

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

% *Judgment Reserved on: 16.03.2011*
Judgment Delivered on: 21.03.2011

+ **RSA No. 156/2004 & CM No.8359/2004**

SHRI. PRAKASH CHAND KHURANA**Appellant**

Through: Mr. M.C.Dhingra, Advocate.

Versus

SHRI. GOPAL KUMAR BAJAJ**Respondent**

Through: Mr. Karan Chauhan, Advocate.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. This appeal has impugned the judgment and decree dated 20.04.04 which has endorsed the finding of the trial judge whereby the suit filed by the plaintiff, Sh. Gopal Kumar Bajaj, seeking a declaration to the effect that he along with Prakash Chand Khurana (defendant no. 1) are the joint tenants of the suit property bearing no. 5260-61 Ward No. 6, Bazar, Balli Maran, Delhi, had been decreed in his favour. Along with the decree of declaration, decree of possession and permanent injunction as prayed for had also been granted in favour of the plaintiff.

2. Plaintiff, Sh. Gopal Kumar Bajaj, had relied upon the compromise decree passed between the parties i.e. between the plaintiff and defendant no. 1 in an eviction proceedings before the

Rent Controller. This compromise decree is dated 1.12.1973. It was averred that an eviction petition had been filed by the landlord i.e. M/s Zeenat Begum (defendant no. 2) against M/S East India Rubber Works Pvt. Ltd. This was a petition under Section 14 (1) (a) and 14(1)(b) of the Delhi Rent Control Act (DRCA). This petition had been decreed under Section 14 (1) (b) on 11.06.1971 i.e. on the ground of sub-letting. Eviction Order had been passed in favour of the landlord.

Appeal has been filed by the respondents. A Compromise decree dated 1.12.1973 had been passed between the parties. In terms of the aforementioned compromise, the plaintiff Sh. Gopal Kumar Bajaj and defendant no. 1, Sh. Prakash Chand, became joint tenants of the top floor and remaining portion on the ground floor as depicted in the site plan Ex. AW 3/1. They had agreed to deliver vacant possession of the godown marked ABCD and the store room marked EFGH as also the whole of the first floor before 02.01.1974 and on this the contingency being fulfilled; eviction order would stand satisfied. There is no dispute about the contents of this decree. This decree has been relied upon in the plaint by Sh. Gopal Kumar Bajaj to seek a declaration to the effect that he is a joint tenant with Sh. Prakash Chand Khurana for the ground floor and the top floor of the said premises. Defendant had disputed the claim of the plaintiff. His contention was that the parties are by agreement occupying separate portion; plaintiff is occupying top floor and the defendant is in occupation of the ground floor.

3. The trial judge had framed two issues:-

1. Whether the plaintiff is entitled to the relief of declaration and permanent injunction as prayed for? OPP.

2. Relief.”

Two witnesses were examined on behalf of the plaintiff and one witness was examined on behalf of the defendant. The suit of the plaintiff was decreed in view of the aforementioned compromise deed dated 1.12.1973 recorded before the Rent Controller which was an admitted proceeding.

4. This judgment of the trial court was affirmed in appeal by the first appellate court. Before the first appellate court, it was contended by the defendant that he had moved an application under Order 6 Rule 17 of the Code of Civil Procedure (hereinafter referred to as “Code”) which has not been decided by the trial court. The said application had neither been allowed and nor dismissed.

5. The impugned judgment had proceeded to decide this application. The finding returned in the impugned judgment qua this application under Order 6 Rule 17 of the Code reads as under:-

“ I proceed to decide the application u/o 6 R 17 CPC. The possession of one of the joint tenants is on behalf of all the joint tenants. Mere exclusion from physical possession does not amount to ouster of the said joint tenants. It is not necessary for one of the joint tenants to seek possession as he is always in constructive possession at least. Moreover, the defendant has already taken this objection in written statement that suit for mere declaration without consequential relief of possession was hit by Section 34 Specific Relief Act. The application was filed only to delay the case. The same is dismissed.”

The said application was dismissed. The trial judge had correctly noted that this application has been filed belatedly only to delay the proceedings. This is fortified from the record. Record shows that the application for amendment of this written statement had been filed after more than 8 years i.e. almost at the conclusion

of the trial. This application had been filed on 22.05.95; written statement had been filed by defendant no. 1 on 16.09.1987; on merits also, the impugned judgment had noted that no amendment is called for as the averment sought to be incorporated by way of amendment i.e. an averment that the possession of the parties is mutually exclusive is already contained in the averment in Para 4 of his written statement wherein he had stated that the plaintiff is in possession of the top floor and the defendant is in possession of the ground floor; this is by way of an agreement which is binding between the parties. The said application was rightly dismissed as a delaying tactic.

6. On merits, the contention of the appellant that only the power of attorney holder of the plaintiff had been examined and the plaintiff not having been come into the witness box, a decree could not follow had been adverted to. Court had reconfirmed the finding that in view of the compromise decree dated 1.12.1973; plaintiff and defendant no. 1 were joint tenants in the suit property. The finding returned in the impugned judgment qua these issues is extracted as follows:-

“ 11. Similarly objection that attorney in favour of PW-2 is meaningless because the suit has not been filed by the power of attorney holder is without any merit. There is no requirement of law that only the person who signed the plaint can give evidence or that the plaintiff cannot appoint attorney, subsequent to the filing of the suit.

12. Non-examination of plaintiff as witness is immaterial. His attorney has been examined as PW-2. It was held in AIR 1999 SC 3089 that examination of attorney is sufficient.

13. The counsel for the appellant laid much emphasis on cross-examination dated 17.03.1994 of PW-2 at page 2. The witness denied that Gopal Kumar (respondent) became tenant after the compromise and not the company. On the basis of this he wanted me to hold that Gopal Kumar did

not become the tenant and that being so he had no right to file the suit. Again I am unable to persuade myself with the arguments. The appellant is equally bound by the suggestion given by him to the effect that Gopal Kumar became tenant and not the company. It is different matter that the witness denied the suggestion. It is not clear as to how the appellant can escape from his suggestion that Gopal Kumar became the tenant.

14. There is yet another way of looking into the matter. The question as to who became the tenant under compromise before LD. RCT. Is a matter of record. Same cannot be changed by answer given by the witness. Copy of the order shows that appellant and respondent became joint tenants in their individual capacity. There is no reference of any company becoming tenant.

15. Any how I feel that there was no necessity of seeking declaration or granting declaration that the parties became joint tenant. The compromise and order of Ld. RCT itself declared that the parties became joint tenant. That was sufficient. So the decree deserves to be modified to the extent that relief of declaration is deleted therefrom. Accordingly, the appeal is accepted in part and the decree is modified to the extent that appellant is restrained from stopping or disturbing or interfering the respondent from using the tenancy premises on ground floor of property. No. 5260-61, Ballimaran, Ward No. 6, Delhi, as shown red in the site plan Wx. PW 2/2."

7. This is a second appeal. It has been admitted and on 08.12.08, the following substantial questions of law were formulated.

"1. Whether the courts below have correctly concluded that the parties are joint tenants in the suit property?

2. Whether the first appellate court was justified in restraining the appellant from interfering with the respondent's use of the ground floor of the suit property?

3. Whether in view of the bar of Section 41 (g) of the Specific Relief Act, the courts below ought to have dismissed the suit of the plaintiff/respondent?"

8. On behalf of the appellant, it has been urged that the courts below have wrongly construed and misinterpreted the concept of a joint tenancy; the courts below have failed to appreciate that the

possession of the parties was mutually exclusive; defendant no. 1 was on the ground floor and was running his shop from there whereas the plaintiff was occupying the second floor. One could not interfere with the possession of the other. The concept of the joint tenancy has not been understood in its correct perspective. Further, in view of the bar of Section 41 (g) of the Specific Relief Act, the suit of the plaintiff was liable to be dismissed. Learned counsel for the appellant has placed reliance upon (2010) 10 SCC 512 Man Kaur Vs. Hartar Singh Sangha to support his submission that in the absence of the attorney holder having coming to the witness box, the suit of the plaintiff was liable to be dismissed.

9. Arguments have been countered. Learned counsel for the respondent has placed reliance upon the judgment of Allahabad High Court reported in Civil Misc. Writ Petition No. 10106 of 1994 Sunil Kumar Singh Vs. Special Judge, Jaunpur & Ors. as also another judgment of the Kerala Bench reported in CRP No. 62 of 1977 Puthukkudi Maliakkal Saiffudin and Anr Vs. Prakasan & Ors. to support his submission that there is the clear distinction between a joint tenant and a co-tenant. The decree dated 1.12.1973 had returned a finding that the plaintiff and defendant no. 1 were joint tenants; they were not tenants in common; possession could not be mutually exclusive as has been urged by the learned counsel for the appellant.

10. Perusal of the record shows that the arguments of the learned counsel for the appellant are completely bereft of any force. Decree dated 1.12.1973 which was a compromise decree arrived at between the parties i.e. plaintiff and defendant no.1

namely Gopal Kumar Bajaj and Prakash Chand Khurana, was to the
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effect that in case the parties i.e. plaintiff and defendant no. 1 deliver vacant possession of the godown and the store room as also the entire first floor of the building as depicted in the site plan Ex. AW3/1, it was before 2.1.1974; eviction order would stand satisfied. In that eventuality, plaintiff and defendant no. 1 would become joint tenants of the remaining portions i.e. entire shop and the remaining portions of the ground floor of the suit property. This is an admitted document. This declares the status of the parties as joint tenants. Both the parties i.e. the plaintiff and the defendant no.1, were joint tenants in the ground floor as also of the top floor of the suit property. Contention of the defendant that he is exclusive in possession of the ground floor and plaintiff is in possession of the top floor is neither borne out from the pleadings and nor from the evidence. It is also not the case of the appellant that he was coerced or pressurized into the compromise of 01.12.1973. Decree dated 1.12.1973 was to be given its due sanctity and both the courts below had rightly held so.

11. In the judgment Allahabad High Court reported in Civil Misc. Writ Petition No. 10106 of 1994 Sunil Kumar Singh Vs. Special Judge, Jaunpur & Ors., a distinction between joint tenants and tenants- in-common had been drawn. A joint tenant has been defined in the "Text Book of Woodfall on Landlord and Tenant, 27th Ed, at page 60 as:-

" Joint tenant have unity of title, unity of commencement of title, unity of interest, so as inn law to have equal shares in the joint estate, unity of possession as well of every part as of the whole, and right of survivorship."

In Mulla's Treatise on the Transfer of Property Act, the following distinction has been noted:-

“A joint tenancy connotes unity of title, possession, interest and commencement of title; in a tenancy-in-common, there may be unity of possession and commencement of title, but the other two features would be absent.”

In a judgment of the Division Bench of Allahabad reported in AIR 1977 All 138 Budhsen Vs Sheel Chandra Aggarwal, it was held that the basic distinction between ‘joint tenants’ and ‘tenants-in-common’, is that in the case of joint tenant, there is unity of title and possession, while in the case of ‘tenants-in-common’, though there is unity of possession, there is no unity of title.

In this case, the decree dated 1.12.1973 had described the plaintiff and the defendant no. 1 as joint tenants. They were united in title and possession.

12. The contention of the appellant that testimony of PW-1 could not be read as he was a mere attorney holder has no force. Judgment of Man Kaur (supra) is inapplicable. PW-2, Sh. S.N. Chaudhary, was the attorney of the plaintiff; he had proved the power of attorney as Ex. PW 2/1; he was working as an accountant with the plaintiff. He had admitted in his cross-examination that he was aware of all the facts and this power of attorney Ex. PW 2/1 had been given to him by Sh. Gopal Kumar Bajaj. No suggestion has been given to this witness that he was not in the knowhow or the knowledge of the facts on the basis of which he had made this deposition. The argument of the learned counsel for the appellant is misconceived.

Section 41 (g) of the Specific Relief Act also does not create any bar.

It states that *“the court may refuse to grant injunction to the plaintiff if there is acquiescence by the plaintiff.”*

This has been urged by the learned counsel for the appellant but no such acquiescence by the plaintiff has been established; he had not acquiesced that the parties would have mutually exclusive possession of the top floor and the ground floor; this is nowhere borne out

13. Substantial questions of law are answered accordingly. Appeal is without any merit. Appeal as also the pending application is dismissed.

INDERMEET KAUR, J.

MARCH 21, 2011

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