

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

+ **RFA No. 330/2003**

% **9th December, 2011**

SH. ASHOK BHATIA Appellant
Through : Mr. Arun Birbal, Advocate.
versus

SH. OM PRAKASH MALHOTRA Respondent
Through : Mr. A.P. Aggarwal, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The counsel for the respondent says that the respondent has taken back the file and, therefore, he has no instructions. This matter is on the Regular Board of this Court since 4.7.2011. Today the matter is effective item No.6 on the Regular Board. I have, therefore, heard counsel for the appellant and am proceeding to dispose of the appeal.

2. The challenge by means of this Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment dated 18.1.2003 passed by the Trial Court. By the impugned judgment, the Trial Court dismissed the suit for possession and mesne profits filed by the appellant / plaintiff.

3. The facts of the case are that the appellant / plaintiff claiming himself to be the owner / landlord of the premises bearing No.A-1/118, Lajpat Nagar, New Delhi filed the subject suit for possession with respect to encroachment of 510 square feet of land belonging to the appellant / plaintiff by the respondent / tenant / defendant. The defendant was a tenant only in respect of one room in the property A-1/118, Lajpat Nagar, New Delhi on the ground floor at a monthly rent of ₹275/- excluding electricity charges. It was pleaded that one tenant, Sh. Subhash Narula has forged a false Will of the mother of the plaintiff dated 10.7.1996 and trespassed into different parts of the property. It was also alleged that the respondent / defendant had sublet part of the encroached portion to a person whose name was not known to the appellant / plaintiff. The subject suit for possession was, therefore, filed alleging the respondent / defendant to be a trespasser and also claiming therein mesne profits for three years prior to filing of the suit.

4. The respondent / defendant contested the suit by objecting to the maintainability thereof, as per Order 2 Rules 3 and 4 CPC, on the ground of misjoinder of causes of action. It was also pleaded that the suit was barred by time.

5. After completion of pleadings, the Trial Court framed the following issues:

- “1. Whether the present suit of the plaintiff is not maintainable u/s 50 of the DRC Act? OPD
2. Whether the present suit is barred u/o 2, 3 & 4 of CPC as alleged in P.O. No.2? OPD
3. Whether the present suit of the plaintiff is barred by limitation as alleged in P.O. No.5? OPD
4. Whether the suit of the plaintiff has been properly valued?OPP
5. Whether the plaintiff is entitled for the decree of possession? OPP
6. Whether the plaintiff is entitled for damages / mesne profits as alleged? OPP
7. Whether the plaintiff is entitled for the decree of permanent injunction? OPP
8. Relief.”

6. So far as issue No.1 is concerned, the Trial Court has rightly held the suit not to be barred by Section 50 of the Delhi Rent Control Act, 1958 inasmuch as the respondent / defendant was not a tenant of the encroached area but was a tenant of only one room. The suit for possession was therefore not for a tenanted premises but for an encroached portion not being the tenanted portion and consequently there was no bar to filing of the suit under Section 50 of the Delhi Rent Control Act, 1958.

7. The Trial Court, however, found in favour of the respondent /

defendant on issue No.2 with respect to misjoinder by holding that the subject suit was a suit for possession, mesne profits and injunction, and that since injunction cannot be claimed in a suit for recovery of possession with mesne profits as per Order 2 Rule 4 CPC the suit was liable to be dismissed.

In my opinion, the Trial Court has wrongly relied upon Order 2 Rule 4 CPC to dismiss the suit inasmuch as the said provision itself provides for a leave to be granted by the court in appropriate cases. In the present case, surely the relief of injunction was very much related to the cause of action of the suit for possession and mesne profits because the injunction which was prayed for was stopping of the misuse of the encroached portion as commercial premises entitling leave to the appellant / plaintiff for joining the cause of action for injunction, however, I need not delve into this aspect further inasmuch as counsel for the appellant / plaintiff says that he does not press the relief of injunction.

8. The only other issue which now requires to be examined is as to whether the suit was barred by time. Once the appellant / plaintiff is the owner of the portion in respect of which possession is prayed, the suit can be barred by limitation only if the respondent / defendant would have taken a plea for adverse possession. A reading of the pleadings in the suit, and the issues framed, shows that no issue was framed with respect to the fact of the

respondent / defendant having become owner by adverse possession. The issue was only whether the suit was barred by limitation. Further, even assuming that there was such an issue which was framed, the only evidence which has been led on behalf of the respondent / defendant is of long possession and not of adverse possession. Adverse possession is different from long possession. Long possession is not automatically adverse possession inasmuch as adverse possession exists only if hostile and continuous possession claiming ownership in the property is proved. The Trial Court while dealing with this issue has observed as under, which though extensive will have to be reproduced to demonstrate the lack of the necessary conclusion of adverse possession of the defendant / respondent for the suit to be dismissed on that ground:-

“In consideration of the submissions made by both the counsels, I have also perused the pleadings of the parties and as per the pleadings of the parties in para 4 it is stated that the defendant in connivance with other tenants had been hatching conspiracy for encroaching the property. One tenant Sh.Subhash Narula has succeeded in manipulating a forged and false WILL of the aged mother of the plaintiff allegedly dated 10.7.96 by committing forgery and immediately after obtaining the aforesaid forged WILL, some of the tenants trespassed on different parts of the property of the plaintiff. The defendant has also illegally encroached upon all the vacant premises starting from the back side of the defendant’s tenanted premises upto the end

of the service lane and upto the boundary of house no.A-1/119 except a small structure which is not inhabitable and which is in possession of the plaintiff. It means that the defendant has also encroached and trespassed the back portion of the property on 10.7.96 and as per the written arguments Ld. counsel for the plaintiff has argued the same thing. As per the pleadings the defendant is the tenant for the front portion of the suit premises and shop which is mentioned in para no.1 and the case of the defendant is that the portion which is being claimed as unauthorised by the plaintiff was under the tenancy already existing in the year 1985 and total rate of rent was Rs.275/- p.m. In consideration of the facts, I also perused the testimony of PW1 Sh. Ashok Bhatia and in para 3 of his testimony by way of affidavit has stated that the defendant Sh. Om Prakash Malhotra has illegally encroached upon all the vacant premises starting from the backside of the tenanted premises upto the end of service lane and upto the boundary of the house no. A-1/109 except a small structure, which is in possession of the plaintiff. But he has not disclosed the period from which the defendant Sh. O.P. Malhotra encroached illegally upon all the vacant premises of the back side of his tenancy. Even in cross examination, he has stated that the tenancy of Sh. O.P. Malhotra was started in his presence initially in the year 1974 and then in 1984 when the agreement was executed. He has further deposed in his cross examination that it is correct that till the life time of his mother he never looked after this property nor he took any rent from the tenants at any time. He saw the rent note first time when it was executed in the year 1984 in the month of March in the presence of his deceased father and Subhash Narula and other tenants Sh. R.P.Singh and Mr.Sachdeva and no written document was prepared about tenancy in the year 1974 in his presence. He does not know

whether any rent receipt had ever been issued to the tenant because the rent used to take by his father and his mother in their life time. It is not in his knowledge that the rent was Rs.220/- p.m. in the year 1974 vol. but it was written in the agreement Ex.PW1/4. He has already narrated to his counsel to the notice dt. 25.9.2000 that the deft. has forcibly occupied the disputed portion in the year 1996. But on perusal of the copy of the notice even in para 3, no time and period has been mentioned as to when and on which date the defendant have illegally encroached all the vacant premises starting from back side of his tenanted premises upto the service lane. Even in para 4 of the plaint it is not crystal clear as and when the defendant has illegally encroached the back portion of his tenanted premises and even in cross examination PW1 who is plaintiff himself has stated that he cannot say whether the defendant is living in C-1/43 Lajpat Nagar prior to 1984 or after 1984. He denied the suggestion that in 1985 the red portion of Ex.PW1/3 was let out by his mother to Om Prakash and total rent of both the portions was Rs.275/- p.m. PW2 Sh. R.P. Singh in para 6 has deposed in affidavit that for the last 5-6 years Sh. Om Prakash Malhotra has occupied the back portion of the premises which was not included in the tenanted premises at the time of agreement. In cross examination he has stated that at the except him, there were another 4/5 persons were present there including Mr. Sachdeva, Malhotra and one person who was property dealer, father and mother of the plaintiff and one D.B. Singh who is his associate was also present and besides these persons no other person was present. But the said Ex.PW1/4 was not typed in his presence and it was already typed. He does not know the name of the occupier at the ground floor in the year 1984. He admitted that in the year 1984 there was a gate in the shop open towards galiyara. He does not know from which

period the plaintiff was remained in the occupation of the back portion of the shop in question i.e. galiara, varanda, latrine and bath but from the last 4/5 years the gate was closed even the entry to the upstairs was also closed and now it is in the occupation of defendant. He has no knowledge whether the said portion i.e. back of the shop was given on rent basis to Sh. Om Prakash Malhotra in 1984. He has no knowledge about the monthly rent of Sh. O.P. Malhotra even prior to 1984. He has further stated in his cross examination that in the quarrel Ashok Bhatia did not ask or utter to give back the possession of the disputed premises to him. I also perused the testimony of DW1 Subhash Narula and he has deposed that he came as tenant in the year 1980 at ground floor and since that he is seeing Sh. O.P. Malhotra using the shop in front side for commercial purposes of running the business. In the year 1985 he took the back side portion and same is in possession of the back side portion. But no cross examination has been conducted that the defendant has not taken the back portion in the year 1985. I also perused the testimony of Sh. O.P. Malhotra and even he has stated that in the year 1985 the defendant got the tenancy of back portion which was having passage from the shop which was earlier under the tenancy of him from Sh. Hem Raj Bhatia and the entire rent was ₹275/- p.m. Thereafter taking the portion under the tenancy in the year 1985, the respondent constructed one store, one bath, WC inside the said shop and is in possession of the entire portion of the front shop and the back portion since the year 1985. I also perused his cross examination and even in cross examination the suggestion was given by the plaintiff counsel that the premises were given by Ms. Motia Bhatia in the year 1984 and this suggestion has been denied by the witness but no question has been asked that the back portion was taken by him in the year 1985. I also perused the

testimony of DW3 to DW7 and DW3 has deposed that since 1986 he is seeing Sh. O.P. Malhotra doing the business in the back side portion and he is in possession of the back side portion. DW4 has deposed that he is also seeing the property in dispute for the last more than 30 years. Previously, a hall on the back side of the shop which is presently with Sh. O.P. Malhotra was with Sh. Hem Raj Bhatia and for the last more than 16/17 years he is seeing Om Prakash Malhotra in possession of the said back side hall and he is carrying on the business in the said portion. DW5 Sh. Balwant Rai Chopra has also deposed the same thing about the possession of the defendant as well as DW6 Sh. R.K. Mehta and DW7 Sh. Subhash Puri also deposed on the same line about the possession of defendant. But no question has been asked by the plaintiff counsel that defendant is not in possession of the said premises since 1985. Even the plaintiff has failed to give any particular date, month & year as and when the defendant has occupied the back portion of the property in dispute illegally. As per the Schedule of Limitation Act, 1963 Part (v) which deals – Suit relating to immovable property Article 64 & 65, the limitation period is 12 years and as per the case law cited by the defendant counsel AIR 1974 SC 1866 wherein it was held that Limitation for filing the suit for possession is 12 years from the date when the plaintiff was dispossessed and present suit has been filed by the plaintiff on 24.5.2001 and the plaintiff has failed to give the proper date, month and year as and when the defendant has illegally occupied the back portion of the property in dispute. However, all the DW1 to DW7 have given the year that defendant O.P. Malhotra has took the back portion on rent in the year 1986. So, the suit has been filed by the plaintiff on 24.5.2001 and it should have been filed on or before in the year 1998. So, I am of the considered view that the present suit of the

plaintiff is barred by limitation as per the limitation mentioned in Article 64 & 65. Issue no.3 is disposed off accordingly in favour of the defendant and against the plaintiff.”

9. A reference to the aforesaid discussion shows that the Trial Court has arrived at a finding as to a specific date or month or year when the possession became adverse to the appellant / plaintiff. Obviously, this finding of the appellant / plaintiff having lost the title to the defendant / respondent on account of the latter’s alleged adverse possession could not have been given because no documentary evidence was led to show adverse possession. No doubt some witnesses have deposed in favour of the respondent / defendant with respect to his possession and trespassing, however, nothing has been filed on record that this possession was a possession of an owner i.e. open hostile and continuous as against the appellant / plaintiff who was the actual owner of the property. The respondent / defendant, therefore, miserably failed to plead or prove the case of the adverse possession.

10. In view of the above, appeal is allowed. Impugned judgment and decree dated 18.1.2003 is set aside. The suit of the appellant / plaintiff is decreed for possession with respect to the portion shown in red in the site plan Ex. PW-1/3 forming part of the larger property bearing No.A-1/118,

Lajpat Nagar, New Delhi. Parties are left to bear their own costs. Decree sheet be prepared. Trial Court record be sent back.

VALMIKI J. MEHTA, J.

DECEMBER 9, 2011

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