn accordingly.

15. With the above directions, the appeal and all pending applications are disposed of.

PRATHIBA M. SINGH
Judge

MARCH 05, 2018

Rahul