

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

+ RFA NO. 179 OF 2008

% Date of Decision: 7th September, 2009

KAVITA GAMBHIR Appellant
! Through: Mr. Kirti Uppal, Advocate.

Versus

\$ **HARI CHAND GAMBHIR & ANR.** ... Respondents
! Through : Mr. Sanjeev Sindhvani,
Advocate.

CORAM:

* **HON'BLE MR. JUSTICE P.K.BHASIN**

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

JUDGMENT

P.K.BHASIN, J:

The present appeal is filed by an unsuccessful defendant in a suit for possession and mesne profits filed by the two respondents herein

in respect of House no. 220, Pocket-7, Block-C, Sector-8, Rohini, Delhi- (hereinafter referred to as 'the suit property') for setting aside the judgment and decree dated 27th March 2008 passed by the Additional District Judge whereby she has been directed to vacate the first floor of the suit property and also to pay mesne profits @ Rs.3250/- p.m.

2. The relevant facts as culled out from the pleadings and evidence of the parties, documents on record, as well as the submissions made before this Court by the counsel for the parties, may first be noticed. The elder son of the respondents, who shall hereinafter be referred to as 'the plaintiffs', got married to the appellant, who shall hereinafter be referred to as 'the defendant', on 4th July 1995. The 'doli' of the defendant after her marriage was brought to the house of Gambhirs in Rohini where at that time the plaintiffs and their two unmarried sons were already living as a joint family. As per the case of the plaintiffs from the day the defendant got married to their son Anil Gambhir they started living in one room

set on the first floor portion and they themselves were occupying the one room set on the ground floor while their younger son after his marriage living in the one room which was there on the second floor with his wife. After some years of their marriage the relations between the defendant and her in-laws including her husband started getting strained and became so bad that the plaintiffs who were living on the ground floor and their younger son and his wife who had been occupying the second floor had to shift to Gurgaon. Defendant's husband also left that house and started living separately in some house in NOIDA leaving behind his wife and two children in the Rohini house. According to the plaintiffs, the defendant had no legal right to stay in the suit property which was their exclusive property having been acquired from DDA by plaintiff no.1, Hari Chand Gambhir from his own funds and constructed also from his own money and the loan taken by him from his employer and that it was only out of love for his wife that he had got her name also included in the perpetual lease deed executed by DDA. It was further pleaded that the defendant in their absence took possession of the ground

floor and second floors also, taking advantage of their having shifted to Gurgaon. Since the plaintiffs did not want their daughter-in-law to stay any more in their house they served a notice dated 27/10/04 upon the defendant to vacate the suit property by 30/11/04 but she did not do that. Hence, the suit was filed by the plaintiffs on 11/01/05 against the defendant for getting back the possession of the suit property from her. Since her occupation of the entire suit property was claimed to be unauthorised after she had failed to surrender the possession, the plaintiffs also claimed mesne profits @ Rs.15,000/- p.m. The plaint was valued for the purposes of court fees and jurisdiction at Rs.12 lacs being the value of the suit property.

3. The suit was contested by the defendant. She claimed that the suit had been filed by her in-laws to force her and their own grandchildren to live the life as destitutes and roofless. Regarding the claim of the plaintiffs that they were the exclusive owners of the suit property her stand was that the suit property belonged to an Hindu Undivided Family(HUF) and her husband being one of the members

of that HUF, she and her children had a right to reside in the property in their occupation. That property in any case was alleged to be her matrimonial home also and for that reason as well she could not be asked to move out from there or to pay any money for residing there. She denied the allegation that she had unauthorisedly occupied the ground and second floors also. She claimed that the ground floor had been locked by the plaintiffs themselves and as far as second floor is concerned she stated that since entry to that floor was through the first floor portion, she was going to the second floor only to keep that portion clean.

4. In the replication the plaintiffs while reiterating their case set out in the plaint pleaded that even the children born out of the wedlock between their son, Anil Gambhir and the defendant had no right to remain in the suit property.

5. The trial court framed the following issues for its decision:-

1. Whether the plaintiffs are only titular owners of the suit property? OPD
2. Whether the suit property is part of the joint family properties possessed and owned by hindu undivided family? OPD
3. Whether the plaintiff is entitled to a decree of possession as prayed for? OPP
4. Whether the plaintiff is entitled to a decree of mesne profits in the sum of Rs. 15,000/- per month from 01.12.2004 till the date of handing over the peaceful and vacant possession as prayed for? OPP
5. Relief.

6. The plaintiff no.1 had claimed in his evidence that he, alongwith his wife had acquired the land, from DDA vide perpetual lease deed dated 19/12/1989 (Ex.PW-1/9) and that he had taken a loan of Rs.1,47,250/- in the year 1990 for the construction of the house. He placed on record a certificate dated 13/12/04, Ex.PW-1/3, from his employer to the effect that in the year 1990 he had been given a loan of Rs.1,47,250/- for the construction of the house in Rohini and that the loan had been recovered back from his salary. The learned trial Court after considering the evidence adduced from both

the sides came to the conclusion that the suit property was the self-acquired property of the plaintiffs and not an HUF property. For arriving at this conclusion the learned trial Judge relied upon the perpetual lease deed dated 19/12/89 in respect of the plot of land over which the suit property was constructed. That lease deed, Ex.PW-1/9, was in the joint names of the plaintiffs and it shows that the plaintiffs had been given the land on perpetual lease for a sum of Rs.7200/-. The Court also relied upon the admission made by the defendant regarding the ownership of the plaintiffs in respect of the suit property in a civil suit for injunction which she had filed before the filing the present suit by the plaintiffs. That suit was by the defendant against the plaintiffs, her husband Anil Gambhir, his brother Ajay Gambhir and his wife Madhu for a decree of permanent injunction restraining them from dispossessing her and her two children from the first floor of the suit property and which suit came to be compromised. The trial Court, however, has held that the plaintiffs had not produced any evidence to show that the defendant was in occupation of the other two floors as well and so passed a

decree for mesne profits only @ Rs.3250/- p.m. for her occupation of the first floor only from 01/12/04 till the delivery of possession of the property to the plaintiffs. The plaintiffs have not challenged that conclusion of the trial Court going against them.

7. I heard the arguments advanced by Shri Kirti Uppal, learned counsel for the appellant and Shri Sanjeev Sindhwani, learned counsel for the respondents, and during the course of hearing of the appeal both of them also took me through the evidence adduced by the parties during the trial of the suit, oral as well as documentary.

8. As far as issues no. 1 and 2 relating to the controversy regarding the ownership of the suit property are concerned, Mr. Kirti Uppal, learned counsel for the appellant, argued with vehemence that the plaintiffs alongwith their two sons and their daughters-in-law were all living together as a joint family in the suit property for years and that showed that the suit property was joint family property and so the defendant was not an unauthorised occupant of the first floor

of the suit property. It was also contended that the trial Court had wrongly come to the conclusion that the suit property belonged to the plaintiffs exclusively and was not an HUF property. He also argued at length to convince me that the appellant's occupation of the property in her possession was protected even under The Protection of Women from Domestic Violence Act, 2005.

9. On the other hand Shri Sanjeev Sindhwani, learned counsel for the respondents, while not disputing the fact that the plaintiffs alongwith their two sons, two daughters-in-law and two grandchildren were living in the suit property as a joint family when there were no disputes between the defendant and their son Anil Gambhir but simply for that reason it could not be inferred that the suit property was a joint family property. It was submitted that there was no presumption that if members of a joint Hindu family reside together in some property which stands in the name of one of the family members would automatically become the joint family property of each member of the joint family. Mr. Sindhwani also

submitted that the plaintiff no.1 had sufficient funds of his own to acquire the plot and for raising the construction also he had used his own money and that although some loan was also taken by him from his employer but that was repaid from his salary. Learned counsel also contended that the burden to prove that the suit property was joint family property lay on the defendant which she had failed to discharge. It was also submitted that in order to shift the burden to the plaintiffs to show that the suit property was their self acquired property the defendant had to show that there was some joint family nucleus with the aid of which the plot of land in question could be purchased or construction thereon could be raised with that nucleus but the defendant had miserably failed to establish that. Learned counsel also submitted that the provisions of The Protection of Women from Domestic Violence Act, 2005 could not be invoked in the present proceedings since no such case was pleaded by the appellant in her written statement and nor could she have done that since at the time she had filed her written statement this Act had not even been promulgated. It was also contended that if at all the

defendant wanted the Court to take notice of that legislation as a subsequent development taking place after the filing of the written statement by her and before the disposal of the suit that could be done only if there was necessary foundation laid in the written statement by alleging facts therein which, according to her, entitled her to get some benefit available under the said Act of 2005 but she did not lay any foundation in her written statement by seeking necessary amendment in the written statement and so she cannot be allowed to make any submissions based on the provisions of the said Act. In support of this contention Mr. Sindhvani cited one judgment of the Supreme Court in **“ Om Parkash Gupta vs Rambir B.Goyal”, (2002)2 SCC 256**. In any event, Mr. Sindhvani also contended, the respondents’ suit for possession of the suit property could not be resisted by the defendant and rejected by the trial Court by invoking any provision of the said Act since it has already been decided by the Supreme Court in **“S.R. Batra & Anr. vs. Smt. Taruna Batra”, AIR 2007 SC 1118** that a wife cannot claim any right of occupation in the property owned by her in-laws as a “shared household” as defined in

Section 2(s) of this Act of 2005 entitling her to live there as a matter of right.

10. I have examined and analysed the evidence on the point of ownership of the suit property and in my view the findings of the learned trial Court to the effect that the plaintiffs have been able to show that the suit property was their self-acquired property and that the defendant has failed to show that it was a joint family property cannot be sustained. As has been noticed already, it is not in dispute that the plaintiffs and their two sons constituted a joint Hindu family and that the suit property is registered in the joint names of the two plaintiffs as lessees. In these circumstances it was rightly submitted by the learned counsel for the plaintiffs that the burden rested on the shoulders of the defendant to show to the contrary that despite the perpetual lease deed being in the names of the plaintiffs the suit property in fact belonged to the joint family of the plaintiffs and their two sons. That is the legal position settled way back in the year 1947 by the Privy Council in “**Appalaswami vs Suryanarayanamurti and**

others”, AIR 1947(34) Privy Council 189 which decision was thereafter followed by the Supreme Court in many of its judgment on the concept of Hindu Undivided Family and Joint Family Property amongst Hindus. Those decisions of the Apex Court are reported as AIR 1954 SC 379, AIR 1966 SC 411, AIR 1969 SC 1076 and AIR 1972 SC 2531. This is what the Privy Council in “Appalaswami v. Suryanarayanamurti”(supra) had held:-

"The Hindu law upon this aspect of the case is well settled. Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property....."

11. And as to the nature of evidence expected from the person claiming some property to be joint family property the Supreme Court in “ Shrinivas Krishanarao Kango vs Narayan Devji Kango”, AIR 1954 SC 379 observed as under:-

“11. Whether the evidence adduced by the plaintiff was sufficient to shift the burden which initially rested on him of establishing that there was adequate nucleus out of which the acquisitions could have been made is one of fact depending on the nature and the extent of the nucleus. The important thing to consider is the income which the nucleus yields. A building in the occupation of the members of a family and yielding no income could not be a nucleus out of which acquisitions could be made, even though it might be of considerable value. On the other hand, a running business in which the capital invested is comparatively small might conceivably produce substantial income, which may well form the foundation of the subsequent acquisitions. These are not abstract questions of law, but questions of fact to be determined on the evidence in the case.....” (emphasis laid)

12. It is thus clear that in a case where some member of a joint family holds any property in his own name it is shown by some other member that when that particular property was acquired there was some joint family nucleus out of which further acquisitions could be made then the burden shifts to that member in whose name the property in question stands and who claims the same to be his self-acquired property to establish that it was his self acquisition.

13. In the present case, despite the fact that in a civil trial burden of proof of any fact in dispute which any party wants the court to accept in his favour is not as heavy as is in a criminal trial upon the

prosecution, it was really very difficult for the defendant in the present case to have adduced evidence to establish the joint family nucleus in the family of Gambhirs since everybody in that family had become inimical towards her and it is her case that they wanted her to lead the life of a destitute. She had entered the Gambhir family only in the year 1995. So, it must have been difficult for the defendant to know the existing family situation and background of Gambhirs before that. However, I am of the view that despite all odds she had been able to extract a very vital piece of information from her father-in-law during his cross-examination and that fact admitted by him is sufficient to discharge her of the initial burden which rested on her for showing that the suit property could have been acquired and constructed with the aid of some joint family nucleus.

14. In cross-examination of plaintiff no.1, who is the only witness from the side of the plaintiffs, it could be extracted from him that before the construction of the suit property he was residing in a house in Gurgaon which belonged to his father and he also stated

that that was the only house which his father had left. He further stated that he and his brothers and sisters had given that house to the widow of one of their brothers. These facts emerging out in the cross-examination of the plaintiff show that when the suit plot was acquired the plaintiff no.1 was in possession of some property which was ancestral in his hands as well as in the hands of his brothers and sisters. So, existence of that ancestral property in the facts of this case did constitute the joint family nucleus which in my view was sufficient to shift the burden to the plaintiffs to show by adducing sufficient evidence, which could be only in their special knowledge, that the suit property was purchased and constructed with the personal money of plaintiff no.1, Hari Chand Gambhir. As noticed already it is the plaintiffs' own case that the suit property was in fact acquired by plaintiff no.1 with his own funds and his wife's name was only got written in the perpetual lease deed out of love and as a measure of security for her in future in case of any need. She was a house wife having no income of her own. Plaintiff no.1 has claimed in his evidence that he had constructed the suit property, which is a

three storeyed house, in the year 1990, after having acquired the land from DDA in December, 1989. Section 106 of the Indian Evidence Act also, in the facts of this case, comes to the aid of the defendant. However, there is no evidence adduced by the plaintiffs, except the *ipse dixit* of plaintiff no.1 that he had acquired the suit land and constructed the suit property with his own money, to discharge the burden which stood shifted on their shoulders because of the admission of existence of an ancestral property in which the plaintiff no.1 had a share. According to plaintiff no.1 he had sought premature retirement from Indian Air Force in 1984 and his salary was only about Rs.2000/- p.m. and he used to save about Rs.500/- to Rs.600/- p.m. from his salary. The lease consideration paid to DDA was Rs.7200/-. For constructing three storeyed house he must have spent lacs of rupees but he has not come out with the exact amount spent on construction. Although he claimed to have obtained loan of Rs.1,47,250/- from The New India Assurance Company Ltd. for the construction of his house but no one from that Company has been examined by him to establish that fact. Although he had placed on

record one document purporting to be a certificate issued by the said Company in 2004(Ex.PW1/3) to the effect that he had been given loan of Rs.1,47,250/- in the year 1990 but its contents cannot be said to have been established in the absence of anybody from this Company coming to the Court to prove its correctness and to be cross-examined by the defendant.

15. As far as the ancestral property of the plaintiff no.1 in Gurgaon is concerned no evidence has been led by him to show as to under what arrangement he had given up his claim in that property. All the relevant facts in that regard were within his special knowledge but he has not divulged any information in that regard. In these circumstances it can be safely presumed that he must have relinquished his interest in that ancestral house, which he claims to have done, after taking money in lieu of his share and that money might have been utilised by him to acquire and build the three storyed house in Rohini, Delhi as the Head of his own joint family. Unfortunately the learned trial Judge did not do the job expected of

him while deciding the valuable rights of the litigants before him. If only he had taken the trouble of going through the cross-examination of plaintiff no.1 the fate of the suit might have been different. The trial Judge does not appear to have known the importance of cross-examination of a witness which is as much a part of evidence in the suit as the examination-in-chief is. No decision should be given without examining the entire evidence including the cross-examination of witnesses. It is possible that the counsel of some party also may not point out some part of the evidence which goes in favour of his client like in the present case as appears to have happened not only during the trial but even in this appeal the learned counsel for the appellant-defendant did not draw my attention towards the cross-examination of plaintiff no.1 Hari Chand during the course of arguments. But that does not absolve the Court of its duty to carefully consider and analyse the entire evidence which is adduced by the parties to a suit. The learned trial Judge has also observed while deciding issues no. 1 and 2 against the defendant that she had failed to show that her husband had contributed anything

towards the purchase of the suit property. That view taken by the learned Judge appears to have been taken in ignorance of the legal concept of a joint family property which the superior courts have been laying down in various judgments some of which I have noticed in the earlier paras. Contribution by each member of a joint family towards the acquisition of some property in the name of one of the members of that family alone is not the *sine qua non* for that property to assume the character of joint property in which each member of the joint family has an interest. It is the existence of some joint family nucleus and the possibility of acquisition by some member of a joint family with the aid of that nucleus which is the determining factor whenever such a dispute comes up before the court.

16. There is no doubt that in her suit for permanent injunction the defendant had claimed that the suit property was owned by her in-laws, the two plaintiffs here but that admission cannot come in her way in getting justice in this case because of her having been able to

establish in the present suit the facts which show that the suit property was a joint family property even though it was recorded in the perpetual lease deed in the names of the two plaintiffs only and which fact appears to have led her earlier to believe that they were the only owners.

17. I am, therefore, of the view that the findings of the learned trial Court on issues no.1 and 2 cannot be sustained and are liable to be reversed. It is held that the plaintiffs have failed to establish that the suit property was their self-acquisition in which their sons had no right or interest and in view of the foregoing discussion the conclusion of this Court is that the same was a joint family property in the hands of the plaintiffs.

18. I am also of the view that even if it were to be accepted by this Court that the suit property was of the plaintiffs alone the decision of the trial Court holding the defendant to be an unauthorised occupant and liable to pay mesne profits cannot be sustained. As has been

noticed already, the defendant's husband Anil Gambhir was living on the first floor of the suit property when he got married to the defendant on 04/07/1995. This fact was not disputed during the course of hearing of the appeal from the side of the respondents. It was also the plaintiffs' own case that after marrying the defendant, their son Anil Gambhir had brought her to the suit property and from the day of their marriage itself they had started living on the first floor of the suit property. The plaintiffs' case is that their son's possession of the first floor of their house was only a sort of 'permissive occupation' and so was the occupation of his wife. It was suggested to the defendant in her cross-examination on behalf of the plaintiffs that her husband also had no right to stay in their house and even their children had no right to remain in occupation of their property. It is also the plaintiffs' case that the moment the permission given to their son and his wife to occupy the first floor of their property was revoked that portion was bound to be vacated by their son and his family. During the course of arguments this Court asked the learned counsel for the plaintiffs as to why the defendant's

husband had not been sued by his parents to get back the possession of the portion of their house which they had permitted him to occupy as a 'permissive user' and when the plaintiffs themselves were claiming that even he had no right to stay in their property. Counsel's reply was that this aspect need not be gone into because the defendant had not taken any objection regarding the non-joinder of her husband in her written statement and even in appeal no such objection was raised on her behalf by her counsel during the course of arguments and secondly, the plaintiffs were not required to implead him since he had already vacated the first floor, had shifted to NOIDA before the filing of the present suit and only his wife and two minor children had continued to stay there and had become unauthorised occupants and suit could be filed against the defendant alone as the children were minors they also need not have been impleaded separately when their mother was a party. The counsel also said that in any event during the pendency of this suit both the children had been handed over by the defendant to their father. It was also submitted that a plaintiff being *dominus litus* can sue

someone against whom he has to claim any relief through the process of law and he cannot be compelled to sue anybody whom he does not wish to sue or against whom no relief is to be claimed, as is the position in the present case where the plaintiffs do not want any relief against their son Anil Gambhir because of his having already vacated the house and shifted to a separate house. The occupation of the defendant's husband in the house of his parents being only permissive because of his being the son of the plaintiffs he was, according to the counsel, not a necessary party. In support of these submissions learned counsel placed reliance on three reported decisions of this court reported as **160 (2009) Delhi Law Times 642, "National Thermal Power Corporation Ltd. v. Wig Brothers Builders & Engineers Ltd.", 2002 (65) DRJ 146, "Ranbir Yadav v. State Bank of India" and 81 (1999) Delhi Law Times 370, "Amrit Kaur v. M/s. Om Prakash Fateh Chand Ltd. & Anr."** and one unreported decision in RFA No. 286/2007 "**Ramesh Kumar Handoo vs Binay Kumar Basu**" decided on 19/11/07. Mr. Sindhvani, however, did not dispute the legal position that the Court can suo moto also invoke the provisions

of Order 1 Rule 10 CPC if it is felt that a necessary party without whom there can be no effective adjudication of the controversy between the parties has not been impleaded and also that this power can be invoked even by the appellate Court. While not disputing this position the learned counsel, however, kept on maintaining that the defendant's husband was not at all a necessary party.

19. As far as the defendant is concerned a reading of her written statement would show that she is claiming the right to be in occupation of the first floor through her husband only who was already living there when he had brought her 'doli' there. The learned trial Judge has also observed in the impugned judgment that: "Even according to the plaintiffs she was not a tenant rather a permissive user, being the wife of the son of the plaintiffs." For the defendant the first floor of the suit property was her matrimonial home from where the plaintiffs cannot evict her. For ousting her from there the plaintiffs have to first oust their son who only had brought her there and it is the plaintiffs' own case that they had permitted their son to

live there with his wife. It is not the case of the plaintiffs that they had terminated the arrangement whatsoever they had with their son under which he was occupying their property with his family. It is also not their case that they had asked their son to move out from their house *lock stock and barrel* i.e. alongwith his cantankerous wife and children. So, the plaintiffs cannot simply ask their daughter-in-law alone to move out of their house. And if actually the plaintiffs have revoked the permission/licence of their son to stay in their house then they have to obtain a decree of possession against their son because of his failure to surrender vacant possession of their property in his occupation and only in that way they can get their son's family also evicted. Unless the plaintiffs get a declaration against their own son Anil Gambhir that he having failed to put them in possession of their property by moving out of the first floor of their property alongwith his family despite revocation of the permission which they had given to him to stay on the first floor they were entitled to get him and his family evicted through a decree of the Court they cannot claim that the occupation of their daughter-in-

law Kavita Gambhir was unauthorised. Now, whether the plaintiffs' son was living there as a tenant or as a licensee or in any other capacity could be known only if he had been impleaded in the suit by the plaintiffs and in whatever capacity their son was permitted by them to occupy the first floor the 'privity' was between them and their son and not between them and their daughter-in-law. They have, however, chosen not to implead him. In my view the defendant's husband was certainly a necessary party and in fact the suit should have been filed only against him and if an order of eviction had been passed against him that would have bound his wife also because she is not claiming any independent right. This position was not disputed even by the learned counsel for the defendant during the course of arguments.

20. In my view, non-impleadment of their son in this suit by the plaintiffs is a fraud on the right of the defendant to stay in her matrimonial home being played by her husband in collusion with his parents. Learned counsel for the plaintiffs had submitted that the

defendant's matrimonial home could be where her husband was living and the suit property had ceased to be her matrimonial home after her husband shifted to NOIDA. So, what was being suggested was that the defendant could go to occupy the house in NOIDA where her husband is staying. I do not agree with this submission. The husband may have many places to reside, whether as a tenant or licensee or in any other capacity and in each such place the wife also gets the right to stay claiming that to be her matrimonial home so long as their jural relationship as husband-wife subsists. It is also not necessary that both husband-wife must be staying in a particular house for it being labelled as the matrimonial home of the wife. In this regard I may refer to the views of Bombay High Court in a judgment which was cited by the counsel for the plaintiffs before me. That judgment is reported as **2008(5) Bom C R 149, " Shammi Nagpal vs Sudhir Nagpal"**. In that case one of the points under consideration was as to what is meant by the expression 'matrimonial home' and it was observed that " In other words, the 'matrimonial home' is the domicile where persons live together actually or **constructively**, as

man and wife.” Now, in the present case if the plaintiffs had impleaded their son Anil in this suit only then, as observed already also, it could be known as to in what capacity he was staying on the first floor of the suit property, whether as a tenant, licensee or in any other capacity and whether that right to occupy the first floor was subsisting or had stood determined. In his absence it cannot be decided by the Court that his occupation was only permissive or as a gratuitous licensee of his parents. The plaintiffs have also not pleaded that they had revoked the permission given to their son to occupy the first floor of their house. All these facts are required to be gone into since if the plaintiffs’ permission to their son to occupy the first floor, if at all his possession was permissive, has not been revoked the first floor would continue to be the defendant’s matrimonial home.

21. The reason given by the learned counsel for the plaintiffs for the non-impleadment of their son in this suit was that their son having voluntarily left their property they were not obliged to obtain any declaration against him that he was an unauthorised occupant

when he actually was not no more in physical possession and no decree of possession was required to be obtained against him. I, however, do not find any substance in this submission also of the learned counsel for the plaintiffs that since the husband of the defendant had shifted to NOIDA before the filing of this suit he was not required to be sued. I do not agree with this submission. As noticed already, in the judgment of Bombay High Court relied upon by the counsel for the plaintiffs it had been held that for a house to be called a matrimonial home of the wife it is not necessary that the possession of both husband and wife has to be actual. It can be constructive also. Here, in the cross-examination of plaintiff no.1 he had also admitted that after they all had moved out of the suit property the defendant's son had lived with the defendant in the suit property. No doubt he had also clarified that that was during the pendency of conciliation proceedings before the Legal Aid Cell at Patiala House Courts but that shows that the defendant's husband was still treating the place where his wife was residing to be her matrimonial home as otherwise he could have invited her to live

with him in his house at NOIDA claiming the same to be her matrimonial home.

22. In any case, even though the plaintiffs' son had shifted to NOIDA before the filing of the present suit it cannot be said that he had surrendered the possession of the property in his occupation to his parents resulting in the cessation of that house as being the matrimonial home of the defendant. He continued to be in occupation thereof through his wife whom he had brought to that house after marrying her and also through his children. He having not done so the plaintiffs cannot claim that their son had surrendered the property which he was occupying alongwith his family with their permission as a gratuitous licensee. In this regard a useful reference can be made to a judgment of the Hon'ble Supreme Court in the case of **"B.P. Achala Anand vs S. Appi Reddy & Anr.", (2005) 3 SCC 313.**

There a case was instituted against the husband by his landlord for his eviction from the tenanted premises. The tenant did not contest the petition effectively and left the tenanted premises and settled

somewhere else but left behind his wife in the tenanted premises with whom his relations were strained. The landlord took the plea that since his tenant had surrendered the tenanted premises his wife had been left with no interest or right to remain in the premises. While dealing with that plea of the landlord and finally rejecting the same, the Supreme Court referred to some English decisions wherein it was held that if a tenant leaves the tenanted premises and settles somewhere else but leaves behind his wife, with whom his relations were strained, to stay in the tenanted premises he would still be considered to be in possession of the tenanted premises through his wife. The relevant portions of the judgment of the Supreme Court dealing with the rights of a Hindu wife to stay in her matrimonial home even when the husband goes away to live separately are reproduced below:-

“2. The facts which are either not disputed, or, are, at this stage, beyond the pale of controversy, may briefly be noticed. The appellant Smt. B.P. Achala Anand (hereinafter 'Smt. Achala' for short) was the legally wedded wife of H.S. Anand-respondent No. 2. Their relationship got estranged so much so that in the year 1983 H.S. Anand deserted his wife Smt. Achala. The matrimonial home was a tenanted premises owned by respondent No. 1. H.S. Anand left behind his wife with the

children in the tenanted premises and walked away to reside in a lodge.....

5. On 28/11/1991, the landlord served a notice upon the tenant H.S. Anand and initiated proceedings for eviction from the suit premises..... The tenant-H.S. Anand appeared in the Court of Small Causes and defended the suit. However, it seems that on account of strained relationship between him and his wife and, further as he had discontinued his residence in the tenanted premises, he was not serious in contesting the suit and consequently, in the event of a decree for eviction being passed, the family members including the appellant-Smt. Achala, the deserted wife, ran the risk of being thrown away from the tenanted premises which happened to be the matrimonial home. Briefly stating these facts, the appellant moved an application under Order I Rule 10 of the Code of Civil Procedure (for short "the Code") seeking her own impleadment in the eviction proceedings so as to defend against the eviction. The trial court, by order dated 30.01.1993, rejected the application.

12. Having said so generally, we may now deal with the right of a wife to reside in the matrimonial home under personal laws. In the factual context of the present case, we are confining ourselves to dealing with the personal law as applicable to Hindus as the parties are so. A Hindu wife is entitled to be maintained by her husband. She is entitled to remain under his roof and protection.....

14. Any precedent, much less of a binding authority, from any Court in India and dealing with a situation as we are called upon to deal with is not available. At least, none has been brought to our notice. However, English decisions can be found. Lord Denning states in *The Due Process of Law* (London, Butterworths, 1980, at page 212) -- "A wife is no longer her husband's chattel. She is beginning to be regarded by the laws as a partner in all affairs which are their common concern. Thus the husband can no longer turn her out of the matrimonial home..... Moreover it has been held that the wife's right is effective, not only as against her husband but also as against the landlord....."

15. In *Old Gate Estates, Ltd. v. Alexander and Anr.*, [1949] 2 All E. R. 822: [1949] W. N. 431, a statutory tenant living with his wife in a flat which constituted the matrimonial home left the premises following a quarrel with his wife, and purported to surrender them to the landlords by agreement. His wife remained in occupation with the use of his furniture. On the wife's refusing to quit the premises, the husband gave her written notice revoking any authority which she might have from him to occupy the flat. In proceedings by the landlords against the tenant and his wife for possession, the court held that the tenant had not given up possession, as he remained in occupation through his wife and furniture......
The reason is because the wife has a very special position in the matrimonial home......He is not entitled to tell her to go without seeing that she has a proper place to go......

16. Their Lordships referred to and applied the dictum of Lord Greene, M.R., in *Brown v. Draper*, [1944] 1 All E.R. 246: [1944] K. B. 309, where the facts were somewhat similar. A husband was the tenant of a house on a weekly tenancy. As in this case, he left the house in a dispute with his wife, and his wife and child remained in occupation of the house with the use of his furniture and he continued to pay rent. He received notice to quit from the landlord and he then stopped paying the rent, but he did not revoke his leave to the wife to reside in the house nor did he remove his furniture. Later, the landlord brought proceedings against the wife for trespass and at the hearing, the husband, who was not made a party to the proceedings, gave evidence that he had no interest in the house. It was held by the Court of Appeal that the husband was still in possession of the house.....

17. Applying the law propounded in *Brown v. Draper* (supra) and in *Old Gate Estates Ltd. v. Alexander and Anr.* (supra), the Court of Appeal held in *Middleton v. Baldock*, [1950] 1 All England Law Reports 708: 66 T. L. R. (Pt. 1) 650, that where a husband had deserted his wife and the wife remained in the matrimonial home, she was lawfully there and the husband remained in occupation through her

33. Having been deserted by the tenant-husband, she cannot be deprived of the roof over her head where the tenant has conveniently left her to face the peril of eviction attributable to default or neglect of himself. We are inclined to hold - and we do so - that a deserted wife continuing in occupation of the premises obtained on lease by her husband, and which was their matrimonial home, occupies a position akin to that of an heir of the tenant-husband if the right to residence of such wife has not come to an end. The tenant having lost interest in protecting his tenancy rights as available to him under the law, the same right would devolve upon and inhere in the wife so long as she continues in occupation of the premises. Her rights and obligations shall not be higher or larger than those of the tenant himself. A suitable amendment in the legislation is called for to that effect. And, so long as that is not done, we, responding to the demands of social and gender justice, need to mould the relief and do complete justice by exercising our jurisdiction under Article 142 of the Constitution. We hasten to add that the purpose of our holding as above is to give the wife's right to residence a meaningful efficacy as dictated by the needs of the times; we do not intend nor do we propose the landlord's right to eviction against his tenant to be subordinated to wife's right to residence enforceable against her husband. Let both the rights co-exist so long as they can.” (emphasis supplied)

23. This judgement of Supreme Court also supports the view which I have already taken that it is not necessary that if the husband settles down somewhere else after leaving the matrimonial home of his wife that house where the wife is left behind would cease to be her matrimonial home. So, unless the plaintiffs obtain a decree of possession against their son they cannot get back the possession from his wife and consequently it has to be held that this suit is liable

to fail for non-joinder of a necessary party. It is well settled now that the defect of non-joinder of a necessary party is fatal.

24. Since the trial Court's conclusion holding the defendant to be an unauthorised occupant of the 1st floor of the suit property is not being sustained the decree passed against the defendant holding her liable to pay mesne profits for her continuing to occupy the 1st floor also has to be set aside . I am also of the view that the decision of the trial Court fixing the mesne profit @ Rs. 3250/- p.m. cannot be upheld also for the reason that the same has been fixed without holding an enquiry, as contemplated under Order XX Rule 12 CPC. As far as grant of past and future mesne profits/damages for unauthorised use and occupation of some immovable property in a suit for possession and mesne profits is concerned, the same can be granted to a plaintiff in the same suit as provided under Order XX Rule 12 of the Code of Civil Procedure instead of requiring the plaintiff to file a separate suit for that relief after getting the declaration that he was entitled to get the same from the tenant of

his property whose possession had become unauthorized. Rule 12 is re-produced below:-

“12. Decree for possession and mesne profits.

(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree:

- (a) For the possession of the property;
- (b) For the rents which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent;
- (ba) for the mesne profits or directing an inquiry as to such mesne profits;
- (c) Directing an inquiry as to rent or mesne profits from the institution of the suit until, -
 - (i) The delivery of possession to the decree-holder,
 - (ii) The relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or
 - (iii) The expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.”

25. The question of grant of past and mesne profits in a suit for possession of an immovable property came to be considered by the Hon'ble Supreme Court in "**Gopalakrishna Pillai vs. Meenakshi Ayal**", AIR 1967 SC 155, and this is what was observed by the Supreme Court:-

"Order 20 Rule 12 enables the Court to pass a decree for both past and future mesne profits but there are important distinctions in the procedure for the enforcement of the two claims. With regard to the past mesne profits, a plaintiff has an existing cause of action on the date of the institution of the suit in view of Order 7. Rules 1 and 2, and Order 7 Rule 7 of the Code of Civil Procedure and Section 7(i) of the Court Fees Act. The plaintiff must plead this cause of action, specifically claim a decree for the past mesne profits, value the claim approximately and pay court-fees thereon, With regard to future mesne profits, the plaintiff has no cause of action on the date of the institution of the suit and it is not possible for him to plead this cause of action or to value it or to pay court-fees thereon at the time of the institution of the suit. Moreover, he can obtain relief in respect of this future cause of action only in a suit, to which the provisions of Order 20 Rule 12 apply. But in a suit to which the provisions of Order 20 R 12 apply, the Court has a discretionary power to pass a decree directing an enquiry into the future mesne profits"

26. From the foregoing, it is clear that as far as the grant of mesne profits/damages for use and occupation for the period prior to the

institution of a suit for possession is concerned, the Court may either pass a decree for mesne profits/damages which have already accrued prior to institution of the suit provided the plaintiff has brought on record sufficient material to enable the Court to ascertain the damages. And in case there is no sufficient material available with the Court for calculating the mesne profits/damages the Court has the discretion to direct an enquiry for that purpose and thereafter depending upon the result of the enquiry final decree for mesne profits/damages can be passed. As far as the grant of future mesne profits is concerned, the only discretion available with the Court is to direct an enquiry for fixing the amount of mesne profits/damages and if no such enquiry is ordered the plaintiff is always at liberty to file an independent suit only for mesne profits/damages. Therefore, the finding of the trial Court holding the defendant liable to pay mesne profits @ Rs. 3250/- p.m. without an enquiry is set aside.

27. As a result of the fore-going discussion and conclusions, this appeal deserves to be allowed and is hereby allowed. Consequently,

the judgment and decree dated 27th March, 2008 passed by the Additional District Judge directing the appellant-defendant to vacate the first floor of property No. 220, Pocket-7, Block-C, Sector-8, Rohini, Delhi and to pay mesne profits @ Rs. 3250/- p.m. are set aside and the suit of the respondents –plaintiffs stands dismissed.

P.K.BHASIN,J

September 07, 2009
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