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

% *Date of decision: July 07, 2015*

\+ **RFA(OS) 63/2015**

MUKESH KUMAR GUPTA ..... Appellant

Represented by: Mr.Vijay Sansawal and Mr.Amitesh Gaurav, Advocates.

versus

SURENDRA KUMAR GUPTA ..... Respondent

Represented by: None.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

CM Nos.11502/2015 (additional documents) & 11503/2015 (Directions)

1. By these applications under Order XLI Rule 27 CPC and Order XI Rule 12 and 14 read with Section 151 CPC Mukesh Kumar Gupta, the Appellant inter alia prays that he was granted No Objection Certificate for installation of separate electricity connection and despite due diligence he has now been able to find those documents and that he is also in possession of the rent receipts deposited by him to the Rent Controller, South and they be permitted to be placed on record.

2. In CM No.11503/2015 he further prays that the Respondent be directed to produce all the documents relating to the sanction plan of the suit property.

3. The fact that the electricity meter was in the name of the Appellant and that Mukesh Kumar had deposited the rent after notice was given by the

Respondent have been duly noted by the learned Single Judge and thus no case is made out for leading additional evidence or directing the Respondent Surendra Kumar Gupta for discovery of the documents.

4. Applications are dismissed as such.

RFA(OS) 63/2015

1. The appeal is listed for preliminary hearing for admission. The record of the suit in which the impugned decree has been passed has been sent along with the appeal file by the Registry of this Court as per practice directions issued. We have heard learned counsel for the Appellant without fixing a date for hearing of the appeal as contemplated by Rule 11 of Order XLI of the Code of Civil Procedure because learned counsel for the Appellant desires that the Appellant be heard today itself.

2. The Respondent Surendra Kumar Gupta filed a suit against his brother Mukesh Kumar Gupta, the Appellant herein seeking recovery of possession, mesne profit/damages and injunction.

3. In the plaint Surendra Kumar Gupta pleaded that he had bought half undivided share in the suit property, that is, House No.E-262, Greater Kailash, Part-II, New Delhi (in short 'the suit property') from Smt.Kamla Kundra vide sale deed dated December 12, 1974 and the property was his self acquired property. The other half of the undivided share in the 250 sq.yards suit property which was built upto 1½ storey was bought by his half brother Devinder Nath Gupta vide separate Sale Deed dated December 18, 1974 from Smt.Kamla Kundra. Both the sale deeds were duly registered. Surendra Kumar Gupta and his brother Devinder Nath Gupta entered into a registered Partition Deed dated January 18, 1980 whereby Devinder Nath Gupta became the absolute owner of the ground floor of the suit property

and Surendra Kumar Gupta, absolute owner of the first floor and the terrace. Since the ground floor was valued at higher rate Devinder Nath Gupta paid a sum of ₹39,300/- to Surendra Kumar Gupta.

4. When the suit property was purchased, the first floor had only two rooms, toilet, kitchen and a lounge. Surendra Kumar Gupta completed the construction on the first floor and also constructed two rooms set on the second floor at his own expenditure in the year 1988 and later in the year 1999 he completed the construction of the second floor and a Barsati floor on the third floor. After the construction of the second floor and the Barsati floor in the year 1999 Mukesh Kumar, the real brother of Surendra Kumar Gupta, who was living at Naya Bans, Khari Baoli sought his permission to reside on the second floor at the suit property since the accommodation at Naya Bans, Khari Baoli was not suitable. Thus Surendra Kumar permitted Mukesh Kumar and his family to occupy the second floor as a licensee in view of the relationship. On the request of Mukesh Kumar Gupta, Surendra Kumar permitted him to obtain a separate electricity meter. However, since Surendra Kumar needed the accommodation he sent a notice dated February 23, 2010 revoking the license of Mukesh Kumar Gupta asking him to vacate the second floor of the suit property and on failure to do so to pay damages @₹50,000/- per month. Since Mukesh Kumar Gupta neither vacated the premises nor paid the damages the suit was instituted.

5. In the written statement defence taken by Mukesh Kumar Gupta was that the suit property was purchased from the joint family funds by the father of the parties and secondly that Mukesh Kumar Gupta was a tenant in his own right in the suit property and not a licensee. Mukesh Kumar pleaded that he was staying in the suit property since 1985 being the younger brother

of Surendra Kumar and also his partner in the firm M/s Mega Enterprises. He stated that he was paying a rent of ₹1,000/- per month.

6. The following issues were settled in the suit on December 09, 2010:

> *"(i) Whether the defendant is a tenant in the suit property as alleged in the written statement? OPD*
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> *(ii) Whether the plaintiff is entitled to the decree of possession in respect of the second floor of E-262, Greater Kailash-II, New Delhi? OPP*
>
> *(iii) Whether the plaintiff is entitled to any mesne profits/damages from the defendant? If so, at what rate and for what period? OPP*
>
> *(iv) Whether the plaintiff is entitled to the decree of injunction? OPP*
>
> *(v) Relief."*

7. The learned Single Judge vide the impugned judgment held that Mukesh Kumar has not been able to prove that he was a tenant on the second floor of the suit property w.e.f 1985 at a monthly rent of ₹1,500/- which he was paying regularly. The rent was deposited by Mukesh Kumar Gupta with the Additional Rent Controller under Section 27 of the Delhi Rent Control Act, 1958 (in short 'the DRC Act') only after the legal notice dated February 23, 2010 was issued by Surendra Kumar Gupta.

8. During his cross-examination Mukesh Kumar Gupta admitted that his ration card at the suit property was issued to him in the year 1999 and the election card in the year 2004. Even in the passport renewed in the year 1999 the residential address was of Naya Bans. Mukesh Kumar Gupta further admitted that half undivided share in the suit property was purchased

in the name of Surendra Kumar and that thereafter a Partition Deed was entered into between the Devinder Nath Gupta and Surendra Kumar Gupta in respect of the suit property. Surendra Kumar Gupta, the Respondent/Plaintiff to prove his case had proved the duly registered Sale Deed dated December 18, 1974 as Ex.PW-1/1, Partition Deed dated February 29, 1980 Ex.PW-1/4, House Tax Assessment Order in the name of Surendra Kumar Ex.PW-1/3. He also proved the Assessment Orders Ex.PW-1/6 to Ex.PW-1/12 to show that the second floor and the Barsati floor were constructed from his own expense in the year 1999. Surendra Kumar Gupta denied that there was any joint family business though he admitted that both Surendra Kumar Gupta and Mukesh Kumar Gupta were carrying on partnership business. In view of this evidence on record and Mukesh Kumar not being able to substantiate his defence that the suit property was purchased from the joint family funds and that he was tenant in his own rights it was held that Mukesh Kumar was only a licensee in the suit property and not a tenant and thus Surendra Kumar was entitled to a decree of possession. Noting the price of immovable property increasing steeply the learned Single Judge fixed ₹20,000/- as rental value of the property as mesne profit from the date of termination of the license, that is, March 12, 2010 upto the date of decree and thus awarded ₹9.40 lakhs in favour of Surendra Kumar Gupta and against Mukesh Kumar Gupta with future damages at the same rate till he vacates the suit property and that Surendra Kumar Gupta would be entitled to interest at the rate of 9% per annum. Thus the present appeal against the impugned judgment and decree dated February 13, 2015.

9. Learned counsel for the Appellant refers to the Partnership Deed

between the two brothers Ex.DW-1/P4 which notices in Clause-12 that Premises No.1137-A/1138, Chandni Chowk, Delhi-110006 which was in the absolute ownership of Surendra Kumar Gupta was to be used for carrying on partnership business during continuation thereof subject to payment of nominal/token rent to Surendra Kumar. It was further agreed that at the time of dissolution of the partnership business or winding thereof for any reason whatsoever the said tenancy rights of the firm will come to an end and Surendra Kumar Gupta will be free to use the same in the manner as he deems fit without any obstruction from the other partners and the same will remain in his possession being the owner thereof.

10. Referring to the decision reported as 1999 (4) SCC 545 *Delta International Ltd.vs. Shyam Sundar Ganeriwalla and another* it is contended that in the absence of a written document and when somebody is in exclusive possession with no special evidence how he got in, the intention is to be gathered from the other evidence which may be available on record, and in such cases exclusive possession of the property would be the most relevant circumstance to arrive at the conclusion that the intention of the parties was to create a lease. Thus in the absence of any lease deed between the parties and on the basis of the partnership deed as noted above both the properties which was being used for business purpose and also the residential purpose were on lease with Mukesh Kumar.

11. Learned counsel for the Appellant has also tried to assert from the Assessment Order that Barsati floor had been constructed in the year 1988 and thus he started residing in the premises immediately thereafter. As noted above in the written statement the stand of Mukesh Kumar is that he has been residing in the property since the year 1985 which fact is belied by

his own documents, that is, ration card of Mukesh Kumar at the address of the suit property being made in the year 1999, the telephone being installed in the year 1999. Further even in the Partnership Deed executed in September 1992 his address is of Naya Bans. The passport renewed sometime in the year 1990 also reflected the address of Naya Bans which all lead to the inference that Mukesh Kumar occupied the suit property only in the year 1999 after Surendra Kumar constructed the second floor and rooms on the third floor which then became the Barsati floor.

12. The contention of learned counsel for Mukesh Kumar relying upon the Assessment Order that Surendra Kumar added first floor and extended Barsati floor in the year 1988 ignores the fact that till the year 1988 only two rooms were constructed on the first floor and thus only after completion of the first floor, two rooms were added on the terrace as Barsati floor. However, when in the year 1999 the earlier Barsati floor was extended and it became the second floor. Barsati floor was shifted to the third floor and only thereafter Surendra Kumar permitted Mukesh Kumar to reside in the property as a licensee. No rent receipts have been produced prior to the notice of revocation of license dated February 23, 2010 and even before this Court vide the applications as noted above only the receipts of the rent deposited before the learned Additional Rent Controller under Section 27 of the DRC Act are sought to be produced.

13. Indubitably, as held by Supreme Court in *Delta International* (supra) to find out whether the document creates lease or license, the real test is to find out the intention of the parties. There is no written document in regard to the suit property. The only written document is Partnership Deed which states about the ownership of Surendra Kumar in the premises No.1137-

A/1138, Chandni Chowk in which the partnership business was to be continued and on dissolution of the partnership business Surendra Kumar being the owner of the same was free to use the same in the manner as he deem fit. The partnership had no clause relating to the suit property, that is, E-262, Greater Kailash, Part-II, New Delhi and the intention to create tenancy for the premises at Chandni Chowk for the partnership business cannot be attributed to have created a lease deed in respect of the suit property as well.

14. In view of the facts noted above we find no merit in the appeal, the same is dismissed in limine.

CM No.11501/2015 (Stay)

Application is dismissed as infructuous.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

JULY 07, 2015
'vn'