

(1995) 08 DEL CK 0042

In the Delhi High Court

Case No : Regular First Appeal No. 367 of 1978

Mitter Sain Jain

APPELLANT

Vs

Attar Sain Jain and Others

RESPONDENT

Date of Decision : 21-08-1995

Acts Referred:

Delhi Rent Control Act, 1958 — Section 2
Evidence Act, 1872 — Section 103
Transfer of Property Act, 1882 — Section 105

Citation : (1995) 3 AD 832 : (1995) 35 DRJ 262

Hon'ble Judges : R.C. Lahoti, J; Manmohan Sarin, J

Bench : Division Bench

Advocate : Mukul Rohatagi, Ravi Gupta, Y.K. Jain and P.K. Jain, for the Appellant;

Judgement

R.C. Lahoti, J.

(1) plaintiff is the appellant, feeling aggrieved by the judgment and decree of the trial court dismissing his suit for recovery of vacant possession of premises bearing No. 1203, Chah Rahat, Bazar Gulian , Delhi-110006 and for recovery of arrears of rent and mesne profits.

(2) The suit was based on landlord-tenant relationship. The plaintiff and defendant No.1 are real brothers. Defendants 2 and 3 are respectively the wife and the son of defendant No.1.

2.1 On 7.7.1959, the plaintiff and defendant No.1 had purchased properties No. 1158 to 1212 situated at Chah Rahat Bazar Gulian Delhi-110006. The suit property is one out of those several properties. It is a garage. It was held on rent of Rs. 11.50 per month by one M.M. Khanna. The plaintiff and defendant No.1 being the co-owners had filed an eviction petition against the tenant. On 20.3.1962, a family partition took place wherein the joint properties were partitioned and the suit premises fell to the share of the plaintiff. With effect from 20.3.1962 defendant No.1 ceased to have any right in the said premises. In the

proceedings for eviction there was a compromise whereunder the tenant M.M. Khanna had agreed to suffer ejectment and then possession was secured by defendant No.1.

2.2.The eviction petition was disposed of as compromised on 11.9.1962 on which date the plaintiff was not present before the Rent Controller Delhi though a counsel duly authorised by the two co -owners was present. Rent in arrears was also recovered from the tenant Mr Khanna by defendant No.1. On 22.6.1963, defendant No.1 sent a money order in an amount of Rs.115.00 to the plaintiff. This money order was followed by two money orders for the months of July and August, both being in an amount of Rs. 11.50 each. In September, 1963 there was again a money order in an amount of Rs. 11.50 sent by defendant No.1 to the plaintiff which was refused by the plaintiff.

2.3On 14.7.64, disputes between the parties were referred to arbitration of Shri J.P. Jain, brother -in-law of the parties. The arbitrator gave an award. He awarded an amount of Rs. 6412.00 to be paid by defendant No.1 to the plaintiff. As to garage (property No. 1203 which is the suit property) defendant No.1 was held to be a trespasser. However the civil court made the award on the former claim a rule of the court while the award on the latter claim was refused to be made a rule on the ground that it was beyond the scope of arbitration.

(3) According to the plaintiff, defendant No.1 had taken possession from the tenant M.M. Khanna unauthorisedly. Inasmuch as the property belonged to the plaintiff, the defendants were liable to deliver vacant possession thereof to the plaintiff. An amount of Rs. 2160.00 as damages for three years prior to the institution of the suit and future mesne profits were also claimed.

(4) The defendants contested the suit pleading that the defendant No.1 was holding the suit premises (garage) as a tenant of the plaintiff at a monthly rent of Rs. 11.50. It will be useful to extract and reproduce the following part of para 4 of the written statement :-

"On the delivery of possession of the said godown by the said Shri Man Mohan Khanna to the plaintiff and defendant No.1, the plaintiff made defendant No.1 as his tenant in respect thereof with effect from 1.9.1962 on a monthly rent of Rs. 11.50 paise. The defendant No.1 on 22.6.1963 remitted rent in respect to the said godown for 10 months from 1.9.1962 to 30.6.1963 amounting to Rs. 115.00 at the said rate of Rs. 11.50 paise by money order under postal receipt No. 4015 dated 22.6.1963 which was duly received by the plaintiff under his signatures on 26.6.1963. Thereafter rent for the month of July, 1963 was again remitted by defendant No to the plaintiff in respect to the said godown in the amount of Rs. 11.450 paise on 1.8.1963 by money order under postal receipt No. 704 dated 1.8.1963 which was also duly received by the plaintiff under his signatures on 3.8.1963. Rent on respect to the said godown for the month of August, 1963 amounting to Rs. 11.50 was again remitted by money order by defendant no.21 to the plaintiff on 3.9.1963 for which postal receipt No. 3238 dated 3.9.1963

dated 3.9.1963 which amount was duly received by the plaintiff under his signatures on 5.9.1963. Thereafter rent for the month of September amounting to Rs. 11.50 was again remitted by defendant No 9.1 to the plaintiff in respect of the said premises by money order on 4.10.1963 which was duly received by the plaintiff. The defendant No.1 while remitting the rent by means of the said money order mentioned in the coupon of the money order the amount and details of rent in respect to the months for which the same was remitted and kept their copies as well . The postal receipts acknowledgement receipts of the amounts sent by money orders signed by the plaintiff and copies of the coupons kept by defendant No.1. are attached herewith.

(5) On 20.3.1963 when the said partition took place the plaintiff and defendant No.1 jointly wrote letter dated 20.3.1963 which was duly signed by both of them to the Assessor and Collector House Tax Department, Municipal Corporation of Delhi informing him about the said partition of the said properties and mentioning therein the names of the tenants in occupation of the different portions of the properties which fell to their respective shares. The defendant No.1 in the said letter has been shown by the plaintiff as a tenant under him in the said godown No. 1203 on a monthly rent of Rs. 11.30. The names of other tenants have also been mentioned by him in the said letter. The defendant No.1 is thus a tenant under the plaintiff in the said godown No. 1203 on a monthly rent of Rs. 11.50 from 1st September, 1962."

(6) It is pertinent to mention here itself that the defendant alleges tenancy in his favor having been created w.e.f. 1.9.1962. There is no deed of lease in writing executed between the parties. The defendant also does not allege and set out particulars of any oral contract of tenancy. For proof of creation of tenancy he has relied on the circumstance of payment and acceptance of rent, and an acknowledgement of such tenancy contained in a joint letter of the plaintiff and defendant No.1 addressed to the M.C.D.

(7) Before the trial court, the principal testimony consisted of the plaintiff and defendant No.1. The defendant has also brought on record copies of the Money orders Ex DW1/2, DW1/4, DW1/6, DW1/7. Money order receipts and money order coupons have also been filed. The trial court has examined the two sets of documentary evidence. The money order coupons form the basis of finding of the trial court upholding the tenancy. The joint letter (Ex. D/3) alleged by the defendant to have been written by the plaintiff and defendant No.1 and sent to the Assessor & Collector of the House tax M.C.D. has been disbelieved by the trial court.

(8) Here itself, it will be useful to extract and reproduce from the judgment of the trial court, the findings which it has recorded as regards the alleged joint letter dated 20.3.1963 (Ex D9). The trial court states vide para 25 of the judgment :

"ALTHOUGH this has also been strongly relied upon by the defendant showing

one of the circumstances of the creation of tenancy by the plaintiff in favor of defendant No.1, yet I do not feel satisfied by this document. This is a carbon copy, the original of which has been received by the house tax department of Municipal Corporation on 22.3. The year of the receipt is however not clear on the stamp acknowledging the receipt of original and the original date seems to have been changed. A careful perusal with naked eye of the date written on letter Ex. D9 shows that the date in fact been changed from 30.3.62 to 20.3.63. It is to be noted that on 20.3.62 a partition of the property has taken place between the plaintiff and defendant No.1 and it was on 30.3.62 as would be clear from Ex P6 also that parties had written to the Assessor and Collector for necessary mutation in this regard. At that time Sh Man Mohan Khanna was a tenant in the premises in dispute. The change of the date from 30th to 20th and of the year from 62 to 63 does not show any signatures of either party. Similarly the change of name from M.M. Khanna to that of defendant No.1 also does not bear the signatures of any party. The name of M.M. Khanna has been deleted and that of the defendant added with a different typewriter. Defendant No.1 did not bother to summon the original record to show that in fact such an application had been filed by the parties on 20.3.63. I may also mention that an endorsement of the Municipal Corporation having received the original on 22.3. cannot be much relied unless it could be shown that on such date in fact the original was given to the corporation by summoning the original record itself. It is otherwise inconceivable that the plaintiff would have written such a letter to the Municipal Corporation on 20.3.1963 because the relations of the parties were strained and defendant had admittedly not paid any amount towards rent till then. On the contrary defendant himself admits that the plaintiff has been refusing to accept the amount whenever approached and that is why he had to remit the rent by money order in June, 1963,. Where then was the occasion for the plaintiff to send such a letter ? "

(9) In spite of its having disbelieved and discarded the joint letter Ex D9 the trial court has held the tenancy proved by the circumstances of the acceptance of rent by the plaintiff through money orders sent by the defendant.

(10) The learned counsel for the defendant- appellant has submitted that the trial court has committed a grave error of law in holding the tenancy proved. It has Therefore to be seen whether the alleged payment and acceptance of rent between the parties proves tenancy having been created.

(11) Section 105 of the Transfer of Property Act, 1882 defines a lease of immovable property as a transfer of a right to enjoy such property for a certain time expressed or implied or in perpetuity in consideration of a price paid or promised or of money etc. to the transferor by the transferee who accepts transfer on such terms. The lease is thus a contract which transfers an interest in immovable property. A contract is necessary for creation of lease. Where there is no contract there can be no lease. If existence of lease is disputed and relationship of landlord and tenant between the parties is disputed the party on

whom lies the burden of proving the contract and the relationship must adduce evidence directed towards the entering into of such contract. The contract need not be in writing. It can be oral as well. But there must be a contract.

(12) The mere factum of payment of rent by one and acceptance by the other does not necessarily create relationship of landlord and tenant between them. Such payment may only prove permissive occupation not amounting to any right or title to possession. But payment and acceptance of rent is an evidence directed towards proof of the existence of a tenancy. Sufficiency of such evidence for the purpose will depend on the facts and circumstances of each case. (See Sheodhari Rai and Others Vs. Suraj Prasad Singh and Others, . In Gurcharan Singh Jodh Singh Vs. Chairman Delhi Improvement Trust, New Delhi, , a Division Bench of this Court has held :

"Rent is a usual, though not an essential, incident of the relationship of Landlord and tenant and payment of rent by the occupier to the owner of premises raises a presumption that the relationship of landlord and tenant has come into existence. The presumption however, is a rebuttable one and may be rebutted by showing that the acts and conduct of the parties are inconsistent with its existence."

(13) In Rulhu Ram Dewat Ram Vs. Than Singh and Others, it has been held that nonpayment of rent negatives existence of relationship of landlord and tenant.

(14) To our mind, tenancy is a matter of contract. The payment and acceptance of rent between the parties is a circumstance pointing out towards existence of landlord tenant relationship between the parties. On the other hand, non payment of rent between the parties would be a circumstances pointing out towards non-existence of such relationship. Such a piece of circumstantial evidence shall have to be appreciated and weight assigned to it by reference to the facts and circumstances of each individual case and the otherwise mutual relationship of the parties. The course of conduct evidenced by continued periodical payments spread over a large period of time would have more impact on the mind of the court than a single payment or stray payment or payments spread over a short period of time. In an individual case there may be available the existence of circumstances both the ways. There may be a few payments and acceptance spread over a small period. The inference as to existence of tenancy relationship flowing from such a circumstance may stand rebutted by the inference flowing from the circumstances of non-payment spread over a long period as is in the case at hand, to be noticed shortly hereinafter.

(15) We may now proceed to examine the facts and circumstances of this case so as to find out whether it was the rent paid by defendant No.1 to the plaintiff by money orders and if so, whether the payment of rent by defendant No.1 to the plaintiff as disclosed by the four money orders is enough to prove the existence of landlord-tenant relationship. Attar Sen (DW1) has proved the money order coupons. In the cross-examination it was suggested to him that in fact it

was the amount of rent which he had received from the tenant M.N. Khanna which was sent by him to the plaintiff by money order. The plaintiff Mitter Sen (Public Witness 3) has explained during the cross examination that the money orders sent by defendant No.1 to the plaintiff related to the rent realised by the defendant from Mr Khanna and sent by the defendant to him. For the several reasons which we proceed to catalogue hereunder the plea of creation of tenancy by payment and acceptance of rent has not appealed to us.

(16) Firstly, defendant No.1 states to have retained copies of the contents of the money order forms with him. Ordinarily one does not retain copies of money order forms. The contents of message which is said to have been delivered by defendant No.1 to the plaintiff by inscribing the same on the place meant for the purpose at the foot of the money order form is more or less similar on all the four money order forms. We may reproduce the message as it is on the first money order Ex DW1/2. Its translation into English reads as under : -

" VERY respected ,my crown, elder brother Mitter Sain Jain, Jai Jinendera It is submitted that Garage No. 1203 is in my possession since 1st September, 1962 for my use as godown. Its rent from 1st Sept 1962 to 30th June 1963@ Rs.11.50 is being remitted please. accept the same. Your Brother Attar Sain Jain Sain Stationery Marg, Delhi"

16.2The tenancy is said to have come into existence on 1.9.1962. The money order was sent on 22.6.1963. In the ordinary course of nature one would not use such a language as has been used by the defendant, unless the message was planned or pre- thought to be utilised as evidence of tenancy in case of an occasion arising for the purpose. 16.3 The lower part of the original money order form containing message is delivered to the addressee. Unless there be an occasion for preserving the lower part and that too when alone it contains a message, ordinarily the lower part is not preserved by the addressee. 16.4 The suit has been filed by the plaintiff on 7.8.74 i.e. after 12 years of the date of alleged creation of tenancy. The defendant No.1, the younger brother appears to be smart enough. Having understood that either the original coupons did not contain any message or having understood that the same were not preserved or were not available with the plaintiff, defendant No.1 developed ingenious story of having copied out the money order forms while sending the money orders and then producing such copies before the court. 16.5 The fourth money order is said to have been refused by the plaintiff. The first three money order forms produced by the defendant No.1 are claimed to be copies of the originals sent to the plaintiff. The plaintiff was never served with notice calling upon him to produce the originals during the trial. The money order forms produced by defendant No.1 would at best be the secondary evidence of the original money order coupons sent to the plaintiff. u/s 63(2) and (3) of Evidence Act secondary evidence means and includes copies made from the original by mechanical process which in themselves ensure accuracy of the copy kept and copies compared with such copies and copies made from or compared with the original.

Not only defendants did not lay foundation for leading secondary evidence, the evidence adduced nowhere proves the contents of money order forms Ex DW1/1, DW1/4 and DW1/6 having been copied from or compared with the original. They were certainly not made from the original by the same mechanical process which would by itself ensure accuracy of the copy. The money order forms are Therefore liable to be excluded from being read in evidence.

(17) Secondly, if at all the defendant No.1 was a tenant holding the said premises on a monthly rent of Rs. 11.50, he would not have stopped remitting the rent soon after September, 1963, the last month for which the rent was remitted as per the contents of the money order form Ex. DW1/7. There has been no payment or tender of rent since 1.10.1963 till 7.8.1974 the date of filing of the suit, that is for a long period of 11 years. Thus, while an inference as to creation of tenancy is sought to be drawn from payment and acceptance of rent for a short period of one year suggested by three payments and one tender, it has been overlooked that complete silence on the part of defendant No.1 in the payment or tender of rent for a long period of about 11 years would rebut the said presumption and at the same time also raise a presumption of absence of tenancy relationship. This weighty factor has been completely lost sight of by the trial court.

(18) Thirdly, admittedly the erstwhile tenant Mr M.N. Khanna was holding the suit premises as a tenant at the rate of Rs. 11.50 . It does not appeal to common sense that vacant possession having been secured from the tenant after litigation and then entering into a compromise which would not have been without some consideration and the plaintiff having secured right and title in the premises by partition would leave the same in possession of defendant No.1 for the same meagre rent of Rs. 11.50 per month.

(19) Fourthly, the relations between the parties were strained. There were disputes. Same were settled through arbitration. It does not appeal to common sense that in spite of strained relations, the plaintiff would have agreed to the defendant occupying the premises for a meager rent of Rs. 11.50. If all was so well between the parties, as could have persuaded them to have an oral tenancy, then where was the occasion for the defendant No.1 to have commenced tendering rent to the plaintiff through money orders.

(20) It appears that the two co-owners i.e. the plaintiff and the defendant No.1 had initiated legal proceedings for the eviction of the tenant Mr Khanna. Defendant No.1 was taking active interest in prosecuting the proceedings and in persuading the tenant to vacate the premises. It ended into a compromise. Defendant No.1 secured possession from the tenant though the property had fallen to the share of the plaintiff. Defendant No.1 occupied the premises. Dispute was raised before the Arbitrator who found defendant No.1 to be a trespasser. The plaintiff could not secure possession because that part of the award was not made a rule of the court. Being brothers, the plaintiff being the elder one thought of behaving more sensibly than indulging posthaste into

litigation against his own brother before a court of law. In between, defendant No.1 started remitting the amount which he might have realised from the tenant Mr Khanna, to the plaintiff by money orders. The event of remitting the amount by money orders is now being twisted to create evidence of landlord-tenant relationship between the parties by developing a story that fits in the money orders and conveniently preparing and producing copies of M.O. forms in the court. It would have been better if the plaintiff would have come out with a clear statement explaining the nature of the amount received by him through money orders from the defendant. However, for this reason alone the Explanation offered by the plaintiff in his statement in the court cannot be excluded from consideration if it otherwise appeals to the court as reasonable which it does.

(21) The tenancy is said to have been created on 1.9.1962. Shortly, thereafter disputes arose between the parties which were referred to adjudication by the Arbitrator. The Arbitrator gave his award on 12.11.1964. One of the disputes referred to the Arbitrator was: the possession of garage 1203 which is now in occupation of the second party (i.e. Attar Sain) but which belongs to the first party (i.e. Mitter Sain). The Arbitrator gave the following award:

"I award regarding item No.2 above i.e. the garage that the second party is a Sublette of Shri Manmohan Khanna without the consent of the first party or in other words he is an unauthorised occupant in the premises and I award that the second party shall hand over vacant and peaceful possession of the garage to the first party within a period of one year from the date of this award or upon getting any of the garages vacated from his tenant, whichever is earlier and till such time the second party remains in occupation of the garage he shall pay to the first party damages for unauthorised occupation which are assessed at the rate of Rs. 60.00 per month."

(22) It is true that the award on item No.2 was refused to be made a rule of the court. The award would not have the effect of decree. But at the same time it does not become a piece of waste paper. The award and the copy of the statement of Mitter Sain recorded during arbitration proceedings go to show that since the very beginning the case of the plaintiff Mitter Sain has been that the defendant Attar Sain was not a tenant but a person in unauthorised occupation of the suit property. It is not an afterthought plea brought into being only for the purpose of the present suit.

(23) The fact remains that the burden of proving existence of landlord-tenant relationship between the parties lay on the defendant No.1. If the defendant No.1 has failed in discharging his onus, he cannot take advantage of the weakness, if any, of the plaintiff. The fact cannot be lost sight of that defendant No.1 had attempted at creating yet another evidence of tenancy by producing a false document Ex D9 which has been rightly discarded by the trial court. To the extent of finding recorded by the trial court on document Ex D9 , we find ourselves in entire agreement with the view taken by the trial court.

(24) As in our opinion the existence of landlord- tenant relationship is not proved between the parties and title of the property admittedly vests in the plaintiff, the possession of the defendant and its continuation is illegal and unauthorised. The plaintiff is entitled to the decree for possession.

(25) In so far as the question of mesne profits is concerned we consider it appropriate to direct an enquiry into the quantum of mesne profits to be held in accordance with Order 20 Rule 12 CPC.

(26) The appeal is allowed. The judgment and decree of the trial court are set aside. The suit is directed to be decreed in the following terms :

(1) THE defendants shall deliver vacant possession to the plaintiff over the suit property which is a garage bearing No. 1203 situated in Chah Rahat, Bazar Gulian , Delhi-110006. (2)The plaintiff shall be entitled to recover mesne profits from defendant No.1 for the period commencing 1.5.71 till the date of delivery of possession or a period of three years from the date of decree, whichever event occurs earlier. (3)The amount of mesne profits shall be determined by the trial court by holding an enquiry. (4)The plaintiff shall be entitled to costs incurred by him in both the courts. Let a decree be drawn accordingly.