

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : DELHI RENT CONTROL ACT, 1958

RSA Nos.301/2005 & 302/2005

DATE OF DECISION : 30th January, 2014

RSA 301/2005

C.D.JOSEPH

.....Appellant

Through: Ms. Suman Kapoor, Advocate.

VERSUS

SMT. SARASWATI DEVI & ANR.

..... Respondent

**Through: Mr. Harish Malhotra, Sr. Adv. with Mr. Rajender Aggarwal,
Advocate.**

RSA 302/2005

SURINDER KUMAR JAIN & ORS.

.....Appellants

Through: Ms. Suman Kapoor, Advocate.

VERSUS

RAJ KUMAR

..... Respondent

**Through: Mr. Harish Malhotra, Sr. Adv. with Mr. Rajender Aggarwal,
Advocate.**

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

VALMIKI J. MEHTA, J (ORAL)

1. This regular second appeal is filed against the impugned judgment of the first appellate court dated 2.7.2005. The first appellate court by the impugned judgment allowed the two appeals which were filed by the respondent no.1 herein, and who is also the respondent no.1 in the other connected appeal being RSA No. 302/2005. By the self-same impugned

judgment appellate court dismissed the cross-objections filed by the present appellants-plaintiffs.

2. Dispute in the present case is as to whether the appellants who were admittedly the tenants in two shop nos.16, Lady Harding Road, New Delhi and 18, Lady Harding Road New Delhi, besides having tenancy rights in the shops, do they have tenancy rights in a passage, staircase and the roof over the shops which are themselves situated on the ground floor. The first appellate court has given the following conclusions to accept the appeals of the respondent no.1 herein in both the appeals and who were the main contesting defendants in the trial court. These main contesting defendants are the admitted owners of the suit property having purchased the property by means of sale deeds proved on record as Ex.PW7/6 and Ex.PW7/7. These conclusions are as under:-

(i) If the appellants-plaintiffs want to assert that they have tenancy rights not only in the shops of which they are tenants, but also to a passage, connecting staircase and the roof over the shops which is accessed by use of the passage and staircase, onus to establish that was upon the appellants-plaintiffs, and which they fail to discharge because there is no rent deed to show that tenancy of the appellants-plaintiffs besides the shop portions also included the passage, staircase and the terrace/roof.

(ii) No rent receipts were filed and proved by the appellants-plaintiffs to show that the same contained the extent of tenancy as including besides the shops, the passage; connecting staircase and the roof of the shop. PW-2 Sh. Mam Chand, Rent Collector on behalf of the erstwhile owners though stated that roof was included in the tenancy, this was only an oral statement and was rightly disbelieved especially for the reason that the said Sh. Mam Chand, Rent Controller said that extent of tenancy was contained in the counterfoils of the rent receipts but those counterfoils of the rent receipts were neither filed nor proved.

It bears mention that there is no reason why the appellants would not have got included in the rent receipts the passage, staircase and roof if really these portions were within the tenanted portion. And, we are talking of receipts not for a few months or years, but those issued for over 30-40 years. Further, in the area of Old Delhi, where every square feet of property is valuable and tenancies have protection of Delhi Rent Control Act, 1958 it is not believable that if tenancy portion included areas of the passage; staircase and roof, and which surely is a huge area, these portions would not have been got shown in the rent receipts as being included in the tenancy area.

Appellants were commercial people and very much know the value of the tenancy of its areas, more so, in Old Delhi, and thus if really the tenancy portion would have included passage; staircase and terrace, appellants-plaintiffs would have definitely got them included in the rent receipts or taken from the landlords some or the other document to show that such area was included in the tenancy premises.

(iii) The sale deeds executed in favour of the respondent no.1 herein in the appeals by the erstwhile owners do not show that the appellants-plaintiffs are tenants besides in the shop premises, also tenants of the passage, staircase and the roof over the terrace. To this aspect I may add that there was no reason for the erstwhile owners to wrongly mention the extent of the tenancy premises in the sale deeds because there was no ulterior motive which has been established in this regard for mentioning only shops on rent in the sale deeds.

(iv) An important aspect was that appellants-plaintiffs had earlier filed a suit against the respondent no.1, and plaint of which earlier suit was exhibited before the trial court as DW1/P2. As per this suit plaint filed by the appellants-plaintiffs seeking cancellation of the sale deeds in favour of respondent no.1 in these appeals appellants/plaintiffs mentioned the extent of the tenancy premises only as the shops, and in that earlier suit plaint there is not even a whisper that the appellants-plaintiffs besides being tenants of the shop are also tenants of the passage, staircase and the roof over the shops.

(v) The appellants/plaintiffs cannot claim easementary rights without such factual aspects first being pleaded, issue thereupon being framed and evidence being led. I may note that entitlement to easement is only if in terms of Section 15 of the Easement Act, 1882 rights of easement are enjoyed for as long as 20 years. Importantly, an entitlement of tenancy rights are wholly at variance and destructive of the claim in the same portion for easementary rights because the claim of tenancy and easementary rights cannot stand side by side. The fact that easementary right is pleaded, in my opinion, itself destroys the case as put up by the appellants-plaintiffs that they had tenancy rights in the passage, staircase and the roof.

3. Counsel for the appellants very strenuously and repeatedly argued before this Court that the admitted position which emerges from record is that appellants-plaintiffs were using the passage, staircase and the roof since over 40 years, and therefore, the tenancy rights in this portion should be held in favour of the appellants-plaintiffs. I do not agree. Mere user of a portion will not necessarily lead to entitlement of important rights such as tenancy

rights in the portions. A landlord for various reasons may not object to use of certain portions, more so in the facts of the present case, where the shops were the only constructions on the ground floor and there was no construction above and therefore, appellants could have used the passage, staircase and the roof for opening of their goods packets as is their stand, however, first appellate court rightly observes that valuable rights in an immovable property in favour of the owners cannot be allowed to be got destroyed merely because evidence is led of use of certain portions of the appellants-plaintiffs. I also agree that valuable rights in an immovable property, more so when such rights stop the entitlement of the owner to construct all floors above the ground floor, cannot be destroyed once appellants-plaintiffs failed to discharge the onus that they had tenancy not only of the shops but also of the roof over the shops. To this aspect, I must at the cost of repetition state that in the earlier plaint filed by the appellants-plaintiffs/tenants no case was set up by them that they were tenants besides of the shops also of passage, staircase and the roof.

4. In view of the above, no substantial question of law arises in this appeal to be entertained under Section 100 CPC, and therefore the appeals are dismissed, leaving the parties to bear their own costs.

JANUARY 30, 2014

Sd/-
VALMIKI J. MEHTA, J.