

Delhi High Court

Sharda Devi Gill (Decd.) Thr. Lrs. vs Rakesh Jain on 8 February, 2008

Equivalent citations: 148 (2008) DLT 33

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Bench: T Thakur, S Bhayana

JUDGMENT S.L. Bhayana, J.

1. The present appeal arises out of a suit for possession, mandatory injunction, damages and mesne profits in respect of use and occupation of the premises bearing No. K-1, Lajpat Nagar-II, New-Delhi (hereinafter referred to as "the suit premises"). The learned Additional District Judge dismissed the suit of the Appellants by order dated 18.12.2000. The facts giving rise to the filing of suit may be summarized as under:

2. The husband of Smt. Sharda Devi Gill expired on 30.04.80. After the death of her husband, the Smt. Sharda Devi Gill continued to live alone in the suit premises till 1986. She was attended to by Sh. Digvijay Singh, PW-3, a childhood friend of her youngest son. In March 1986, Smt. Sharda Devi Gill was introduced to Sh. Rakesh Jain, the Defendant-Respondent by Sh. Digvijay Singh, PW-3. On the assurance of Sh. Digvijay Singh PW-3, Smt. Sharda Devi Gill agreed to permit the Defendant-Respondent to stay in a portion of the suit premises as a permissive occupant/licensee along with his family. The Defendant-Respondent was not in exclusive possession of any portion of the suit premises till November 1990. In November 1990, Smt. Sharda Devi Gill fell ill and shifted to the house of her son, Dr. J.S. Gill, Appellant No. 2. On her return to the suit premises in January 1991, she was shocked to see illegal construction on the suit premises and requested the Respondent to vacate and hand over peaceful possession of the suit premises to her, which he refused. On these allegations Smt. Sharda Devi Gill filed a suit for possession, mandatory injunction and mesne profits.

3. During the pendency of the suit, the Smt. Sharda Devi Gill died on 23.04.98 and her three sons-S/Sh. S.S. Gill, J.S. Gill and R.S. Gill were brought on record as her legal representatives.

4. The Defendant-Respondent contested the suit. He filed the written statement in which he denied that he was introduced to Smt. Sharda Devi Gill by Sh. Digvijay Singh, PW-3 or by Sh. S.K. Pahwa, PW-2. He also denied that he had made any addition or alteration to the suit premises. He further claimed that Smt. Sharda Devi Gill let out three rooms, a kitchen, a bathroom and a toilet to him at a monthly rent of Rs. 700/-. He averred that he had never been a licensee and, therefore, the question of termination of license would not arise. Before the institution of the present suit, the Defendant-Respondent filed suit No. 604/1991 for perpetual injunction, which was decided in his favor.

5. On the pleadings of the parties, the trial Court framed the following issues for determination:

(i). Whether the suit was signed and verified by the duly authorized person?

(ii) Whether the suit has been properly valued for the purpose of Court fees?

- (iii) Whether Section 50 of the Delhi Rent Control Act bars the suit?
- (iv) Whether the Defendant was a licensee? And if so, to what extent?
- (v) Whether the Defendants status presently is that of a trespasser?
- (vi) Whether the Plaintiff is entitled to the possession of the property in question?
- (vii) Whether the Plaintiff is entitled to possession of the property in question and if so, to what extent?
- (viii) Relief.

6. In support of their case, the Appellants have examined three witnesses namely Sh. S.S. Gill, PW₁, who is the son and Attorney of late Smt. Sharda Devi Gill, Sh. S.K. Pahwa, PW-2 and Sh. Digvijay Singh, PW-3. The Respondent has examined as many as five witnesses namely Sh. Raj Kumar, DW-1, Sh. Rajinder Bisht, DW-2, Sh. Rakeh Jain, DW-3, Sh. Vijay Kumar DW-4 and Sh. B.K. Gupta, DW-5.

7. By the judgment and decree impugned in this Appeal, the Trial Court answered issue No. 1 in favor of the Plaintiffs-Appellants and held that Sh. S.S. Gill, PW₁ was the authorized signatory of Smt. Sharda Devi Gill by virtue of the Special Power of Attorney (Ex PW₁/1) executed in his favor by her. Issue No. 2 was also held in favor of the Plaintiffs-Appellants. The Trial Court was of the opinion that the suit had been correctly valued at Rs. 4,00,000/-for the purposes of Court fees. The Trial Court however, in its judgment while dismissing the suit did not settle the question regarding the status of the Respondent in the suit premises and hence, correctness of the judgment and decree passed by the learned Additional District Judge has been questioned on law and fact by the Appellants in respect of issues No.3, 4, 5, 6, 7 and 8 which are based on the status of the Respondent in the suit premises.

8. Learned Counsel for the Appellants contended that the Respondent, in spite of residing in the suit premises for over 10 years, was unable to produce any evidence in support of the payment of rent. It was further contended that the Respondent has been unable to produce a single rent receipt, entry regarding the payment of rent in his tax returns, nor any bank statement to indicate that he ever paid the rent to Smt. Sharda Devi Gill. The Appellants further submitted that the Respondent cannot claim that the services of taking care of Smt. Sharda Devi Gill in lieu of right of occupation would not amount to receipt of rent, as otherwise, the entire purpose of rent law would be defeated. To support his argument, learned Counsel for the Appellants relied on *Ralhu Ram v. Than Singh* where the Court held as under:

Non-payment of rent negatives existence of relationship of landlord and tenant. This was so held in *Kanwar Ammar Ahmed Khan v. Union of India* :

The relationship of landlord and tenant comes into existence as the result of an agreement, express or implied. It may be implied from the acts and conduct of the parties which indicate that the landlord intended to divest himself of the possession of the premises and that the tenant intended to assume possession thereof. One of the most important circumstances from which this inference may be drawn is the payment of rent, for although rent is not an essential, it is a normal incident of tenancy, and the fact that a person in possession of the premises paid rent to the owner thereof indicates to an extent at least that the relationship of landlord and tenant exists between the parties. On the other hand the fact that no rent was paid would lead one to a contrary conclusion and negative the existence of such relationship.

9. Learned Counsel for the Appellants further argued that the deceased Smt. Sharda Devi Gill permitted the Respondent to stay in a portion of the suit premises marked red in site plan Ex.PW1/2 as a permissive occupant. The Respondent was not in exclusive possession of any portion of the suit premises and in fact the parties used a common kitchen and toilet till 1990. In the absence of Smt.Sharda Devi Gill, the Respondent raised unauthorized construction as shown green in Ex.PW1/2. Thereafter, Smt. Sharda Devi Gill directed the Respondent to vacate the suit premises.

10. Learned Counsel for the Appellants vehemently argued that the Trial Court has failed to appreciate that the Respondent has been unable to prove his tenancy in the suit premises. He argued that the two essential ingredients of tenancy being 'rent' and 'exclusive possession' have not been proved by the Respondent and hence, his status in the suit premises is that of a 'trespasser'. In support of his contention learned Counsel has placed reliance on Dipak Banerjee v. Lilabati Chakaraborty , wherein the Apex Court categorically held that in order to prove tenancy or sub-tenancy two ingredients have to be established, firstly the tenant must have exclusive right of possession or interest in the premises or part of the premises in question and secondly that right must be in lieu of payment of some compensation of rent.

11. Learned Counsel for the Appellants further submitted that the Respondent was not a stranger to the Appellants and he was inducted in the suit premises on the recommendation of Sh. Digvijay Singh, PW3. The Respondent was inducted as a licensee, in order that he takes care of Smt. Sharda Devi Gill in her old age and, had promised to vacate the premises when he was directed to do so.

12. Learned Counsel for the Appellants further submitted that the learned Trial Court failed to award damages in favor of the Appellants and against the Respondent. Although the Respondent had been using the suit premises illegally and in an unauthorised manner after his license had been revoked by the Appellants, the learned Trial Court did not award any mesne profits for use and occupation of the suit premises in favor of the Appellants and against the Respondent. Learned Counsel for the Appellants has drawn our attention to the evidence of Sh. S.S. Gill who is the son and Attorney of late Smt. Sharda Devi Gill. He has categorically stated before the Trial Court that they have claimed damages for the use and occupation of the premises @ Rs. 10,000/- per month and that the same may be awarded against the Respondent. Learned Counsel for the Appellants has also drawn our attention to the evidence of Sh. Digvijay Singh PW-3 who has categorically stated in his examination-in- chief that the market rent of the premises in 1996 was Rs. 10,000/- per month and he had given his own house on the 2nd floor to M/s. Jindle Polyester Ltd at a monthly rent of

Rs. 12,000/-. He had a written lease agreement with the said tenant. In his cross-examination, he has denied the suggestion that he had falsely deposed about the rent of Rs. 12,000/- per month.

13. Mr. V.B. Andley, learned senior counsel appearing for the Respondent, on the other hand, contended that the Respondent was inducted in the suit premise as a tenant of Smt. Sharda Devi Gill since March 1986 for a rent of Rs. 700 per month in respect of three rooms, kitchen, bathroom and a toilet along with the right of common use of the front open Courtyard and back yard of the suit premises. He further stated that he occupied the said premises on 16.03.1986 as a tenant and had been paying the rent in advance by the 6th, 7th, or 8th of each month.

14. Learned senior counsel contended that three sons of Smt. Sharda Devi Gill, i.e., Appellants No. 1, 2 and 3 did not like the idea of keeping the Respondent along with his family in the suit premises. He further submitted that it is only by reason of the fact that he was inducted in the suit premises as a tenant, the Appellants had an objection as there would be no other reason for Smt. Sharda Devi Gill's sons to object to the Respondent being inducted only as a person to look after her.

15. Learned senior counsel further argued that the Respondent was in exclusive possession of the said three rooms and had been locking the premises since its inception. It is argued that the Respondent was enrolled as voter from the suit premises and that he had a gas connection, two or three telephone lines and if the Respondent had been inducted in order to look after Smt. Sharda Devi Gill all these amenities would have been provided to the Respondent by Smt. Sharda Devi Gill. The Respondent also denied to have raised any illegal construction marked PQRS in Ex. PW-1/2. The Respondent further, in his cross-examination, denied that he came in contact with Smt. Sharda Devi Gill through Mr. S.K. Pahwa PW-2. He has stated that he was introduced to Smt. Sharda Devi Gill in the house of Appellant No. 2, through a broker.

16. It is argued on behalf of the Respondent that the Appellants were unable to prove that the Respondent was inducted as a licensee. The Respondent contended that though a formal document was absent, in such cases reliance would have to be placed on the intentions of the parties and the surrounding circumstances must be taken into account. To support his contention learned Counsel placed reliance in the case of M.N. Clubwala and Anr. v. Fida Hussain Saheb and Ors. . The Respondent has further contended that he is in exclusive possession of the suit premises having an interest therein and the conduct of the parties and the surrounding circumstances indicate that the intention of the parties was to create a tenancy and not a mere licensee.

17. We have heard the learned Counsel for the parties and perused the impugned judgment and record.

18. We have gone through the statement of Sh. S.S. Gill, PW-1 who has categorically deposed before the Trial Court that in 1986 his mother was living alone in the suit premises. He and his brother Dr. J.S. Gill were living separately from Smt. Sharda Devi Gill in Delhi while his second brother Sh. R.S. Gill has been living in England for the last 14 years. Sh. Digvijay Singh, PW-3 was a close family friend who was also living near the suit premises. Sh. Digvijay Singh brought the Defendant-Respondent to Smt. Sharda Devi Gill and told her that the Defendant was a very homely

and decent person and that he would live along with her in another room in the suit premises, and would be a support to her. The Defendant was introduced by Shri S.K. Pahwa to Sh. Digvijay Singh. Sh. S.K. Pahwa was an old friend of Digvijay Singh. When he visited his mother, Smt. Sharda Devi Gill told him about the induction of the Respondent- Defendant at the instance of Sh. Digvijay Singh into a room in the suit premises, as a help and support to her. He stated that his mother Smt. Sharda Devi Gill had not entered into any kind of an agreement with the Respondent- Defendant nor was there any monetary consideration to be paid by the Defendant-Respondent for staying in the suit premises. He has further deposed that his mother fell ill in 1990 and for the purposes of treatment she shifted to the house of his brother for three months i.e. from November 1990 to January, 1991. During the absence of Smt. Sharda Devi Gill from the suit premises, the Respondent Defendant added portion PQRS shown in black outlines on the site plan. When Smt. Sharda Devi Gill discovered this, she told the same to her sons. They were very upset and directed the Respondent-Defendant to vacate the house. Instead of vacating the house, the Respondent-Defendant filed a false suit against him, his mother and brothers charging them of forcibly trying to evict him from the suit premises.

19. We have also gone through the statement of Sh. S.K. Pahwa PW-2 who has deposed before the Trial Court, that he knew the Respondent-Defendant Sh. Rakesh Jain due to some business dealings. Sh. Rakesh Jain requested him to help him find some accommodation in Lajpat Nagar as he was having some problems with his father. Sh. Digvijay Singh had told him that the mother of his friend was an old lady and living alone and requested him to shift to the house of that lady, but he refused. He then introduced Sh. Rakesh Jain to Digvijay Singh and told him that Sh. Rakesh Jain was a nice person and would look after Smt. Sharda Devi Gill and Sh. Rakesh Jain also assured that he would vacate the suit premises whenever he was directed to do so. Sh. Rakesh Jain shifted to the suit premises in March, 1986.

20. We have also gone through the statement of PW-3 Sh. Digvijay Singh who has categorically deposed before the Trial Court that Smt. Sharda Devi Gill was above 70 years of age and had expressed her desire, for somebody to stay with her as a help as it would be good for her. He talked to Sh. S.K. Pahwa about the same, who introduced him to Sh. Rakesh Jain and told him that Sh. Rakesh Jain would be a good help to the Plaintiff as his wife was a housewife and that the Respondent-Defendant would take care of Smt. Sharda Devi Gill and help her.

21. There was no question of payment of rent but the Respondent- Defendant was to vacate the suit premises as and when asked to and, that he would look after Smt. Sharda Devi Gill. On these terms, Sh. Rakesh Jain was inducted into the house of the Plaintiff.

22. From the statement of all three witnesses examined on behalf of the Appellants-Plaintiffs, it has been proved on record that the Respondent' Defendant, Sh. Rakesh Jain was introduced to Smt. Sharda Devi Gill by Sh. S.K. Pahwa and Sh. Digvijay Singh, with a clear understanding that he would look after Smt. Sharda Devi Gill and that he would vacate the premises as and when he would be asked to do so. It has also been proved beyond reasonable doubt that the Respondent-Defendant was not inducted as a tenant in the suit premises but was inducted only as a licensee to look after the old lady who was in need of such help at the relevant time. It has also been proved on record that no

rent was to be paid by the Respondent-Defendant to Smt. Sharda Devi Gill for use and occupation of the suit premises by the Respondent-Defendant.

23. We have also gone through the statements of the witnesses examined by the Respondent-Defendant in this case. Sh. Rakesh Jain who is the Respondent herein, has deposed before the Trial Court that he met Smt. Sharda Devi Gill at D-II/49, Ansari Nagar where she had agreed to let out three rooms, kitchen, bathroom and toilet along with common use of back Courtyard and front Courtyard at a monthly rate of Rs. 700/- at ground floor K-1, Lajpat Nagar, New Delhi and it was given to him for residential-cum-commercial purpose. He occupied the suit premises on 16.3.1986. He made cash payments to the landlady and she did not give the receipt of any such payments made to him. In his cross-examination, he admitted that he had not named the broker who had introduced him with Smt. Sharda Devi Gill. He has denied the suggestion that there was no broker and, that he had made an entirely false statement. He has admitted that there was no written agreement entered into between him and Smt. Sharda Devi Gill. He has admitted that he had no rent receipt in respect of the suit premises. He has also admitted that there was no payment made by him to Smt. Sharda Devi Gill either by cross cheque or by self cheque. He has admitted that he had additional residential accommodation in East of Kailash. He has admitted that he had stated that damages for use and occupation of the suit premises was Rs. 2,000/- per month. He has denied the suggestion that he was inducted into the suit premises to take care of Smt. Sharda Devi Gill as a licensee. He has also admitted that he was an Income Tax assessed. He has admitted that Smt. Sharda Devi Gill had asked him to vacate the premises in 1991. He has admitted that he had filed Suit No. 604/1991 in which he had admitted that he did not give the name of any broker in his statement. He has denied the suggestion that there was no broker and that he had made an entirely false statement. He has also admitted that in Suit No. 604/1991 filed by him, he had stated that damages for use and occupation of that premises was Rs. 2,000/- per month while in the present case he has stated that the damages for use and occupation of the same premises were Rs. 1500/- per month.

24. We have also gone through the statement of Sh. Vijay Kumar DW- 4. He has admitted that the Respondent-Defendant had told him that he had purchased a three bed room accommodation at East of Kailash in Block A. He has further stated that he was not in a position to say if the premises at K-1, Lajpat Nagar, New Delhi was let out and would earn rent of Rs. 10,000/- per month. He has further admitted that the premises in East of Kailash was purchased by Mr. Rakesh Jain two years back.

25. Other witnesses examined by the Defendant are formal in nature.

26. The Respondent-Defendant has not produced a single witness to prove that he had taken the suit premises on rent from Smt. Sharda Devi Gill at a monthly rent of Rs. 700/-. No witness has come forward to state this fact before the Trial Court. Sh. Rakesh Jain who has himself deposed as DW-3 has categorically stated that there was no rent deed executed between him and Smt. Sharda Devi Gill. There is no oral or documentary evidence to prove payment of rent by the respondent except a self-serving and wholly uncorroborated assertion made by him in his own testimony to that effect. The respondent has, in our opinion, failed to establish the payment of rent to Smt. Sharda Devi Gill.

The payment of rent between the parties is a circumstance pointing towards existence of landlord-tenant relationship. On the other hand, the absence of payment of rent indicates the non-existence of such a relationship. This Court in the case of *Mitter Sain Jain v. Attar Sain Jain* 1995 (35) DRJ 262, has held as under:

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.

27. To the same effect is the decision of Allahabad High Court in *Turab v. Laxmi* , where the Court summed up the legal position in the following passage:

The possession of a property by a person without the payment of money and for the purpose of safety thereof, the possession not being unrestricted or uncontrolled would show that the person is a licensee and not a lessee.

28. The respondent has, in the instant case, admitted that he is an income-tax assessed but has not claimed any expense in the course of his assessment towards rent allegedly paid by him to Smt. Sharda Devi Gill @ Rs. 700/- per month less or more. He has further admitted that he maintains books of account but even in those books of accounts, he has nowhere claimed payment of Rs. 700/- per month as rent to Smt. Sharda Devi Gill in respect of the suit premises. The failure of the respondent to claim any deduction towards rent allegedly paid by him in the income-tax assessment proceedings as also his failure to record in his books of account the payment of any such rent assumes importance because of the case set up by the appellant that no rent was at any stage fixed between the parties or paid to her. It is difficult to appreciate as to why the respondent should not have shown the payment of rent in the books of his account if any such rent was actually being paid nor is it clear as to why the respondent failed to make a claim for deduction in the income-tax assessment proceedings especially when according to the respondent, the premises is being used by him for residential and commercial purposes both. As a matter of fact, a tenant to whom the landlady refuses to give a receipt for payment of rent would have taken care to make entries regarding such payments in his account books and claiming deduction in income-tax assessment proceedings. The respondents failure to do either one of these two things is a circumstance which lends considerable support to the case of the appellant that no payment of rent was ever made or had to be made by him because the respondent was occupying the premises only as a licensee or not

as a tenant.

29. There is yet another circumstance which supports the version of the appellant that the respondent was let into possession of the premises as a licensee. While the appellant has given her version and supported the same by examining the relevant witnesses, who have explained the circumstances in which the respondent was brought into the property, the respondent's version is that he was inducted into the premises as a tenant with the help of one Shri. Batra, a broker. Significantly, the respondent has not examined the said Shri Batra as a witness nor offered any explanation for his failure to do so. The testimony of Shri Batra could alone support the respondent's version whether he was brought into the premises as a tenant as alleged by him in absence of any documentary or other evidence to support that version. We repeatedly asked Mr. Andley, as to whether the respondent had any explanation to offer for his failure to examine Shri Batra as a witness, we were unable to get any such explanation. The legal position on the subject is fairly well settled by the decisions of the Supreme Court. We may in this regard refer to the decision of the Supreme Court in *Gopal Krishnaji Ketkar v. Mohamed Haji Latif and Ors.*, where the court has declared that a party who relies upon a certain state of affairs cannot withhold the same from the Court and that rely upon the abstract doctrine of onus of proof. The court observed:

Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof.

30. It is also useful to refer to the observation made by the Privy Council in *Murugesam Pillai v. Gnana Sambandha Pandara Sannadhi* AIR 1917 PC 6, where the Court observed:

A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough? they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordship's opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition.

31. To the same effect are the decisions of this Court in *Bansidhar Ganga Pershad Agency v. Chanan Lal and Anr.* 2nd (1975) I Delhi 45 and *Hari Kumar v. Sat Narain Mehra* 1996 (36) DRJ 96.

32. In the light of the above legal position, we have no manner of doubt that the withholding of the best evidence by the respondents, namely, the deposition of Shri Batra, who has allegedly brokered the deal regarding alleged creation of the tenancy must give rise to an adverse inference that in case the said witness had been produced by the respondents, his testimony would have gone against him. Suffice it to say that the respondent has failed to establish his version that he was occupying the suit premises as a tenant. The appellants' version, on the other hand, is not only supported by the

testimony of the witnesses examined at the trial but reasonably probable which we accept.

33. That brings us into the question of payment of damages for unauthorised use and occupation of the premises beyond the termination of the license. PW-2 Sh. S.S. Gill has also categorically stated before the Court that the damages have been claimed by Smt. Sharda Devi Gill for the suit premises @ Rs. 10,000/- per month. While PW-3, Sh. Digvijay Singh has deposed before the Court that the market rent of the premises in 1996 was Rs. 10,000/- per month and that he had given his own house on 2nd floor to M/s. Jindle Polyester Ltd at a monthly rent of Rs. 12,000/-. and he had got written lease agreement. In the cross- examination also, he has denied the suggestion that he is deposing falsely about the rent of Rs. 12,000/- per month.

34. In the result, the Appeal is allowed with costs. The judgment and decree passed by the learned Trial Court dated 18.12.2000 is set aside. A decree for recovery of possession is passed in favor of the Appellants and against the Respondent in respect of the suit premises bearing No. K-1, Lajpat Nagar, New Delhi. The Respondent-Defendant is directed to hand over peaceful and vacant possession of the suit premises to the Appellants and pay damages and mesne profits for use and occupation of the suit premises @ Rs. 10,000 per month from the date of institution of the Suit till the vacation of the suit premises. In case the respondent fails to vacate the premises and pay the amount of damages as aforesaid within a period of three months from today, the amount payable by the respondent shall start earning interest @ 15% per annum from the date of this order till actual vacation of the premises and/or payment of the amount, whichever is later. The appellant is also held entitled to costs assessed at Rs. 10,000/-.