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

+ REGULAR SECOND APPEAL NO.148/2003

% Date of Decision : October 24, 2008

M/s. Fridge Home & Ors. .....Appellants

Through : Mr. A. P. Aggarwal, Advocate

Versus

MCD & Anr. .....Respondents

Through : NEMO

CORAM:

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

1. Whether Reporters of local papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not ? No
3. Whether the judgment should be reported in the Digest ? No

SUDERSHAN KUMAR MISRA, J :

1. This regular second appeal under Section 100 of the Code of Civil Procedure, 1908 impugns the judgment of the first Appellate Court passed on 13.5.2003. It arises in the following circumstances :-

2. It is the appellants' case that the first appellant is a partnership firm called M/s. Fridge Home. The second and the third appellants are partners in that firm. On 5.4.1981, the second respondent, Smt. Harbans Kaur, inducted the appellants as tenants in the suit premises, which is shop No.2 located in 1/1, Main Bazar, Kailash Nagar, New Delhi. In order to run

their business from the said shop, the appellants obtained a licence from the Municipal Corporation of Delhi on 18.1.1982. For this purpose, they had also furnished a site plan of the said shop to the Municipal Corporation of Delhi.

3. It is also the case of the appellants that the second respondent, Smt. Harbans Kaur, had originally let out the adjoining shop No.1 to one Smt. Parvati, and that she had obtained a decree of eviction and possession in respect thereof against Smt. Parvati on 12.2.1982. The appellants then contend that on 15.11.1982, the third appellant, Shri Paramjit Singh, was inducted by Smt. Harbans Kaur as a tenant in that shop. From there, Shri Paramjit Singh claims to be running his own business, called M/s. Fridge Air. Smt. Harbans Kaur had also instituted proceedings to evict Shri Paramjit Singh from that shop. In defence to that suit, it was, inter alia, contended that the aforesaid decree dated 12.2.1982 obtained by Smt. Harbans Kaur against her erstwhile tenant, Smt. Parvati, pertaining to shop No.1 is a nullity because the tenancy of Smt. Parvati was protected under the Delhi Rent Control Act. In the instant suit, the appellants contended that since respondent No.2, i.e., Smt. Harbans Kaur, was proceeding to execute the decree obtained by her against Smt. Parvati to recover possession of shop No.1, they apprehended substantial damage to the adjoining shop No.2, i.e., the suit property. They also apprehended that by the execution of the decree for possession of shop No.1, they may also be dispossessed from the suit property, i.e., shop No.2 and consequently, they moved a suit

for injunction praying that the second respondent be restrained from dispossessing the appellants from shop No.2 or any part thereof since they are in lawful possession of the same. It was contended that both shop No.1 and shop No.2 were different and were under the tenancy of different persons, and therefore had nothing to do with each other. They also stated that they had lost the lease deed and other relevant documents of the suit property, i.e., shop No.2, in the year 1984.

4. The suit was resisted, inter alia, on the ground that the first appellant was not a registered firm and was, therefore, not competent to file the suit. It was also alleged that this suit was filed by the appellants in collusion with Smt. Parvati, who was the erstwhile tenant of shop No.1, and that in collusion with Smt. Parvati, the appellants have demolished a portion of the wall in between the two shops. The owner, i.e., the second respondent herein, also disputed the site plan of shop No.2, i.e., the suit property, annexed by the appellants to their suit. The said respondent, however, admitted that shop No.2 was let out to appellants No.2 and 3 on 5.4.1991 through a rent note. She also alleged that the appellant had prevented her from executing the decree of possession granted in her favour with regard to shop No.1.

5. Before this court, counsel for the appellants confined his case to one aspect only. He submits that the statement made by DW-1, Shri Beant Singh, who was the General Attorney and husband of the defendant, to the effect that, "the shop is in the same position which was at the time when it was in occupation

of Parvati Devi", amounts to unequivocal admission on the part of the defendant that the size and dimensions of the adjoining shop No.1 remained unaltered and was the same as it was at the time Smt. Parvati was in occupation of that shop. He submits that in view of this admission, concurrent findings of both the courts below to the effect that since shops No.1 and 2 are admittedly in possession of real brothers, there is a strong probability of breaking and changing the shape of the common wall separating the two shops, because of which permanent injunction sought by the appellants deserves to be declined, is unsupportable. He submits that under the circumstances, the impugned decision has given rise to a substantial question as to whether the courts below were justified in ignoring the aforesaid admission made by DW-1. It is contended that this admission established the case of the appellants/plaintiffs on all fours and that since it was made by the husband of the owner of the premises, who was arrayed as defendant No.2 in the suit, the permanent injunction sought by the appellants could not have been denied to them.

6. I am afraid and do not agree with the contentions of the learned counsel for the appellants in this regard. To my mind, no substantial question of law arises in the facts and circumstances of the instant case. The statement of DW-1, Shri Beant Singh, relied upon by counsel for the appellants, needs to be read as a whole along with all the other facts and circumstances that have come on record. Even otherwise, I do not think that the statement is of much help to the appellants.

Counsel for the appellants submits that by saying that the said, "shop is in the same position which was at the time when it was in occupation of Parvati Devi", the witness meant that the size of shop No.1 remained unaltered and that it was of the same size throughout. However, the record shows that this statement has been recorded immediately after the suggestion that there was no removal of the common wall was denied by that witness. The record does not show this statement to have been made in response to any separate, specific suggestion. Furthermore, in his examination-in-chief, this witness has made a categorical statement that, "in the meantime wall between the shop No.1 and 2 which was common wall was demolished by the plaintiff, and hence the separate entity of shop No.1 was distorted." It is, therefore, obvious that in his examination-in-chief, the witness had categorically and clearly stated that the size of the shop had been changed by the appellant. If the appellants wanted to rebut this, they could have simply suggested to that witness in cross examination that the size of shop No.1 had remained unchanged, and that consequently, the size of shop no.2, which was the suit property and in respect of which permanent injunction against dispossession was sought, had also remained unaltered. Unfortunately, this was not done for reasons best known to the appellants. Nothing has been elucidated in the cross-examination to suggest that the size of the shop in question remained the same. A mere isolated statement that, "the shop was in the same position", which is not in response to any specific suggestion, is not the same thing and cannot,

under the circumstances, be taken to mean that the size of the shop in question remained unchanged. The words "position" and "size" are not synonyms. They are entirely different words with distinct meanings, and looked at in the light of the statement of the same witness in his examination-in-chief that the appellants had distorted the separate entity of shop No.1 by demolishing the common wall between the two shops, his statement in cross-examination that the shop, "was in the same position", cannot be taken as an admission that the size of the suit property had remained unchanged. Looking to the totality of circumstances and the evidence as a whole, including the examination-in-chief as well as the immediately preceding statements in his cross examination, to my mind, this line in the cross examination is quite vague and it cannot, without anything more, turn the whole case around. Furthermore, physical size of the premises is a straight forward question of fact. It was always open to the plaintiffs/appellants to have proved this fact by direct evidence of the same but they have failed to do so. The learned Addl. District Judge has carefully examined this question. He finds that even the shape and size of shop No.2, as shown in the site plan furnished by the appellants to the Municipal Corporation of Delhi, clearly shows that the partition wall between the two shops has been tampered with and that the size and shape of shop no.2, as indicated on that map, is unusual and rarely seen. He finds that whilst the size of shop No.1 is now hardly 2' x 4', the size of shops No.2, 3 and 4 is much bigger than the size of shop No.1.

Furthermore, the learned Addl. District Judge has also taken note of the fact that the third appellant was also disbelieved with regard to the manner in which he claimed to have come into possession of shop No.1 in the other suit he had filed concerning that shop. According to the learned Addl. District Judge, this also reflected on the conduct of the appellants, meaning thereby, that looking to the totality of the circumstances, he did not consider their conduct above board. He also finds it unusual that both the brothers are running similar business from adjoining shops and that too by similar sounding names, i.e., "Fridge Air" and, "Fridge Home". Furthermore, on the one hand, appellant No.3 claims to be a partner of the appellant firm Fridge Home, along with his brother, i.e., appellant No.2, which is carrying on its business in shop No.2; at the same time, he also claims to be running an independent proprietorship from shop No.1 and is trying to base his possession of shop No.1 on that ground. It is also noteworthy that the appellants failed to prove the original site plan filed before the Municipal Corporation of Delhi for obtaining a licence for shop No.2. Only a document purporting to be a copy thereof was filed by the appellants. Even this did not bear any seal of the office of the Municipal Corporation of Delhi. Since the appellants had claimed that they had filed the requisite plan with the Municipal Corporation of Delhi for obtaining their licence, nothing prevented them from summoning the records of the Corporation to prove this fact. The Civil Judge has also noted that Smt. Harbans Kaur had

instituted a suit against Smt. Parvati on 23.9.1980, i.e., before the instant suit came to be filed. Along with that suit, Smt. Harbans Kaur also filed a site plan of shop No.1. Since that suit was for recovery of shop No.1, there could be no reason for Smt. Harbans Kaur to file a wrong site plan and get her own suit defeated. Consequently, the learned Civil Judge has relied on that site plan as denoting the correct position of shop No.1 and the suit property, i.e., shop No.2 since they abut each other with a common wall in between. He has also found that the plan filed by the appellants in the instant suit denotes a shape which is improbable. To my mind, the approach of the Civil Judge in this regard is unexceptionable.

7. It is also an admitted fact that on the site, there were four shops and now only three shops are left. It is also quite clear that shops No.1 and 2 have been merged by removal of the common wall between the two. In my view, the decision of the learned Addl. District Judge in upholding the judgment of the Trial Court is well reasoned and comprehensive. The conclusion reached by the courts below is plausible and is based on cogent evidence. Under the circumstances, to my mind, no substantial question of law arises in this case. The appeal is, therefore, dismissed.

Sudershan Kumar Misra, J.

October 24, 2008
rs/OPN