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IN THE HIGH COURT OF DELHI AT NEW DELHI

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*Reserved on: 3rd November, 2023**Date of Decision: 12th December, 2023*

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RSA 2/2023 & CM APPL. 381/2023(stay)**SH. PEHLAD RAI**

..... Appellant

Through: Mr. Om Prakash and Mr. Durgesh
Gupta, Advocates.

versus

**SMT. TARA DEVI (NOW DECEASED) THROUGH HER
LEGAL HEIRS & ORS.**

.....Respondent

Through: Mr. S.K. Bhalla, Advocate

CORAM:**HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA****J U D G M E N T****MANMEET PRITAM SINGH ARORA, J:**

1. This second appeal filed under Section 100 of the Code of Civil Procedure, 1908 ('CPC') impugns the judgment dated 17.10.2022 passed by ADJ-07, Central District, Tis Hazari Courts, Delhi ('First Appellate Court') in RCA No. 19/2020, titled as **Sh. Pehlad Rai v. Smt. Tara Devi Thr. LRs & Anr.**

1.1. The First Appellate Court vide the impugned judgment dismissed the appeal filed against the judgment and decree dated 02.05.2016 passed by Civil Judge-09, Central District, Tis Hazari Courts, Delhi ('Trial Court') in CS No. 570/2006, titled as **Smt. Tara Devi v. Sh. Prahlad Rai.**

1.2. For the sake of convenience, the parties are being referred to as per their rank and status before the Trial Court. The Appellant herein is being



referred to as the defendant and the Respondent herein is being referred to as the counter-claimant.

1.3. The defendant initially filed a civil suit seeking permanent injunction restraining the counter-claimant from dispossessing the defendant forcibly and without due process of law from the six (6) wooden boxes i.e., three (3) wooden almirahs partitioned in two (2) boxes each ('suit property' or 'said almirahs') are located in Shop no. 5239, Ghash Mandi, Gali Petiwali, Gandhi Market, Sadar Bazar, Delhi. The plea set up by the defendant in this suit was that he is a tenant with respect to the said almirahs in suit property.

1.4. The counter-claimant herein filed her written statement in the suit and denied the contention of the defendant herein, stating that the permission to use the said almirahs was given to the defendant on leave and license basis. The counter-claimant sought a decree of mandatory injunction against the defendant for vacating the said almirahs and Thada located in Shop no. 5239, Ghash Mandi, Gali Petiwali, Gandhi Market, Sadar Bazar, Delhi.

1.5. The suit filed by the defendant was later dismissed as withdrawn at the request of the said defendant. The Trial Court vide judgment dated 02.05.2016 allowed the counter claim filed by the Respondent herein, and directed the defendant to leave the said almirahs and Thada located in Shop no. 5239, Ghash Mandi, Gali Petiwali, Gandhi Market, Sadar Bazar, Delhi, which has been upheld by the First Appellate Court vide the impugned judgment dated 17.10.2022.

Arguments of the Appellant i.e. defendant



2. The learned counsel for the Appellant i.e., defendant states that the counter-claimant sought a mandatory injunction against the defendant which can only be granted against a party who is in lawful occupation.

2.1. He states that however, the First Appellate Court failed to appreciate that the counter-claimant alleged in the pleadings that the defendant is in illegal occupation of the suit property as 'trespasser'. He states that this pleading of illegal occupation by the counter-claimant cannot justify the finding of 'license' returned by the First Appellate Court in favour of the counter-claimant.

2.2. He states that no reliance can be placed by the counter-claimant on the previous judgement dated 23.12.1999 passed by the civil court in a prior suit bearing no. 939/19923, awarding damages in favour of the counter-claimant, for the period from 01.07.1992 to 30.06.1993, as the said judgement does not deal with the issue of existence of 'tenancy' or 'license' between the parties.

2.3. He states that since in the counter-claim, it has been alleged that the defendant is a 'trespasser', the first substantial question of law arising for consideration is 'Whether the relief of mandatory injunction is maintainable against a trespasser?' (question of law no.1).

2.4. He states that the Trial Court has awarded mesne profits at Rs. 60/- per day w.e.f. 24.01.2009 until the date of vacation and has further awarded interest at 6% on the sum of mesne profits for the period 24.01.2009 till 24.07.2014. He states that no interest is payable in law on the decree of mesne profits and proposes this as the second substantial question of law (question of law no.2).

Arguments of the Respondent i.e., Counter-Claimant



3. In reply, learned counsel for the Respondent i.e., counter-claimant states that the suit property, which comprises of six (6) wooden boxes i.e., three (3) wooden almirahs partitioned in two (2) boxes each and the Thada ('suit property' or 'said almirahs') are located in Shop no. 5239, Ghash Mandi, Gali Petiwali, Gandhi Market, Sadar Bazar, Delhi ('said Shop').

3.1. He states that the counter-claimant herself is a tenant in the said Shop. He states that the rolling shutter of the said Shop is under the exclusive lock and key of the counter-claimant. He states that it is the counter-claimant, who opens the rolling shutter every morning and closes the same in the evening. He states that if the said rolling shutter is not opened on any particular day for any reason by the counter-claimant, the defendant cannot use the said almirahs.

3.2. He states that the defendant was granted only a license to use the suit property. He states that the defendant is not a tenant for the said suit property as alleged.

3.3. He states that the judgement of the civil court dated 23.12.1999 pertaining to determination of damages for the period of 01.07.1992 to 30.06.1993 conclusively determines that the defendant is an 'illegal occupant' in the suit property. He states the said judgement was affirmed by the appellate court vide judgement dated 07.01.2004 passed in RCA No. 19/2001 and was upheld by the High Court in RSA No. 66/2004 vide judgment dated 29.11.2005. He states that the damages awarded by the said Court have not been paid by the defendant till date.

3.4. He states that the defendant was granted a limited right as a licensee to use six (6) wooden boxes i.e., three (3) wooden almirahs



partitioned in two (2) boxes each to keep his goods as well as the Thada and the said license has been revoked by the counter-claimant. He states that therefore, the judgments of the Trial court and the First Appellate Court, directing him to leave the suit property is correct.

Analysis and Conclusion

4. This Court has considered the submissions of the learned counsel for the parties and perused the record.

5. The written statement of counter-claimant was initially filed on 02.09.1992 and thereafter, amended with the leave of the Court on 24.07.2014. In order to adjudicate, the relief of mandatory injunction, the Trial Court framed issue no. 2, wherein the Trial Court decided the defence of the defendant as to 'whether, he is a tenant in the subject property?'.

5.1 The Trial Court after perusing the testimony of CW-1 (counter-claimant), RW-1 (defendant), the Local Commissioner's Report at Ex. P-1 and after examining the documents produced by RW-1, returned the following findings of fact: -

- (i) The husband of the counter-claimant was himself a tenant in the Shop.
- (ii) There is no evidence on record to show that the suit property i.e., six (6) wooden boxes i.e., three (3) wooden almirahs and Thada were being used by the defendant for trading purpose as a distinct shop, as alleged by the defendant.
- (iii) The counter-claimant has the keys to the rolling shutter and it is the counter-claimant who opens and closes the said Shop in which the said almirahs are located. The defendant can use the said almirahs only



when the said Shop is opened by the counter-claimant and not otherwise. The Trial Court thus concluded that the defendant is a mere licensee qua the said almirahs and Thada; and is not a tenant.

5.2 The relevant portion of the finding of the Trial Court on the said issue no. 2 reads as under:

“26. In the present case, it is not in dispute that the defendant/respondent is in possession of six boxes (three sets of two boxes each) in the property bearing no. 5329, Gall Peti Wali, Ghas Mandi, Sadar Bazar, Delhi. It is also not in dispute that there is only one shutter on the gate of the shop and the lock has been put on the said shutter by the counter claimant and she opens the shutter everyday and locks the shutter everyday. Now, on the basis of material on record, the Court shall decide whether the defendant / respondent is tenant in the six boxes or licensee.

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29. It is interesting to note that suggestion has been given to CW-1 Tara Devi that her husband himself was a tenant in the property and for this, he has not issued any rent receipt as directed by him. The suggestion given to the counter-claimant is an admission on the part of the defendant / respondent that the husband of the counter claimant was tenant in the shop.

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32. I have considered the contentions. The statement of the counter claimants are Ex.RW1/24 and Ex. RW1/25. Both statements are photocopy and the statements have been admittedly not recorded by the defendant/respondent. The document being photocopy has not been proved as per law of evidence and therefore the documents/statements are not reliable. However even if it is assumed for the sake of arguments that she made such a statement, it shows that she is a tenant in the property. The term 'tenant' used by the counter-claimant / plaintiff in the said statement does not make the relation between the parties as that of landlord and tenant and the relation between the parties is to be decided on the basis of terms of agreement and the light enjoyed by the tenant/licensee. The intention of the parties as regards the relation of tenant or licensee is to be gathered from the circumstances of the case and not from the terminology used by the parties.

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34. I have considered the contentions of Ld. Counsel. The CW-1 has stated that the boxes are fixed in the wall. The boxes fixed in the wall are partitioned in the centre (half) with wooden planks at some places and with cement slabs in some place (in some boxes).



35. The judgments A. Satyanarayn vs. M. Yadgiri 2002 X AD(SC) 126 can be distinguished from the facts of the case. In the said case, the wooden structure was in the nature of permanent structure standing on the land which had walls and roof made of wood. However, in the present case, the subject matter are six wooden boxes i.e. three wooden almirah partitioned in two boxes each.

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39. It is also stated in the report of the Local Commissioner that this counter has shortened the entry to the shop. The report of the Local Commissioner makes it clear that Prahlad Rai had put a counter outside the shop bearing no. 5329 and the counter shortened the entry to the shop. The counter has not been put inside the shop in front of the almirahs / boxes in possession of the defendant / respondent. **Merely putting of the counter outside the shop at the entry of the shop does not prove that the boxes / almirahs were used by the defendant / respondent as separate shops.** Had it been the case that the almirahs / boxes were used for trading purpose, the respondent must have put his counter inside the shop just outside the almirahs in his possession. **Therefore, this Court is of the view that the material on record is not sufficient to prove on the balance of probability that the almirahs were used for trading purpose/ as distinct shop as alleged by the defendant /respondent.**

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42. In the present case, the counter-claimant is herself a tenant of the shop. She has the keys of the shutter and she opens and closes it. The defendant I respondent is permitted to use the boxes only for the limited period till the shop is kept open by the counter-claimant. If the counterclaimant does not open the shutter of the shop on any particular day for any reason, the boxes cannot be used by the defendant/respondent. Therefore, in the facts and circumstances of the case, this Court holds that the defendant was a mere licensee on the boxes and not tenant. Accordingly, this issue is decided against the defendant I respondent and in favour of the plaintiff I counter claimant.”

(Emphasis supplied)

5.3 The Trial Court has thus considered the oral and the documentary evidence carefully before returning the finding that the defendant is a licensee in the suit property. The Trial court has rightly considered the law cited before it to hold that the permission granted to the defendant for using the wooden boxes located in the Shop cannot be construed as a premises; and therefore, the permission cannot constitute a lease. The



Trial Court has also rightly concluded that since the counter-claimant had exclusive right to open and lock the rolling shutter of the said Shop, the permission granted to the defendant to use the said almirahs is a license. This Court finds no infirmity in the well-reasoned finding of the Trial Court holding the defendant to be a licensee.

5.4 The First Appellate Court as well after perusing the evidence on record has upheld the finding of the Trial Court and concurred that the nature of the transaction between the counter-claimant and the defendant was license and not a lease. The relevant findings of the First Appellate Court read as under: -

*“21. Thus it is no longer res integra that it is the operational intention of the parties that determine the nature of transaction. It is admitted position that the wooden boxes are situated **inside** the property bearing no. 5329, Ghas Mandi, Gali Petiwali, Gandhi Market, Sadar Bazar, Delhi. It is also not in dispute that there is one shutter on the gate of the shop and lock has been put on the said shutter by the Respondent, who opens the shutter every day and locks the shutter everyday. **Thus, the defendant is permitted to use the same only for a limited period till the shop was kept open by the Respondent. If the counter- claimant does not open the shutter of the shop on any particular day for any reason, the boxes cannot be used by the appellant.** At this juncture it is relevant to refer to the argument advanced by the Ld. Counsel for appellant that since the appellant was not cross examined by the respondent on the aspect of tenancy, therefore the account of the appellant shall be presumed to be accepted by the appellant. Respondent in the counter claim and evidence led by her contended that her late husband was himself a tenant in the suit property. A suggestion was given to the Respondent that the husband of the Respondent was himself a tenant in the suit property and for this, he has not issued any rent receipt as directed by him. **The suggestion given to the respondent is an admission on the part of the appellant that the husband of the respondent himself was a tenant in the shop.** As observed by the Hon'ble Supreme Court in **Rajbir Kaur Supra**, even exclusive possession itself is not decisive in favour of a lease and against a mere licence, for, even the grant of exclusive possession might turn out to be only a licence and not a lease where the grantor himself has no power to grant the lease.*

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*24. **Thus, in case where right is given only to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a license.** As rightly indicated by the Ld, Trial Court, the Ld. Local commissioner report indicate that the exclusive possession and control of the shop remain with the respondent and the Appellant was given right to use the wooden boxes to keep articles. Reliance is also placed by the appellant on the judgment 1980 (1) Rent Control Reporter 569 to contend that a lease/tenancy could be created by delivery of possession under Oral agreement without executing any written document. The onus to prove the Oral Agreement was on the appellant, which onus the appellant has failed to discharge. **Further as already discussed hereinabove the operational intention of the parties shows that the nature of transaction was license and not lease.** Accordingly, I do not find any merit in the arguments advanced by the Ld. counsel for the appellant that appellant was a tenant in the suit property.”*

(Emphasis supplied)

5.5 The learned counsel for the defendant during the course of oral arguments has failed to show any infirmity in the said concurrent findings of the Trial Court and the First Appellate Court. The defendant admits that (i) the key to the rolling shutter of the Shop is with the counter-claimant; (ii) the defendant cannot use the said almirahs when the Shop is closed and (iii) the counter-claimant herself is a tenant in the Shop, without any right to sub-let the said Shop or any portion thereof.

5.6 Therefore, the finding of the Courts below that the defendant is a licensee with respect to the use of the six (6) wooden boxes i.e., three (3) wooden almirahs and the Thada is therefore a finding of fact based on the evidence led by the parties and the said finding does not give rise to any question of law.

6. The defendant during the course of arguments before this Court has urged that the relief of mandatory injunction (for vacating the almirahs and the Thada) granted by the Trial Court in favour of the counter-claimant while deciding issue no. 5 is not maintainable as in its



pleading, the counter-claimant had alleged that the defendant is a trespasser.

6.1. The said contention of the Respondent has been dealt with and negated by the First Appellate Court correctly in the following manner: -

“14. It is further urged on behalf of the appellant that the suit for mandatory injunction is not maintainable against the trespasser /person who has forcibly entered into the property. It is argued by the Ld. Counsel appearing on behalf of appellant that the plaintiff/respondent has averred in the amended counter claim that the appellant is a trespasser and therefore suit/counter claim for mandatory injunction filed by the respondent was liable to be dismissed. As already discussed hereinabove the pleadings of the parties has to be read as a whole. The Hon'ble Supreme Court in Udhav Singh v, Madhav Rao Scindia, (1977) 1 see 511.....

15. The original counter claim as filed by the counter claimant as well as amended counter claim shows that the Respondent has only refuted the claim of the appellant being tenant as claimed by the appellant and has not contended that the appellant is a trespasser. The Respondent has not made any averment in the counter claim that the appellant is a trespasser in the suit property. The averment is that in the year 1991 after the death of husband of the Respondent, the appellant started claiming himself to be a tenant with respect to wooden boxes. In para no. 1 of the counter claim, counter claimant has mentioned wooden boxes were given on leave and licenses basis. The counter claimant has only controverted the stand taken by the plaintiff that he is the tenant in the suit property. The counter claim has to be read as a whole to ascertain its true import. The Hon'ble High Court has also noted in the order dated 24/07/2014 that the suit for mandatory injunction is maintainable against the licensee and after going through the pleadings of parties permitted the respondent to delete the word 'possession' and substitute the same with 'mandatory injunction'. The issues framed by the Ld. Trial Court and the evidence led by the parties also shows that the appellant was well aware of the status of relationship contended by the respondent in the counter claim and therefore the ground that the suit for mandatory injunction was not maintainable as urged in the present appeal is without any merits. Further from the pleadings filed by the appellant himself in the suit, which was later on withdrawn by him shows that appellant himself has claimed to be tenant in the suit property, which claim was controverted by the respondent on the ground that the appellant is a licensee. Therefore, the ground urged in the present appeal



that the plaintiff is a trespasser and therefore, the suit for mandatory injunction was not maintainable against him is without any merit.”

(Emphasis supplied)

6.2. The learned counsel for the defendant during the course of arguments has been unable to point out the error in the aforesaid finding of the First Appellate Court.

6.3. This Court as well has perused the pleadings at paragraph ‘1’ and ‘2’ of the statement of counter-claim (amended) and concurs with the finding returned by the First Appellate Court. There is no mention of the word ‘trespasser’ in the said paragraphs and this appears to be inference drawn by the defendant himself.

6.4. Further, as is evident from the record, this plea that *the defendant has been described as a trespasser and therefore, no relief of mandatory injunction is maintainable against the defendant* was a ground urged for the first time before the First Appellate Court. No such plea was raised before the Trial Court and it therefore deserves to be disallowed on this ground alone. In the considered opinion of this Court this plea cannot be maintained by the defendant as he himself asserts that he is a tenant and does not admit that he is a trespasser. The issue of defendant being a trespasser does not arise for consideration in the facts of this case. Therefore, this Court finds no error in the finding returned by the First Appellate Court rejecting the said contention of the defendant.

6.5. The Counter-claimant admits that the defendant was a licensee who was permitted to use the suit property on payment of daily license fee. The said license was revoked by the Counter-claimant and she called upon the defendant to stop visiting the Shop and using the suit property. However, the defendant continued to visit the shop and used



the suit property despite revocation of the license. It is in these facts that the Counter-claimant has pleaded that the defendant is illegally using the suit property and sought a mandatory injunction to the defendant to vacate the suit property; and described him as an illegal occupant. In the opinion of this Court a mandatory injunction against the licensee whose license has been revoked is maintainable and has been rightly granted by the courts below.

6.6. In the opinion of this Court, proposed question of law no. 1 does not arise for consideration.

7. Lastly, learned counsel for the defendant has urged that the Trial Court has wrongly awarded interest at 6% per annum on amount of mesne profits for the period 24.01.2009 till 24.07.2014. He has urged this as the question of law no.2.

7.1 It is a matter of record that the counter-claim was instituted in the year 1992. The Trial Court awarded mesne profit at Rs. 60/day for all the said almirahs and Thada with effect from 24.01.2009 till the boxes are vacated. The Trial Court has held that the counter-claim is entitled to pendente lite interest at 6% per annum on the mesne profits for the period 24.01.2009 till 24.7.2014. The award of interest for the pendente lite period is within the jurisdiction of the civil court as observed by a Co-ordinate bench of this Court in the case of ***M/s Roshan Lal Vegetable Products Pvt. Ltd. v. M/s Param International & Anr., 2011 SCC OnLine Del 325***, the operative portion of the judgment reads as under:

“16. As far as the form for making a claim for mesne profits, and interest on mesne profits, are concerned, there is a difference between a claim for the period prior to the suit and a claim for the period subsequent to the suit. However, by the Code of Civil Procedure (Amendment) Act, 1976, clause (b) of sub-rule (1) had been redrafted in two clauses (b) and (ba); (b) for



rents and (ba) for mesne profits. The Court may either order a specific amount or it may order an inquiry under Order XX Rule 12 CPC and then on the inquiry being completed, pass appropriate orders. The Court fees on the claim for pendente lite mesne profits is to be paid before framing the decree. Regarding interest on mesne profits, Section 2(12) of the CPC which defines mesne profits, itself includes interest.

17. The present suit was filed on 10th January, 2006. Regarding interest, the claim is vague. **Therefore, on the mesne profits for the period prior to the suit, interest is not allowed. However, the grant of pendente lite mesne profits and interest thereon is always in the jurisdiction of the court.** (Fateh Chand v. Balkishan Das, AIR 1963 SC 1405: [1964] 1 SCR 515; Mahant Narayana Dasjee Varu v. Board of Trustees, AIR 1965 SC 1231; Lucy Kochuyareed v. P. Mariappa Gounder, (1979) 3 SCC 150: AIR 1979 SC 1214; and Tarquino Raul Henriques v. Damodar Mangalji and Co. Pvt. Ltd., AIR 1989 Bombay 309.)”

(Emphasis supplied)

7.2. Thus, award of pendent lite interest by the Trial Court is in accordance with law. Therefore, the proposed questions of law no.2 do not arise for consideration.

8. The arguments raised by the Appellant do not raise any question of law much less a substantial question of law and the grounds merely challenge the concurrent finding of facts.

9. In this regard, it would be appropriate to refer to the case of ***Nazir Mohamed v. J. Kamal and others (2020) 19 SCC 57*** wherein the Supreme Court observed that second appeal only lies on a substantial question of law and the party cannot agitate facts or call upon the High Court to re-appreciate the evidence in a second appeal. The operative portion to this aspect reads as under:

*“22. A second appeal, or for that matter, any appeal is not a matter of right. the right of appeal is conferred by statute. A second appeal only lies on a substantial question of law. If statute confers a limited right of appeal, the court cannot expand the scope of the appeal. **It was not open to the respondent-plaintiff to reagitate facts or to call upon the High Court to reanalyze or reappreciate evidence in a second appeal.***

23. Section 100 CPC, as amended, restricts the right of second appeal, to Only those cases, where a substantial question of law is involved. The



existence of a "substantial question of law" is the sine qua non for the exercise of jurisdiction under Section 100 CPC.

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28. To be "substantial", a question of law must be debatable, not previously settled by the law of the land or any binding precedent, and must have a material bearing on the decision of the case and/or the rights of the parties before it, if answered either way.

29. To be a question of law "involved in the case, there must be first, a foundation for it laid in the pleadings, and the question should emerge from the sustainable findings of fact, arrived at by courts of facts, and it must be necessary to decide that question of law for a just and proper decision of the case."

(Emphasis supplied)

10. This second appeal is accordingly dismissed and the order of the Trial Court and First Appellate Court are upheld. The Appellant will be liable to pay costs of Rs. 10,000/- to the Respondent within two (2) weeks failing which the said cost will be recovered in the execution.

11. These proceedings were instituted on 17.08.1992 and have been a subject matter of adjudication for thirty-one (31) years now. The Appellant has no reasonable defence for continuing to use the suit property after the passing of the decree of the Trial Court dated 02.05.2016. The first appeal also stood dismissed on 17.10.2022; however, the Appellant has continued to use the suit property. The Appellant i.e., defendant is directed to forthwith vacate the suit property on or before 31.12.2023, failing which he will become liable to pay mesne profits at Rs. 100/- per day for each month w.e.f. 17.10.2022 the date of the judgment of the First Appellate Court.

12. Pending application(s) stands disposed of.

**MANMEET PRITAM SINGH ARORA
(JUDGE)**

DECEMBER 12, 2023/rhc/sk