

(2013) 10 DEL CK 0239

In the Delhi High Court

Case No : Regular Second Appeal 59 of 2013 and CM No. 4786 of 2013

Nand Kishore

APPELLANT

Vs

Shree Sanatan Dharam Sabha Laxmi Narayan Temple Trust

RESPONDENT

Date of Decision : 24-10-2013

Acts Referred:

Citation : (2013) 10 DEL CK 0239

Hon'ble Judges : V.K. Shali, J

Bench : Single Bench

Advocate : R.D. Sharma, Mr. Rajat Sharma, Mr. Chetan Sharma and Mr. Manish, for the Appellant; Sanjay Aggarwal, Advocate and Mr. V.K. Mishra, AR, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Shali, J.—I have heard the learned counsel for the appellant as well as the learned counsel for the respondent. Vide order dated 20.03.2013, the following question was framed:

Whether the concurrent finding of fact arrived at by the two courts below with regard to the appellant being a licensee in the premises in question is substantiated by any evidence on record or not?

2. Before dealing with the aforesaid question, it may be pertinent to give the brief background of the case.

3. The respondent herein is a registered society under the Societies Registration Act, 1860 and is running a temple known as Birla Mandir, Mandir Marg, New Delhi. A suit for possession and recovery of damages/mesne profits came to be filed on behalf of the respondent/society through one of its trustees who was duly authorized vide the resolution dated 15.03.2004. The allegation made by the respondent/society against the appellant herein was that the father of the appellant was allotted a shop purely on a licence basis for selling flowers and garlands on the periphery of the mandir on a monthly licence fee of Rs. 40. It

was alleged that the licence fee of Rs. 40 was being reflected as bhaint/offering on the receipts issues to the father of the appellant. After the demise of the father of the appellant, the appellant continued to be in occupation of the premises in question in the capacity of the licensee and the licence fee was enhanced to Rs. 600/- per month in December, 2003. It was also alleged in the plaint that with effect from 01.01.2004, the licence fee was further enhanced to Rs. 1,000/- per month on a mutual understanding between the appellant and the respondent apart from the payment of Rs. 20 per month by way of electricity charges but the said amount was never paid and since the appellant had run into arrears of payment of licence fee with effect from 01.01.2004, at the aforesaid rate of Rs. 1,000 per month, consequently the suit for possession and damages/ mesne profits was filed against him.

4. The present appellant defended the claim of the respondent/plaintiff. It was averred by him that he was a tenant in the suit premises just as his father was a tenant. It was stated that the amount of rent which was paid by him was reflected as an bhaint/offering by the respondent which is stated to have been done by the respondent only with a view to save the income tax liability. It was further stated by the appellant that he was compelled to file a petition u/s 45 of the Delhi Rent Control Act, 1958 on account of disruption of essential amenities by the respondent/plaintiff as well as a petition u/s 27 of the Delhi Rent Control Act, 1958 depositing the rent in the court of ARC. On the completion of pleadings of the parties, the following issues were framed:

1. Whether the defendant is the licensee in the suit property? OPP.
2. Whether the suit of the plaintiff liable to be dismissed u/s 41(f) (g) & (h) of Specific Relief Act? OPD
3. Whether the plaintiff has any cause of action to file the present suit? OPD
4. Whether the plaintiff is entitled to decree of possession in respect of the suit property? OPP
5. Whether the plaintiff is entitled to mesne profit, if so at what rate and for what period? OPP
6. Whether the plaintiff is entitled to arrears of licence fee and arrears of electricity charges to the tune of Rs. 11,000/- and Rs. 1722/- respectively? OPP
7. Relief.

5. Out of the above issues, the most important issue was as to whether the appellant/defendant was a licensee in the suit property in question. This issue has been decided by the trial court in favour of the respondent/plaintiff. The respondent/plaintiff in support of its case had filed an affidavit Ex. PW 1/A of Mr. Vinod Kumar Mishra who was subjected to extensive cross-examination on behalf of the appellant/plaintiff. In the affidavit, the said witness had supported the case set up in the plaint by the respondent/plaintiff that the appellant/defendant was

a licensee in respect of the property in question. It was also admitted by him that there was no formal licence deed signed by the parties in this regard and the licence fee which was being paid by the appellant to the respondent was being reflected in the receipts as bhaint/offering and that at no point of time, the word "rent" was used in any of the receipts issued to the appellant/defendant. The appellant/defendant filed his own affidavit refuting the claim of the respondent/plaintiff. He supported his statement by stating that he was a tenant in the property in question. The documents in this regard Ex. DW-1/PX-1, Ex. DW-1/PX-2 and Ex. DW-1/PX-3 were admitted by him having his signatures at point A. These documents show that the rate list of various items purported to have been sold by the appellant/defendant were got approved by him from the respondent/plaintiff.

6. The trial court accepted the plea of the respondent/plaintiff that the appellant was a licensee in respect of the shop in question on the basis of receipts having been produced. A reliance was placed in this regard on the documents admitted by the appellant in his cross examination with regard to the approval of the rate list. It was a finding which was affirmed by the first appellate court as well.

7. The main contention of the learned counsel for the appellant is that there is no evidence on record to show that the appellant/defendant was a licensee in respect of the shop in question and the onus in respect of proving that the appellant was a tenant in the shop in question was wrongly put on him. Accordingly, the finding returned by the two courts below was irrational.

8. This court formulated a question after preliminary hearing only with regard to the concurrent finding having been returned by the two courts below as to whether the appellant was a licensee or not. The basic dictum of rule of evidence is that "one who asserts must prove". The respondent/plaintiff having filed a suit for possession and recovery of damages/mesne profits against the appellant claiming him to be a licensee in respect of the shop in question, was required to prove the same. The trial court had rightly framed an issue as to whether the appellant was a licensee in the shop in question and placed onus on the respondent/plaintiff. This onus was discharged by the respondent by filing an affidavit of PW-1 Mr. Vinod Kumar Mishra who supported the averments made in the plaint that the appellant was a licensee in the shop in question and the amount which was being paid by way of licence fee was being shown as bhaint/offering in the receipts. The onus having been discharged by the respondent, it shifted to the appellant to prove that he was not a licensee but a tenant. In this regard, no doubt he had made a statement in his affidavit exhibited as ExDW1/1 that he is a tenant and paying rent in respect of the shop in question, but one must not lose sight of the fact that in his cross-examination he has admitted the documents ExDW-1/PX-1, ExDW-1/PX-2 and ExDW-1/PX-3 which show that the rates of the items sold by him at the shop in question were being got approved by him from the respondent/plaintiff. If the appellant was a tenant in respect of the shop in question, then he would never have been required to get the rates

approved from the respondent/plaintiff. The very fact that the rates were got approved, lends credence or corroboration to the case of the respondent that he was a licensee. In addition to this, it is also admitted by the appellant that the shop in question was being opened and closed according to the timings fixed by the respondent. That was another factor which shows that though the appellant may be in physical possession of the shop in question, the nature of business, the rates of the items sold at the shop in question, the time of opening and closing of shop in question were all effectively being regulated by the respondent/plaintiff. This can only happen if a person who is in occupation is a licensee and not tenant. Accordingly, I feel that the concurrent finding returned by the two courts below was absolutely right that the appellant was a licensee and not the tenant.

9. The last submission which has been made by the learned counsel for the appellant is that he had filed an application under Order 41 Rule 27 CPC seeking permission to adduce additional evidence during the stage of appeal. However, the said application has not been decided. The learned counsel for the respondent has refuted this contention of the learned counsel for the appellant that the application under Order 41 Rule 27 CPC has not been decided.

10. I have perused the record. The application under Order 41 Rule 27 CPC of the appellant seeking permission to adduce additional evidence was rejected by the first appellate court on 17.09.2012. The reason given for the rejection of the application under Order 41 Rule 27 CPC by the first appellate court was that the said provision permits a party to adduce additional evidence by way of documents while as in instant case, the appellant in the application had not sought permission to place any documents on record, but had only urged that he may be permitted to prove the record of the income tax authorities in order to show that in the returns filed by the respondent/plaintiff, the amount of money which was being received by the respondent/plaintiff, was reflected as rent. The first appellate court had concluded that since no document along with the application had been placed on record, therefore, the application could not be allowed. In any case, the first appellate court had rejected the application by an independent order and if the appellant felt aggrieved by the said order, he could have assailed that order. Having chosen not to do so, it is not open to the appellant to now contend that the said application has not been decided by the first appellate court and, therefore, the concurrent finding returned by the two courts below is not sustainable.

11. In view of the aforesaid discussion, I am of the considered opinion that there is no infirmity in the concurrent finding returned by the two courts below with regard to holding that the appellant was a licensee in respect of the shop in question. Accordingly, the question which was framed by this court on 20.03.2013, is answered in the negative and the appeal is dismissed.