

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 07.12.2010

CS(OS) 1444/1998

SHRI KRANTI ARORA

..... PLAINTIFF

Vs

M/S BIRLA VXL LTD.

..... DEFENDANT

Advocates who appeared in this case:

For the Plaintiff : Mr Rajit Dutta, Sr. Advocate with Mr Kumar Dushyant Singh, Advocate
For the Defendant: Mr Sanjiv Jha & Mr Sanjay Kumar Yadav, Advocates

CORAM :-

HON'BLE MR JUSTICE RAJIV SHAKDHER

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

RAJIV SHAKDHER, J

1. This is a suit filed by the plaintiff for possession and recovery of damages. The property in issue of which possession is sought is a flat bearing No. 12, situate at 3-4, South End Lane, New Delhi (hereinafter referred to as the 'flat'). The plaintiff has claimed ownership of the flat. It is the plaintiff's case that the defendant being a trespasser, has no legal right to claim the occupation of the flat and hence, possession ought to be given to him. It would be pertinent to note here that the issues famed with regard to ownership of the flat have not been pressed by the plaintiff in view of the stand taken by the defendant that the plaintiff is the land lord. I will advert to the orders passed in this regard in the later part of my judgment.

1.1. However, consequential relief of damages is sought for three years spanning a period, commencing from May, 1995 and ending with May, 1998. Damages are sought at the rate of Rs 85,000/- per month. Total damages claimed are a sum of Rs 30,60,000/-.

1.2 I may also point out at this stage that even though in paragraph 7 of the plaint the suit has been valued for the purposes of jurisdiction at Rs 11,50,000/-, the learned Jt. Registrar during the course of scrutiny, vide order dated 13.08.2003, came to the conclusion, based on a holistic reading of the averments made in paragraph 7 of the plaint, that the suit for the purposes of jurisdiction and court fee is valued above Rs 20 lacs. This order of the court has attained finality. There is no issue between the parties with regard to the pecuniary jurisdiction of this court.

2. The plaintiff in support of his case and reliefs claimed (which are noticed hereinabove), has made the following averments. However, before I set out to do that, I must indicate that there is complete lack of chronological structure in the pleadings of both parties. I have attempted to put these in a chronological manner in the later part of my judgment after perusing the pleadings, placing together the evidence and recording the submissions of counsel.

2.1 On 08.09.1979 a builder by the name of M/s Kailash Nath & Associates (hereinafter referred to as “Kailash Nath Associates”) entered into a collaboration agreement with one Smt. Birender Amarjit Singh, Mr Inder Vijay Singh, Mrs Tavleen Amarjit Singh and Mrs Uday Hardev Singh (collectively described as ‘Singhs’) in respect of development of a plot situate at 3-4, South End Lane, New Delhi (in short the “South End lane plot”) . The said collaboration agreement gave rights to Kailash Nath Associates to sell and dispose residential flats constructed thereon in the manner, in which, it was thought fit by them.

2.2 The plaintiff, in the meanwhile, entered into an agreement with Kailash Nath Associates for purchase of a flat admeasuring 2200 sq. ft. which, as per the averment made in the plaint, would be an area on any floor, of the complex, to be built on the South End Lane plot. In pursuance of the said agreement on 19.02.1990, the plaintiff paid a sum of Rs 6.90 lacs by way of a draft bearing no. 683219, drawn on New Bank of India, Tolstoy Marg, New Delhi (hereinafter referred to as ‘NBI’) to Kailash Nath Associates, towards the booking amount, for a flat to be constructed in the proposed complex.

Against the said payment, a receipt was issued by Kailash Nath Associate bearing No. 699 dated 19.02.1990.

2.3 The proposed flat was hypothecated by the plaintiff in favour of the NBI. NBI evidently opened loan account in the name of the plaintiff being account no. 533/38.

2.4 It is pertinent to note that prior to the plaintiff's claim of purchase of the flat he had entered into an agreement dated 30.01.1989 (in short '1989 agreement') with the Singhs. It is averred in the plaint that in terms of clause 15 of the 1989 agreement the plaintiff, who was the buyer of the flat, authorized the seller (i.e., the Singhs) to hand over vacant peaceful possession to a company by the name of General Marketing and Manufacturing Co. Ltd. (in short 'GMMCL'), in terms of, what was evidently, a court decree. To be noted the particulars of the court decree were not referred to. The said clause 15 of the 1989 agreement further went on to say that delivery of possession to GMMCL would be deemed and treated, as if the sellers, i.e., Singhs had handed over peaceful possession to the plaintiff, (i.e., the buyer) subject to, however, the plaintiff/ buyer having paid all amounts due to the seller/ Singhs and other authorities concerned within the stipulated period.

2.5 The plaintiff further avers (and therefore display knowledge of proceedings concerning the flat in the Supreme Court) that by an order passed by the Supreme Court on 18.11.1992 in IA No. 2/1990, 3&4/1992 and 5&6/1992 he was compelled to hand over peaceful possession of the flat to the GMMCL. There is, in the plaint, also a reference to another order of the Supreme Court dated 19.04.1993 based on which the plaintiff avers that it has taken resort to the present suit proceedings as, express liberty in that regard had been granted to the plaintiff.

2.6 It is also averred that one Sh. O.P. Khaitan, Advocate/ Solicitor, along with the defendant herein, wrongly claimed to be the assignees of the flat and hence, are guilty of misuse of the process of law. There is also a reference to the proceedings before the Additional Rent Controller (in short 'ARC') whereby, the interim standard rent of the flat was fixed by the said ARC at Rs 1300 per month. The said order was carried in appeal to

the Additional Rent Controller Tribunal (in short 'Tribunal') which evidently by order dated 03.04.1998 set aside the order of the ARC and remanded the matter to ARC for adjudication.

3. As against this, the stand taken by the defendant is that they are the tenants of the plaintiff and that their rights flow from various orders passed by the Supreme Court in Civil Appeal No. 2684/85 entitled General Marketing and Manufacturing Co. Ltd vs Smt. Birender Amarjit Singh & Ors. Particular reference has been made by the defendant to orders dated 21.08.1984, 18.11.1992, 02.12.1992 and 08.12.1992 passed in the said proceedings. It is the defendant's case that except for the first order the last three orders of the Supreme Court were deliberately suppressed by the plaintiff herein. It is also the case of the defendant that the orders passed by the Supreme Court from time to time in the said proceedings would demonstrate that they are in lawful possession of the flat in their capacity as a 'tenant'. The defendants have also made reference to the fact that by order dated 21.08.1984, passed in the aforementioned Civil Appeal, the Supreme Court had directed that the appellant (i.e., GMMCL) in those proceedings shall pay to the respondent (i.e., Birender Amarjit Singh) the interim rent as determined by the ARC, Delhi pending determination of the standard rent.

3.1 The defendant says that the interim rent of Rs 1300 per month was fixed by the ARC by order dated 19.05.1995 to which reference has also been made by the plaintiff, as noticed by me hereinabove; keeping in view another agreement dated 23.07.1971 which postulated a rent of Rs 1300 per month. The defendant has also referred to the order of the Tribunal dated 03.04.1998, whereby order dated 19.05.1995 passed by the ARC was set aside. The stand taken by the defendant is that the application for fixation of standard rent is pending before the ARC. The defendant has alleged that the instant action has been filed in collusion with Mr O.P. Khaitan, who, as a matter of fact, it is averred, has also filed a suit bearing no. 935/95 wherein, damages in the form of rent at the rate of Rs 85,000/- per month have been claimed from the defendant, which is a figure identical to one claimed in the present suit. The defendant has also referred to one

Mr Ashwani Kumar, who filed a suit no. 4352/1992 in this court claiming to be the owner of the flat and, in that sense has put a question mark on the ownership of the plaintiff to the flat. The defendant has also taken objection as regards non-joinder of necessary parties in so far as Singhs and O.P.Khaitan are concerned.

3.2 More particularly, the defendant has raised an objection with regard to the subject matter jurisdiction of this court in the context of Section 50 of the Delhi Rent Control Act 1958 (hereinafter referred to as “DRC Act”).

3.3 There are also objections with regard to limitation and the valuation of the suit for the purposes of jurisdiction.

3.4 It is averred that since the market value of the flat was about Rs 1.50 crores (at the point in time, when the written statement was filed) and hence, the suit was not properly valued.

4. In the replication, apart from reiterating the stand taken in the plaint, the plaintiff has refuted the contentions of the defendant. It is specifically stated that since there exists no relationship of landlord and tenant between the plaintiff and the defendant – the defendant being in illegal possession, is a mere trespasser; entitling the plaintiff to seek possession, by having the defendant evicted from the flat. A particular emphasis is placed on order dated 19.04.1992 passed by the Supreme Court in the aforementioned proceedings which, according to the plaintiff, enabled it, as indicated above, to institute the proceedings for seeking possession, and consequential relief of damages against the defendant.

5. In support of its case the plaintiff examined himself and three other witnesses. Mr Kranti Arora, i.e., the plaintiff (PW1); Mr Sunil Mendiratta, Clerk, Punjab National Bank (PW2); Sh. Manmohan Sharma, C.A. with Kailash Nath & Associates (PW3) and Mr Ashok Kr. Gupta (PW4) contractor, who evidently undertook the renovation work in the flat. The defendant, on the other hand, examined only one witness, i.e., Mr R.C. Tiwari (DW1), who purportedly is the constituted attorney of the defendant.

5.1 Kranti Arora (PW1) in his examination-in-chief, which was filed by way of affidavit, reiterated the stand taken in the plaint. In his cross-examination he testified that he purchased the flat from Kailash Nath & Associates in January, 1989 and paid an initial amount of Rs 6.90 lacs by taking a loan from NBI. The witness, in his cross-examination accepted the fact the agreement dated 23.07.1971 (in short '1971 agreement') entered into between Singhs and GMMCL was in his knowledge, as also the fact that, the said agreement finds mention in the 1989 agreement which evidenced the purchase of flat by him. The witness went on to say that prior to the signing of the 1989 agreement he was not aware of the contents of the 1971 agreement. However, he became aware of the same on signing the 1989 agreement in January of that year. He further stated that on signing of the 1989 agreement he became aware that the flat 'in dispute' was to be given on rent to GMMCL. He voluntarily stated that it had to be given on rent for a period of 10 years. The witness, however, refuted the fact that he had any knowledge of the agreement between Birender Amarjit Singh and GMMCL of 1971 and 1984. The witness went on to say that on signing 1989 agreement he became aware of agreement dated 21.08.1984 signed/ executed between Birender Amarjit Singh and GMMCL. PW1 also accepted the fact that the rent of the flat was to be determined by the ARC and that he became aware of the fact of fixing the rent when he signed the 1989 agreement (PW1/5). PW1, however, asserted that he did not know that GMMCL had assigned its right in favour of O.P. Khaitan (HUF). The witness, however, accepted the fact that he had filed the assignment deed dated 30.11.1987, which is marked as true copy along with the suit. The witness went on to state that he became aware of the assignment deed dated 30.11.1987 through his lawyer, who informed him that there was litigation pending between O.P. Khaitan (HUF) and the defendant. The witness displayed a lack of knowledge as to whether he had approached the Supreme Court before filing the suit or that he had moved any application before the Supreme Court in respect of the flat. On being shown the list of documents, wherein an application filed before the Supreme Court was also attached, the witness stated that he was aware of the orders that had been passed

in respect of the flat by the Supreme Court. He accepted the fact that he was aware of the order of the Supreme Court, whereby it was directed that the flat in dispute had to be handed over to the defendant. Curiously, while he stated that he was aware of the orders passed by the Supreme Court, he said that he was not aware that the interim rent of the flat in dispute was fixed at Rs 1300 per month by the ARC. He went on to say that against the said order of the ARC, an application had been moved before the Tribunal. PW1, however, accepted the fact that he was aware that the rent of the flat in question was Rs. 1300 per month prior to filing of the instant suit. The witness stated that he had paid consideration in respect of the flat through cheque. The witness also accepted the fact that the defendant had been tendering the rent to him once a year. The witness went on to accept the fact that he had represented to the NDMC that it is the defendant who would pay the property tax on the flat in issue. The witness, on being shown an affidavit dated 29.08.1980 filed before the Supreme Court, accepted the fact that the said document bore his signatures.

5.2 To be noted the aforesaid document, which is appended at page 30, is an affidavit dated 29.08.1990 filed in Civil Appeal No. 2684-85/1984. The said document on perusal appears to be an application filed in the Supreme Court for impleading the defendant, i.e., Kranti Arora as party to the suit proceedings. Despite this, the witnesses stated that he did not remember whether he moved an application for impleadment as a party to the proceedings in the Supreme Court. He also displayed lack of knowledge as to whether he had mentioned this fact in the instant suit or in his affidavit by way of evidence. He also displayed lack of knowledge as to the exact date when the defendant purportedly trespassed in the flat in question.

5.3 Sh. Sunil Mendiratta (PW2), who was an employee of the Punjab National Bank at the relevant point in time, testified to the effect that the erstwhile NBI has merged with Punjab National Bank. PW2 went on to state that since the record was more than 8 years old, it was destroyed as per the banking guidelines then in operation. A copy of the said guidelines (Ex. PW2/B) was placed on record. The witness went on to testify that since

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the record had been destroyed, he could not produce the document pertaining to the loan account no. 533 whereby the amount in issue, purportedly a sum of Rs 6.90 lacs, had been furnished as loan to the plaintiff (PW1).

5.4 In his cross-examination PW2 said that he was not aware of the transaction pertaining of loan account no. 533 purportedly pertaining to the plaintiff. He displayed lack of knowledge both with regard to account number and its status.

5.5 Sh. Uday Kumar, whose affidavit by way of evidence had been placed on record, was dropped by the plaintiff as a witness based on the statement of the counsel recorded by the court vide order dated 15.11.2006.

5.6 Sh. Manmohan Sharma (PW3) deposed that the flat in issue, which is located in a building known as Gauri Apartment, South End Lane, New Delhi was developed by Kailash Nath & Associates. He went on to say that in pursuance of the collaboration agreement a flat was directly booked after receiving payment from parties. The witness identified the signatures on the 1989 agreement (Ex. PW1/B) of one Mr Ravi Khanna. He further identified the signatures of Mr Kailash Nath on Exhibit PW1/1 (Colly). He also identified the signatures of Mr Kailash Nath on letter dated 22.08.1990 (Ex. PW1/1 collectively). The witness asserted that flat no. 12 was sold to the plaintiff. In his cross-examination PW3 accepted the fact that he was retainer of Kailash Nath & Associates and not its employee. The witness asserted that the 1989 agreement was executed in his presence, and that the said agreement was executed for selling flat no. 12 constructed on the South End Lane Plot. The witness further testified that the said agreement was executed between Birender Amarjit, Kailash Nath Associates and the plaintiff. PW3 also testified that the total consideration of the flat was Rs 11.50 lacs out of which Rs 5 lacs was paid directly by the plaintiff, and the balance Rs 6.90 lacs was received from the bank. To be noted there is obviously a typographical error and/or a calculation mistake as the amount adds up to Rs 11.90 lacs and not Rs 11.50 lacs as stated.

5.7 Continuing with the narrative, PW3 further asserted that in the agreement though the total amount was mentioned, the details of the transaction was not set out. The

witness also alluded to the fact that he was unaware of any other document having been executed qua the flat in question or, about any dispute pertaining to the same.

5.8 Ashok Kumar (PW4), is the contractor, who evidently carried out renovation work in the flat in question. The witness in his cross-examination stated that he did not remember as to whether the affidavit of evidence filed by him was executed in Patiala House Court or before the oath Commissioner in the High Court. PW4 testified that he had received Rs 2.5 lacs for the work of renovation and, since it was a meager amount, there was no written contract executed with the plaintiff. On being confronted that in the affidavit the remuneration received was mentioned as Rs 8 lacs, the witness explained the same by saying that he had included not only the consideration received by him in respect of the work carried out, but also the consideration received by other sub-contractors, such as, the electrician, carpenters, etc. In so far as his work was concerned, PW4 stated that scope of work envisaged carrying out only civil work.

6. In so far as DW1 is concerned in his examination-in-chief filed by way of affidavit he stated that GMMCL is a Birla's concern, and a tenant of Smt. Birender Amarjit Singh (the landlady) of the complex situate on South End Lane plot. Since Smt Birender Amarjit Singh had desired to build complex, that is, multi-storey building on the South End Lane plot she approached GMMCL to hand over vacant possession in lieu it being given a flat on rent in the proposed. Accordingly, an agreement dated 23.07.1971 (Ex. PW1/3) was executed between Smt Birender Amarjit Singh, the erstwhile landlady and GMMCL. The witness further testified that since Smt Birender Amarjit Singh reneged on her promise after the completion of the complex, propelling GMMCL to institute a suit which, reached the Supreme Court. In the Special Leave Petition filed by GMMCL, on leave being granted it was converted into civil appeal no. 2684-85/1984.

6.1 In the Supreme Court Smt Birender Amarjit Singh arrived at a settlement with GMMCL vide agreement dated 21.08.1984 which received the imprimatur of the Supreme Court by an order of even date i.e., 21.08.1984 (Ex. DW1/4). The witness went on to depose that by a deed of assignment dated 30.11.1987, GMMCL assigned its rights

in the proposed flat for the Sum of Rs 5,000/- in favour of O.P. Khaitan (HUF); a fact which is not, according to the witness, denied by the plaintiff. DW1 further asserted that O.P. Khaitan (HUF) assigned his rights in the agreement dated 21.08.1984 to the defendant-Birla for a consideration of Rs 18.50 lacs. DW1 deposed that since Smt Birender Amarjit Singh had failed to hand over the flat to GMMCL, an application was filed in the Supreme Court. The Supreme Court vide order dated 05.09.1990 directed that the land lady (sic) shall furnish an undertaking to keep a vacant plot available in the complex situate on South End Lane plot in compliance with its order dated 21.08.1994. Accordingly, an undertaking dated 11.09.1990 was furnished by Smt. Birender Amarjit Singh. The copy of the order and the undertaking are marked as exhibits DW1/5 and DW1/6. DW1 further asserted that the defendant once again approached the Supreme Court for possession of the flat in issue. The Supreme Court by an order dated 18.11.1992 directed Smt. Birender Amarjit Singh to do the needful in the matter. Since Smt. Birender Amarjit Singh did not comply with the order; on 02.12.1992 the Supreme Court directed Mr. R.C. Bhalla, Advocate be handed over possession of the flat. The commissioner of police, Delhi was directed to ensure compliance of the order through the Deputy Commissioner of Police. DW-1 further deposed that finally, the flat in issue was handed over to the defendant on 05.12.1992; a fact which was reported to the Supreme Court on 08.12.1992. A copy of the order of the Supreme Court dated 08.12.1992 was filed and marked as exhibit DW1/9. DW1 further asserted that pursuant to the orders of the Supreme Court an application was moved by the defendant for fixation of rent before the ARC, Delhi. Consequent thereto, the witness asserted, that interim rent of Rs 1300 was fixed. In this regard order of the ARC dated 19.05.1995 was also relied upon.

6.2 The witness went on to depose that since the land lady had failed to pay the rent, NDMC had attached the rent, and finally it was the defendant which discharged the liability of property tax in respect of the flat.

6.3 The witness also asserted that O.P. Khaitan (HUF) had filed a suit bearing no. 62/2001 claiming therein to be the land lord qua the defendant; wherein a prayer for mesne profit is also made.

6.4 By an order dated 29.07.2005, the aforementioned suit was dismissed on the ground that it was barred under the provisions of Section 50 of the DRC Act.

6.5 DW1 asserted that an appeal being RFA No. 650/2005 has been filed against the dismissal of the said suit, wherein the defendant has filed objections being: CO No. 15767/2006. To be noted the said RFA is pending adjudication in this court.

6.6 DW1 asserted that the plaintiff was well aware of the Supreme Court's proceedings, and the respective rights and obligations of the land lord qua the property, i.e., the flat in issue. The witness asserted, that the agreement without doubt refers to the orders of the Supreme Court and the liabilities of the plaintiff qua the defendant. The witness went on to state that the tenancy of the defendant was both permanent and irrevocable, and, therefore, its liability was limited to payment of rent determined by ARC, Delhi. DW1 asserted that the defendant was handed over possession of the flat pursuant to the settlement arrived at in the Supreme Court, as recorded in the order of the Supreme Court order dated 21.08.1984.

6.7 In the cross-examination DW1 testified that he was the senior manager of Ajax Business Services Ltd., New Delhi and that he had surrendered his certificate of practice . DW1 further testified that a power of attorney was issued in his favour by the company secretary of the defendant, i.e., one U.C. Jain.

6.8 To a question as to when the defendant came to occupy and consequently, use the flat in question, the witness responded by asserting that the defendant company had been in occupation and use of the demised premises since December, 1992. DW1 went on to say that the defendant was occupying the property pursuant to the orders of the Supreme Court as assignees of O.P. Khaitan. The witness further stated that there was an agreement between the defendant and O.P. Khaitan which permitted it to do so.

6.9 To a question as to whether there had been any agreement with the plaintiff with respect to the flat in issue the witness answered in negative.

6.10 The witness also testified that the defendant and GMMCL were not connected as they were separate concerns.

6.11 In response to a question as to whether the witness was aware of the existence of order dated 19.04.1993 passed by the Supreme Court, the witness responded by saying that the same stood already exhibited.

6.12 To a question as to how long the GMMCL were authorized to occupy the flat in question, the witness replied that it was an irrevocable tenancy in its favour. This was explained by the witness by submitting that the tenancy was irrevocable as there was an agreement between the then land lady Smt Birender Amarjit Singh and the defendant's predecessor-in-interest.

6.13 DW1 asserted that the defendant had paid the property tax to NDMC for the year 1994-96 as the rent was attached by NDMC towards property tax. He further went on to say that the payment of property tax was stopped under the directions of NDMC.

6.14 To a question as to who was paying the property tax prior to 1994, the witness displayed a lack of knowledge in respect of the same. Similarly, as to who was paying the lease rent to the L&DO in respect of the property in question, the witness stated that he was unaware of the same. The witness asserted that the defendant became tenant of the flat by virtue of the order passed by the Supreme Court in November, 1992. The DW1 asserted that he was attached to the defendant because it was their sister company. The witness asserted that U.C. Jain was the (Company) secretary of the defendant. He also asserted that the possession of the flat in question was obtained on 2-3/12/1992.

6.15 DW1 testified that as on date they were paying rent of Rs 1300 per month to the plaintiff. The witness went on to say that no receipt in respect of the said rent was being issued by the plaintiff.

7. DW1 accepted the fact that pursuant to the orders of this Court dated 01.05.2007, property tax was being paid by the defendant, since it has not been decided by the court

as to whose liability it was to pay property tax. DW1 denied the suggestions that defendant was in illegal possession of the flat or that it was a trespasser. The witness denied that the plaintiff was the lawful owner.

8. In support of the case set up by the plaintiff Mr Dutta, learned senior counsel submitted that in accordance with the orders of the Supreme Court dated 19.04.1993, passed in Civil Appeal No. 2684-85/1984, plaintiff was entitled to maintain the present action. It was submitted by Mr Dutta that the plaintiff was the lawful owner of the flat in issue which was purchased by him from Kailash Nath & Associates. Mr Dutta, however, submitted that in view of the fact that the defendant had accepted in its written statement that the plaintiff was its land lord, the question of ownership of the flat in question need not be decided by the court. Therefore, according to Mr Dutta, the only question which required adjudication was whether in its capacity as the land lord it could seek possession of the flat in question in the instant proceedings. Mr Dutta argued that the objection set up by the defendant in this regard, based on Section 50 of the DRC Act, is no longer res integra since in an application filed by the defendant under Order 7 Rule 11 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') this very ground was raised – which the court rejected vide order dated 16.05.2000. The order having attained finality, the issue could not be re-agitated by the defendant. Thus, it was Mr Dutta's submission that the suit ought to be decreed in favour of the plaintiff. Mr Dutta spent a considerable amount of time in taking me through the various proceedings of the Supreme Court in order to buttress his submissions and the relief claimed in the suit.

9. On the other hand, the defendant was represented by Mr Jha. Mr Jha reiterated the stand taken by the defendant in the written statement. Particular emphasis was placed by Mr Jha on the settlement arrived at with Smt. Birender Amarjit Singh and GMMCL which was reflected in the Supreme Court's order dated 21.08.1984. Mr Jha took me through the evidence of DW1, in particular the examination-in-chief, most of which, according to him, had remained unrebutted. Mr Jha asserted that the testimony of DW1 would establish how the defendant came to occupy and possess the flat in issue. The sum

and substance of Mr Jha's submission was that the defendant being the assignee of O.P. Khaitan (HUF), who, in turn was the assignee of GMMCL, the occupation and/or possession of the flat in question was lawful.

9.1 Mr Jha also sought to demonstrate that since the rent of the flat in issue was Rs 1300 per month the jurisdiction of this court was ousted. In this regard reliance was placed on Section 50 of the DRC Act.

9.2 Mr Jha, as a matter of fact, vehemently stressed the fact that the defendant's tenancy was irrevocable in view of the history and the circumstances which resulted in GMMCL, in the first instance, possessing and/or occupying the flat in question. Based on the aforesaid submissions Mr Jha sought the dismissal of the suit.

REASONS:

10. Having perused the pleadings and evidence filed in the matter, as also after hearing the submissions of counsels, in my view, to understand with clarity the issues at hand, the history and the circumstances, in which GMMCL came to occupy and/or possess the flat in question needs to be detailed out chronologically; as these details, unfortunately, have not been set out in a structured manner in the pleadings, as they ought to have been. First, in the series of agreement mentioned in the pleadings, is the agreement dated 23.07.1971 (which is referred to in short as the 1971 agreement). This agreement was executed between Smt Birender Amarjit Singh and GMMCL. A perusal of the 1971 agreement would show that the GMMCL was a tenant in the premises situate on South End Lane plot. Since, Smt Birender Amarjit Singh desired to build a complex, in the form of a multi-storey building, comprising of residential flats, she offered to let out a flat admeasuring 3600 sq. ft. in the proposed complex at a rent of Rs 1300 per month, in lieu of GMMCL handing over vacant possession of the premises in its occupation. The broad location of the premises was described in clause 2 of the 1971 agreement. Clause 3 & 4 of the 1971 agreement stated that the construction of complex would be completed latest by July, 1974, and that the flat proposed to be given to GMMCL would be similar to the other flats which were to be constructed as part of the

proposed complex. Clause 5 fixed liquidated damages at the rate of Rs 2500 per month, in case Smt Birender Amarjit Singh failed to deliver a flat to GMMCL.

10.1 Interestingly, while clause 6 of 1971 agreement prohibited Smt Birender Amarjit Singh from selling, transferring, assigning or sub-letting the premises without fulfilling its obligation towards GMMCL; it permitted GMMCL to assign, sub-let, transfer or part with the possession of the flat in the proposed complex to any corporate body or firm. The only caveat being that: GMMCL would be liable for payment of rent of Rs 1300 per month to Smt Birender Amarjit Singh. Clause 7 provided that in case GMMCL were to let out the flat in issue at a higher rent, which could result in Smt. Birender Amarjit Singh being mulcted with an increased tax liability-GMMCL would be obliged to reimburse the same to Smt. Birender Amarjit Singh.

10.2 Interestingly, Clause 8 provided that in case the construction of the proposed complex did not commence by 30.06.1972 then, Smt. Birender Amarjit Singh was required to return possession of the premises to GMMCL on the terms already agreed to; which were evidently contained in the letter dated 05.06.1968.

10.3 Clause 9 of the 1971 agreement, on which much stress was laid by Mr Dutta in the course of his argument, provided that the agreement was valid only for a period of 10 years from the date the flat in question in the proposed complex was handed over to GMMCL. The agreement was, however, renewable on terms and conditions to be mutually agreed to between the parties.

11. It appears that, pursuant to the aforesaid agreement on 08.09.1979 a collaboration agreement (in short 1979 collaboration agreement) was executed between Singhs and Kailash Nath & Associates. It is the common case of both parties that this agreement provided for construction of a complex, that is, a multi-storey building on South End Lane plot, in which the flat in question was to be located. Though the building was constructed, disputes seem to have erupted between Smt. Birender Amarjit Singh and GMMCL. Legal proceedings were initiated by GMMCL. Unfortunately the details of the nature of dispute have not been placed on record by either party except what is

discernable from the testimony of DW1. What is, however, not in dispute is that, the disputes, which obtained between Smt. Birender Amarjit Singh and GMMCL, reached the Supreme Court and were subject matter of the civil appeal being: CA No. 2684-85/1984. It is also not in dispute that a settlement, evidently was arrived at between GMMCL and Smt. Birender Amarjit Singh, which forms part of the court record. The agreement being crucial, to the determination of the issues between the parties, is extracted hereinbelow for the purposes of convenience:

“The parties have before this Court agreed that a flat of 1800 sq. ft. area shall be given by the respondents to the appellant or to their successor or assignee on rent. The rent of the said flat shall be the standard rent of the said flat as determined by the Court of the Rent Controller, Delhi, under the Delhi Rent Control Act, 1958, who shall fix the rent taking into account the agreement dated the 23rd July, 1971, between the parties. The said flat shall be situated on the first floor and will be the flat earmarked in red ink in the building plan annexed herewith. The said flat shall be similar to and shall have similar amenities/ fixtures/ fittings as all the other flats in the building. The possession of the said flat shall be handed over by the respondents to the appellant within ten days of the grant of the completion certificate for the said building, without waiting for the said fixation of standard rent by the Rent Controller.....”

12. What has emerged from the pleadings and the evidence on record is that on 30.11.1987, GMMCL executed an assignment deed in favour of O.P. Khaitan (HUF). There is a reference in the recital of the assignment deed to the effect that GMMCL was the tenant of the entire property, that is, the South End Lane Plot. There is also a reference to the agreement dated 21.08.1984 executed between M/s Singhs (all five persons whose names are noticed by me in the beginning of the judgment) and GMMCL. The recitals also advert to the fact that the Singhs, in their capacity as the land lord, had agreed to give on rent to the GMMCL or its successors or its assigns a flat admeasuring 1800 sq. ft. on the first floor of the complex proposed to be constructed on the South End Lane plot. In the said assignment deed there is also a reference to the orders of even date, i.e., 21.08.1984 passed in Civil Appeal No. 2184-85/1984 and, a reference to the

fact that the agreement had received the imprimatur of the Supreme Court. The recitals also allude to the fact that the proposed complex, on the said date, was still under construction and, therefore, in the circumstances obtaining, GMMCL had assigned its rights in favour of O.P. Khaitan (HUF) in consideration of a sum of Rs 5,000/-.

13. The defendants have alluded to an agreement dated 26.06.1989 executed between O.P. Khaitan (HUF) and VXL India Ltd. which later on changed its name to Birla VXL, (i.e., the defendant) whereby, O.P. Khaitan (HUF) sub-let the flat in issue to the defendant on payment of a security deposit of Rs 18.50 lacs. The rent for the property was that, which would have been fixed by the ARC. To be noted that the original of the agreement had not been placed on record. The plaintiff has filed a photocopy of the said document, to which evidently no objection has been taken by the defendant.

13.1 It is pertinent to note that thereafter another agreement dated 30.01.1989 (i.e., the 1989 agreement) was executed between Singhs, Kailash Nath & Associates (who were collectively referred to as the sellers) and the plaintiff in his capacity as the buyer in respect of the flat in issue. Once again only a photocopy of the agreement has been filed. Both the 1989 agreement, as also the earlier agreement dated 26.06.1989, as indicated above, are filed by the plaintiff. A perusal of this document would show that there is a reference to the Supreme Court proceeding dated 21.08.1984 whereby, a settlement was arrived at between GMMCL and Smt Birender Amarjit Singh. As a matter of fact the relevant part of the agreement dated 21.08.1984 has been extracted in the 1989 agreement. There are two crucial clauses incorporated in 1989 agreement, these being: clauses 15 & 16. By virtue of clause 15 the plaintiff, i.e., the buyer of the flat in question authorized the sellers, which included Singhs and Kailash Nath & Associates to hand over vacant/ peaceful possession to GMMCL in terms of the court decree. The date of the decree was left blank. It is obvious that the 1989 agreement was executed in anticipation of orders in a pending court proceeding. The clause goes on to say that the delivery of possession to GMMCL would be treated by the sellers (i.e., Singhs and Kailash Nath & Associates) as handing over physical possession of the flat to the plaintiff

(i.e., buyer) subject, of course, to the plaintiff/ buyer making the entire payment in that regard. Furthermore, clause 16 of the 1989 agreement explicitly provides that the agreement is subject to a court decree (which has obvious reference to a decree that may be passed in future) and that the decree would be binding on the plaintiff/ buyer. More importantly, clause goes on to state that the plaintiff/ buyer would do nothing to contravene the court decree, and that any violation would supply sufficient cause to the sellers (Birender Amarjit Singh and Kailash Nath & Associates), to terminate this agreement without notice to the plaintiff/ buyer, as also have the right to forfeit the amounts paid by him. There is one more clause, which is clause 29, to which I must make a reference. The said clause 29 conferred right in the plaintiff/ buyer to let out, sell, transfer or convey or deal with or dispose of the flat and the garage purchased by him, upon the building being completed and, the possession of the flat and the garage, being handed over to GMMCL. The plaintiff/ buyer could however deal with flat only upon receiving prior written permission of the letter (i.e., Smt. Birender Amarjit Singh and Kailash Nath & Associates).

14. It appears that in the beginning of 1990, the plaintiff entered the fray. It is the plaintiff's case that he had paid a sum of Rs 11.50 lacs to Kailash Nath & Associates; a fact which finds support in the testimony of PW3 (Manmohan Sharma), who deposed that the plaintiff had paid a sum of Rs 11.50 lacs for purchase of flat no. 2, which is situate in the complex constructed on the South End Lane Plot. The said witness PW3 also asserted that the 1989 agreement was executed in his presence.

15. It is also not in dispute, though the plaintiff (PW1) tried to obfuscate the issue in his cross-examination, that he had filed an application for impleadment in proceedings pending in the Supreme Court, which is, ***Civil Appeal No. 2684-85/1984 entitled General Marketing and Manufacturing Co. Ltd. vs Birender Amarjit Singh & Ors.*** As a matter of fact, in the course of argument, Mr Dutta accepted the fact; which is that, not only was such an application filed, but also that, it was rejected by the Supreme Court. As a matter of fact, because there was failure on the part of Smt. Birender Amarjit Singh to comply

with the settlement arrived on 21.08.1984 at between GMMCL and Birender Amarjit Singh; on GMMCL moving the Supreme Court once again, the Supreme Court vide order dated 05.09.1990 directed Smt. Birender Amarjit Singh to file an undertaking to the effect that she would keep a flat in the proposed complex available in order to facilitate compliance with the Supreme Court's earlier order dated 21.08.1984. It is not disputed that Smt. Birender Amarjit Singh did file an undertaking in terms of the order of the Supreme Court on 11.09.1990 to facilitate compliance of the Supreme Court's order dated 21.08.1984.

16. Since, despite the order of 05.09.1990 there was no compliance, in as much as, delivery of the flat in question had not been handed over to the defendant, an application was moved whereupon the Supreme Court directed Smt. Birender Amarjit Singh in no uncertain terms to hand over possession of the flat to the defendant *“prior to December, 1992”* vide its order dated 18.11.1992, notwithstanding the fact that she had been unable to obtain a completion certificate-which was sought to be bandied as the reason for failure to hand over possession of the flat. Importantly, the plaintiff's application being IA No. 2/1990 came up for hearing before the Supreme Court on the same date. The court noted that there was no appearance on behalf of the plaintiff. The court went on to observe that even otherwise they did not find any ground to allow the plaintiff's application for impleadment. Consequently, the same was dismissed. The plaintiff evidently impeded compliance with the Supreme Court's order dated 18.11.1992 which, propelled the Supreme Court to direct compliance of its order by use of force. At the relevant time Mr R.C. Bhalla, who appeared as advocate for the defendant, was designated as the person to receive possession of the flat through the aegis of the concerned Deputy Commissioner of Police. Notices for contempt were issued against three persons, who, according to the court, were obstructing the compliance with the orders of the Supreme Court. Amongst the three persons, plaintiff was one of those to whom show cause notice for initiating contempt proceedings was issued.

17. It is because of the intervention of the Supreme Court that the defendant secured possession of the flat in question. This is recorded in the Supreme Court order dated 08.12.1992. Therefore, in my opinion, to contend that the defendant is a trespasser, and not in lawful possession of the flat in question, is contrary to record. The veracity of the orders of the Supreme Court, referred to by me hereinabove, has not been put in issue by any of the parties appearing before me. Therefore, there is no doubt, in lieu of GMMCL vacating the premises situate on South End Lane Plot, GMMCL was to secure a flat in the proposed new building. The arrangement, it emerges was that GMMCL was required to pay rent at the rate of Rs 1300 per month to Smt. Birender Amarjit Singh for the use and occupation of the flat. In addition to this GMMCL had the right to sell, transfer or part possession of the flat in favour of any corporate body or firm. Since Smt. Birender Amarjit Singh attempted to renege on the terms agreed to under the 1971 agreement, proceedings were initiated, which reached the Supreme Court. In the Supreme Court a settlement dated 21.08.1984 was arrived at whereby, it was agreed that Smt. Birender Amarjit Singh would hand over a flat measuring 1800 sq. ft. to GMMCL or its successors or assigns on payment of rent. It was further agreed that the rent of the flat would be standard rent as determined by the ARC, Delhi in terms of the 1971 agreement. It was further agreed that the flat would be located on the first floor, which was earmarked in red colour, in the building plan annexed to the said agreement. As per the settlement dated 21.08.1984, Smt. Birender Amarjit Singh was required to hand over the flat to GMMCL within ten days of grant of completion certificate. This provision was deviously used to its advantage by Smt. Birender Amarjit Singh, to delay delivery of possession of the flat on a specious ground that the completion certification had not been obtained. This, as noticed above, forced GMMCL to approach the Supreme Court by various interlocutory applications. It was only with the intercession of the Supreme Court that the GMMCL obtained possession of the flat on or around 08.12.1992. The fact that the plaintiff herein, tried to intervene in the matter by way of an interlocutory application cannot be denied, as a matter of fact, the plaintiff's application for

impleadment was dismissed by the Supreme Court vide order dated 18.11.1992. The plaintiff was, however, given liberty to take recourse to a remedy available to him in law. As observed above, the said application was disposed of by the Supreme Court vide its order dated 19.04.1993. The Supreme Court on 19.04.1993 passed the following orders:

“...So far as the applications made by Ashwini Kumar and Kranti Arora are concerned, they raise questions which do not arise for determination in this proceedings and they are free to resort to such remedy as may be available to them elsewhere for this purpose...”

18. In these circumstances, it is quite evident that while, as noticed by me hereinabove, the defendant cannot be labeled as a trespasser, the plaintiff is also well within his right, to take recourse to legal proceedings that are available to him in law.

18.1 I must point out here that: Mr Dutta did attempt to argue before me that the defendant was a trespasser based on clause 9 of the 1971 agreement. For the sake of convenience the same is extracted hereinbelow:

“9. This agreement will be valid for a period of 10 (Ten) years from the date the said flat in the proposed multi-storeyed building is handed over to the party hereto of the second part and thereafter will be renewable on terms and conditions as may be mutually agree.”

19. It is not disputed that the defendant obtained possession of the flat only in December, 1992. If Mr Dutta's submission was to be accepted then the validity of the agreement would come to an end in 2002. As against this, it has been argued by the defendant that not only is their right as tenant irrevocable, in view of they being assignee's of the interest that GMMCL had in the flat but also that rights, if any, of the plaintiff in regard to the same cannot be agitated in this court in view of the provisions of Section 50 of the DRC Act. It is not disputed by parties that the standard rent in respect of the flat in question has not been fixed. Pursuant to the Tribunal, setting aside the order of the ARC dated 19.05.1995; the matter is pending with ARC even today. The fact, however, remains that at the moment, the defendant is tendering a rent of Rs 1300 per month. The question is: can the plaintiff, in these circumstances, take recourse to a civil suit. Mr Dutta, as noticed above by me, has submitted that in view of defendant's

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application under Order 7 Rule 11 of the CPC having been rejected on the same ground, this issue cannot be revisited. In my view, this submission of Mr Dutta is untenable. The reason being that: at the stage when the defendant's application under Order 7 Rule 11 of the CPC came to be disposed of, the assertion made in the plaint had to be necessarily be accepted as true – which is undoubtedly the mandate of law. The learned Judge thereafter very consciously observed that “*contraverted and disputed facts can be decided only after a trial*”. As a footnote to the order the learned Judge went on to state that observations made in the context of the application filed by the tenant would have no bearing on the final disposal of the proceedings pending before the Rent Controller. A holistic reading of the order would show that the order dated 16.05.2000 passed by this court could not be construed to mean that the court could not, upon perusal of evidence on record, determine the issue of the jurisdiction of this court, in terms of Section 50 of the DRC Act. A perusal of the orders and evidence on record clearly demonstrates that the possession of the flat in question by the defendant is not that of a trespasser. If that be so, the provisions of Section 50 of the DRC Act will get triggered.

20. Since I have come to the conclusion that the defendant is not a trespasser, the other question which I touched upon hereinabove requires to be dealt with. This being: is the defendant's tenancy interminable or will the defendant be confined to clause 9 of the 1971 agreement. However, answer to this question is also tied in with the answer to the question whether the plaintiff can maintain a civil suit when admittedly the rent, right from 1971 for the flat in issue, continues to be Rs 1300 per month. Mr Dutta has argued before me that the maintainability of the present action is to be determined in the context of the order of the Supreme Court dated 19.04.1993. A perusal of the order of the Supreme Court dated 19.04.1993 would show that the Supreme Court has only observed that the plaintiff was “*free to resort to such remedy as may be available to him elsewhere for this purpose*”. The Supreme Court did not make reference to any particular remedy to which the plaintiff could take recourse to.

20.1 At this stage, I must digress a little. As noticed by me at the very beginning of the judgment, even though by an order dated 29.10.2001 this court had framed eight (8) issues, at the conclusion of the hearing before me, Mr Dutta had submitted that he does not wish to press issue nos. 2, 3, 4 & 6 in view of the fact that the defendant had admitted in the written statement that the plaintiff was the land lord of the flat in question. For the sake of convenience the eight issues framed by this Court on 29.10.2001 are culled out hereinbelow:

“1. Whether in view of the orders dated 21.08.1984 and 18.11.1992 passed by the Hon’ble Supreme Court in CA 2684-85/84, the present suit is maintainable? If so, its effect?

2. Whether the plaintiff can claim title in respect of the undertaking dated 18.11.1992 filed by one Smt. Birinder Amarjit Singh in the Hon’ble Supreme Court in CA 2684-85/84?

3. Whether the plaintiff has purchased and is the owner and in occupation and possession of the flat bearing No. situated at 3-4, South End Lane, New Delhi?

4. Whether the plaintiff has carried out massive renovation/ reflooring/ alterations in the suit flat out of his own resources? If so its effect?

5. Whether the defendant is a trespasser and has no legal right to continue in occupation?

6. Whether the defendant and one Shri O.P. Khaitan and one M/s General Marketing are in collusion with each other in depriving the plaintiff of his rightful legal rights in the property?

7. Whether the plaintiff is entitled to the relief claimed?

8. Relief.”

20.2 In view of the submissions made by Mr Dutta on 07.10.2010, I am presently required to direct my attention to the maintainability of the suit in the context of the remedy that the plaintiff has taken recourse to. The ambit of issue no. 1, therefore, is according to me not only the right to file a proceeding but also the nature of the proceedings. While the plaintiff, undoubtedly, in terms of order of the Supreme Court dated 19.04.1993 has a right to take recourse to a legal proceedings and to agitate his grievance, before an appropriate forum, the remedy of a civil suit is not the appropriate

remedy. Therefore, the argument raised by Mr Dutta, based on clause 9 of the 1971 agreement, would not only have to be seen in the context of the agreement dated 21.08.1984 but also the provisions of the DRC Act. The said agreement between GMMCL and Smt. Birender Amarjit Singh subsumed at least certain parts of 1971 agreement. Whether it is subsumed, in particular clause 9 of the 1971 agreement would have to be examined by the ARC not only in the context of the agreement dated 21.08.1984 but also in the context of provisions of the DRC Act. The ARC would have to examine perhaps the scope and effect of clause 9 of the 1971 agreement in the context of provisions of DRC Act. In these circumstances, in my view, while the plaintiff is entitled to initiate an action for agitating his right for recovery of possession of the flat in question - the recourse to the instant suit is not the appropriate remedy, in view of the bar of Section 50 of the DRC Act.

20.3 As a footnote, I may add that O.P. Khaitan (HUF) has also, I am told, filed an application for impleadment in the proceedings pending before the ARC. The said application of O.P. Khaitan (HUF) was allowed by the ARC by order dated 10.01.2001. The matter was, however, carried to the Tribunal which set aside the order of the ARC vide its judgment dated 24.07.2004 (check). Aggrieved by the order of the Tribunal O.P. Khaitan (HUF) carried the matter by way of a revision to this court being CM(M) No. 1433/2004 entitled O.P. Khaitan vs. Birla VXL. Apart from this, as noticed above, a RFA bearing No. 650/2005 was filed by O.P. Khaitan (HUF) to agitate the dismissal of the suit filed by O.P. Khaitan (HUF). The said RFA is also pending adjudication.

21. In view of the above discussion my response to the issues, which survive for decision, i.e., issue nos. 1, 5, 7 & 8 is as follows:

ISSUE NO. 1

21.1 As discussed above, the plaintiff is entitled to take recourse to legal proceedings. The present suit is not the appropriate proceedings and hence, in view of the bar of Section 50 of the DRC Act the present suit is not maintainable. The suit is, accordingly, dismissed.

ISSUE NO. 5

21.2 The defendant is not a trespasser; but its continued possession of the flat in question would be subject to outcome of the appropriate proceedings, if any, which the plaintiff may take recourse to. This issue is answered, accordingly.

ISSUE NOS. 7&8.

21.3 The plaintiff is not entitled to relief claimed.

22. In view of the above, the suit is dismissed. The cost will follow the result of the suit. The suit be consigned to the record.

RAJIV SHAKDHER, J

DECEMBER 07, 2010

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