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

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Reserved on: 01st November, 2019
Decided on : 05th November, 2019

+ **RFA 191/2019 and CM APPL No.10858/2019**

MOHD AZIZ

..... Appellant

Through : Mr.Diwan Singh Chauhan,
Advocate.

versus

RIYAZUDDIN

..... Respondent

Through : Mr.Vimal Puggal, Advocate.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This appeal is preferred by the appellant/plaintiff against the judgment and decree dated 01.12.2018 passed by the learned Additional District Judge/Central District, Pilot Court, Tis Hazari Courts, Delhi (hereinafter referred as the learned '*Trial Court*') in CS No.1923/2018 whereby the suit of the appellant was dismissed after trail.

2. The brief facts which culminated into filing of this appeal are the appellant had filed a Civil Suit for recovery of Rs.4.00 Lac with interest against the respondent stating *inter alia* the respondent is landlord/owner of the two shops on the ground floor, forming part of the property bearing No.A-8/62, DDA Flats, Inder Lok, Delhi – 110035 (hereinafter referred as the '*shops in question*'). The respondent intended to re-let the shops to the appellant, being occupied by some other tenants.

3. Since the appellant was in need of rented shops so he approached the respondent through one Mohd.Saleem and paid Rs.4.00 Lac in cash to the respondent as an interest free security deposit for letting of the shops with effect from 01.08.2016 with a rental of Rs.8,000/- per month.

4. It is the case of the appellant that an agreement dated 30.07.2016 was entered into between the parties only when the cash amount of Rs.4.00 lac was paid by the appellant and duly acknowledged by the respondent in the agreement itself; yet the learned Trial Court disbelieved the case of the appellant saying *inter alia* **a)** no separate receipt was proved by the respondent for alleged payment of Rs.4.00 lac; and **b)** it was highly illogical for any person to make payment of Rs.4.00 lac in cash to a landlord without receiving possession of rented shop(s). The learned Trial Court rather disbelieved the version of the appellant herein and had dismissed his suit for money recovery. The learned Trial Court even ignored the legal notice dated 11.05.2018 though served upon the respondent was never replied, till after the suit was filed.

5. It is also alleged the learned Trial Court even ignored admissions made by the respondent in his written statement wherein he admitted to be an owner of the shop(s) in question on the ground floor of the said property; that the appellant had approached him through one Mohd. Saleem and shown keen interest to take those shops on rent and even agreed to make payment of Rs.4.00 lac as an *interest free security* and to get prepared a rent agreement in respect of such shops and would take those on rent with effect from 01.08.2016 on a monthly rental of Rs.8,000/-.

6. The respondent in his written statement also admitted on 30.07.2016 the appellant had assured the respondent to take his one shop on rent and had himself got prepared an agreement, but since the appellant did not pay the cash amount the shop was not given to him. He also admitted as per the agreement dated 30.07.2016 the respondent was to refund such amount of Rs.4.00 lac as and when the appellant would return/over hand the possession of the shop in question to him and that the said agreement was entered into between the parties in the presence of said Mohd.Saleem.

7. It is the case of the appellant despite all these admissions the learned Trial Court had dismissed the suit on its own whims and fancies, going beyond the scope of the written document viz the Rent Agreement, proved as *Ex.P1*.

8. Both the parties led their respective evidence on following issues:-

"1). Whether the plaintiff has concealed the material facts from court, for which, he is not entitled to any relief from court of law? OPD,

2). Whether the Agreement Ex.P1 failed due to the failure of the defendant in handing over the possession of the property subject matter of the Agreement, as alleged by the plaintiff? OPP.

3). Whether the Agreement Ex.P1 failed on account of failure of the plaintiff in not making the payment of Rs.4 lacs, as claimed by the defendant? OPD.

4). Whether the plaintiff had paid an amount of Rs.4 lacs, as claimed by him, by way of security deposit? OPP

5). Whether the plaintiff is entitled to the amount claimed, or to any other amount? OPP.

6). Whether the plaintiff is entitled to the interest, if so, at what rate and for what period? OPP.

7). Relief."

9. The appellant examined himself as *PW1* and proved his affidavit as *Ex.PW1/A*; agreement dated 02.08.2016 as *Ex.P1* being an admitted document; legal notice dated 11.05.2018, postal receipts, and tracking

report as Ex.*PW1/1* to Ex.*PW1/4*. The appellant also examined *PW2* Mohd. Saleem, a witness to the agreement Ex.*P1*, which fact was never disputed.

10. The respondent has examined himself as *DW1* and proved his affidavit as Ex.*DW1/A* and even his statement, under Section 165 of the Indian Evidence Act, 1872, was also recorded.

11. The learned Trial Court dealt with issues No.2 to 4 above and held- *a)* no receipt of Rs.4.00 Lac was filed by the appellant; *b)* the appellant though relied upon clause No.3 of the agreement Ex.*P1* which notes payment of Rs.4.00 Lac as security deposit, but denied other contents of the said agreement viz clause 1 which notes the physical possession was handed over / taken over by the appellant on 01.08.2016 but whereas it was never handed over; *c)* since two clauses were in contrast, hence credibility of Ex.*P1* was torn into pieces; *d)* the conduct of the appellant in making the payment of Rs.4.00 Lac without receiving possession was suspicious as no tenant with reasonable and average mind would hand over an amount of Rs.4.00 lac in cash without even taking a receipt or without receiving possession; *e)* neither any money was paid nor possession of the shop was handed over; *f)* the appellant took two years to send legal notice which was quite opposed to normal human conduct; *g)* giving of the reply to the legal notice after receipt of the summons of the Court had no adverse effect on the case of the respondent; *h)* the conduct of the appellant was to extract money and not to take the shops on rent; *i)* the appellant could not disclose the name of the persons who were in occupation of the shops as tenant; *j)* the

attestation of the agreement Ex.*PI* two days later throw doubt on the purity of the agreement itself; *k*) if the possession was not handed over despite being mentioned in the agreement, then there is every possibility the appellant had not made payment of Rs.4.00 Lac in cash and it was also wrongly mentioned; *l*) the agreement is neither properly executed nor attested as per law; and *m*) the appellant thus has committed breach of the agreement.

12. A bare perusal of the cross-examination of the appellant/*PW1* would show he has though deposed he do not know where the agreement was prepared but said the respondent and Mohd. Saleem had brought the agreement to him at his shop and it was not got attested on the same day and that the respondent and the property dealer told him the shop(s) in question was in possession of one of his tenants and he would get it vacated but when the appellant went to the shop on 01.08.2016, it was still lying locked. *PW1* further deposed he had given legal notice after two years, but has been requesting the respondent to refund the money, though he did not went ahead to file any complaint to any police station, but nevertheless kept on requesting the landlord and he assured to refund the amount. The appellant denied the possession was not handed over to him as he did not pay the money. He denied the agreement Ex.*PI* is a forged and fabricated document.

13. The testimony of *PW2*, another witness of the appellant is also relevant as he had not only proved agreement Ex.*PI* but had also identified his signatures and of both the parties on it. He deposed the agreement was signed in the office of the appellant where the appellant

had given Rs.4.00 lac in his presence to the respondent. Moreso, in his cross examination he deposed Rs.4.00 lac was in the denomination viz two bundles of Rs.1000/- and four bundles of Rs.500, thus totaling Rs.4.00 lac. No suggestion was put to *PW2* that money was never paid in such denomination.

14. The respondent appearing as *DW1* admitted the agreement *Ex.P1* was executed on 30.07.2016 and he also gave reply vide *Ex.PW1/4* to the legal notice *Ex.PW1/1* of appellant but only after the receipt of summons of the suit on 11.06.2018, as allegedly, was not keeping well during the period in between. He admitted the appellant is having an annual income of more than Rs.4.00 lac and he is rich person, but denied appellant paid Rs.4.00 lac to him.

15. Thus, a bare perusal of the evidence would show that agreement *Ex.P1* was proved being *admitted* by the respondent; *PW2* Mohd.Saleem; witnesseth the agreement viz *Ex.P1*; the agreement was signed in the office of the appellant, which even the respondent did not deny. *PW2* rather deposed the amount of Rs.4.00 lac was paid in cash in the denomination of two bundles of Rs.1000/- and four bundles of Rs.500 and no suggestion contrary to it was given. Thus, the appellant through an independent witness proved an amount of Rs.4.00 lac was paid by him to the respondent in his office and in presence of *PW2* Mohd.Saleem in denomination of two bundles of Rs.1000/- each and four bundles of Rs.500 each.

16. The only question now to be seen is qua an alleged unnatural conduct of the appellant or if a separate receipt was ever required for

payment of Rs.4.00 lac. Qua the receipt, the agreement Ex.*PI* duly notes an amount of Rs.4.00 Lac has been paid in cash to the respondent and the respondent had signed such agreement acknowledging this fact, which is duly witnesseth by *PW2*. Thus, the finding of the learned Trial Court qua a separate cash receipt of Rs.4.00 lac was required is totally erroneous as there was absolutely no necessity to obtain a separate receipt for such payment, once transaction was duly noted in Ex.*PI* and duly signed by the parties.

17. The conduct of the appellant rather does not appear to be unreasonable or unnatural. Anyone having an intention to begin relations with another, need to repose faith upon the other and thus paying of Rs.4.00 lac in cash as advance and duly acknowledged in Ex.*PI* can never be an unnatural conduct on the part of the appellant. Further, the agreement was entered into on 30.07.2016 and though it was mentioned in clause 1 of Ex *PI*, the possession is taken over on 01.08.2016 but it is factually incorrect, as on 30.07.2016 it could never be noted of possession being delivered on 01.08.2016. All one can say about clause No.1 of agreement Ex.*PI* is its poor drafting. It ought to have noted the possession *shall be handed over* on 01.08.2016 instead of it being *handed over* on 01.08.2016. The appellant has categorically deposed he has been making requests to the respondent on numerous occasions for repayment, though did not file any written complaint. There is nothing unnatural in such conduct too. It was only when the respondent refused to return the money, the appellant sent a legal notice Ex.*PW1/1* to the respondent, who even ignored it and did not send any reply. It was only after receipt of the summons from the Court, the respondent gave a reply to save his face

and such reply would be no effect. This conduct of the respondent rather show he tried to act clever.

18. Admittedly, the agreement Ex.P1 was signed by both the parties, acknowledging receipt of an amount of Rs.4.00 Lac, hence dismissing the suit of appellant on flimsy reasons was nothing but perverse finding. Such finding is even against the spirit of Section 91 and 92 of the Indian Evidence Act, 1872, which read:-

“91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document -- When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

92.Exclusion of evidence of oral agreement

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for purpose of contradicting, varying, adding to, or subtracting from, its terms;

Provision (1) – Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2) – The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3). – The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4). – The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract grant or disposition of property is by law required to be in writing, or has

been registered according to the law in force for the time being as to the registration of documents.

Proviso (5) – Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved.

Provided that the annexing of such incident would not be repugnant to, or inconsistent with the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts."

19. It is settled law as held in catena of judgments including in *Roop Kumar vs. Mohan Thedani* 2003 (6) SCC 595; *Yash Chhabra vs. Maya Jain* 2015 (151) DRJ 316 an oral plea to contradict written agreement is not tenable in terms of Section 91 of the Indian Evidence Act, 1872.

20. In the circumstances, the appeal is allowed. The impugned judgment and decree dated 01.12.2018 is set aside. Consequently, the suit of the appellant is decreed in the sum of Rs.4.00 lac with costs (till date) and simple interest of 9% per annum on the decretal amount from the date of filing of the suit till actual realisation. Decree sheet be drawn. The pending application, if any, also stands disposed of.

न्यायमेव जयते **YOGESH KHANNA, J.**

NOVEMBER 05, 2019

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