

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

+ **RSA No.69/2011**

% **26st September, 2011**

ABDUL KALAM Appellant

Through: Mr. S.S.Jauhar, Advocate

VERSUS

SMT. KHATOON BEGUM Respondent

Through: Ms. Meenu Ojha, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular Second Appeal is to the impugned judgment of the Appellate Court dated 27.1.2011, and by which judgment, the Appellate Court allowed the appeal of the respondent/plaintiff against the judgment of the first court dated 28.2.2002. By the judgment dated 28.2.2002, the first court had dismissed the suit for possession filed by the respondent/plaintiff. The Appellate Court, by the impugned judgment dated 27.1.2011 has passed a decree for possession with respect to the subject property being the

RSA No.69/2011 **Page 1 of 13**

roof of the premises no. 7191, Gali Garhiya, Quresh Nagar, Sadar Bazar, Delhi (in short 'the subject property').

2. The facts of the case are that the subject property was given by the Ministry of Rehabilitation in tenancy to one Sh. Alla Bux. After the death of Sh. Alla Bux, admittedly, the property came in the co-ownership/co-tenancy of his two sons, namely, Sh. Abdul Salam and Sh. Ali Hasan. Respondent/plaintiff is the widow of the son Sh. Ali Hasan and the appellant/defendant is the son of the other son Sh. Abdul Salam. The ground floor of the property is constructed upon and the same has been divided as regards possession and enjoyment between the appellant/defendant and the respondent/plaintiff. The parties are, therefore, undisputedly in possession and enjoyment of these respective portions. The dispute is with respect to the terrace floor above the ground floor of the subject property. The respondent/plaintiff filed a suit for permanent injunction on the ground that she apprehended that the appellant/defendant may dispossess her from the terrace of the property and therefore, subject suit came to be filed for permanent injunction. During the pendency of the suit, a Local Commissioner was appointed and who found that the appellant/defendant was in possession of the terrace. This finding of possession of the terrace of the appellant/defendant was simply on the ground that the goods of the appellant/defendant were found on the terrace. The respondent/plaintiff thereafter converted the

suit from the suit for injunction to a suit claiming possession of terrace, and which suit was filed under Section 6 of the Specific Relief Act, 1963 alleging that the respondent/plaintiff had been dispossessed. The appellant/defendant contested the suit on the ground that he was always in possession of the roof and therefore, the suit for possession, much less under Section 6 of the Specific Relief Act, 1963, was not maintainable. The relationship of the parties and the fact that each branch was a co-tenant under the Ministry of Rehabilitation was not disputed by either of the parties in the courts below.

3. After the pleadings were complete, the following issues were framed by the trial court:-

- “1. Whether the pltff. has any locus standi to file the present suit against the deft.?OPD
2. Whether the plff. paid the advalorem court fee as accordingly to the value of the property in dispute?OPD
3. Whether the suit u/s 6 of the S.R.Act is maintainable as pltf. has taken two contradictory pleas?OPD
4. Whether the suit of the plff. is bad for misjoinder of necessary parties?OPD
5. Whether any cause of action arose against the deft.? OPD
6. Whether the plff. has come to the court with the clean hands or suppressed the material facts?OPD
7. Whether the pltf. is entitled to relief sought?OPP
8. Relief.”

4. The relevant issues are actually issues no. 3 and 6 and while dealing with these issues, the trial court/first court held in favour of the appellant/defendant on the ground that the Local Commissioner had found the appellant/defendant to be in possession of the property, and no objections were filed to the report of the Local Commissioner. The trial court, therefore, on the reasoning given in paras 27 to 30, 35, 36, 38 and 39 of its judgment dismissed the suit of the respondent/plaintiff. These paras read as under:

“27. Onus of prove these issues was upon the deft. Ld. cl. for deft. argued that the pltf. While filing the suit for Permanent Inj.has taken the plea that she is the owner of half of the property as shown red in the site plan and is in exclusive possession of the same after death of her husband and has also stated that the originally Sh. Alla Bux her father in law was the owner of the aforesaid property and after his death Abdul Salam and Ali Hussain his sons and legal heirs became the owner who divided the suit property by mets and bounds in equal half share and they accordingly occupied the shares but after the amendment the pltf. Took a plea that the pltf. is the tenant of Ministry of Rehabilitation of half of the property as shown red in the site plan and she is in exclusive possession of the same and originally the father of the husband of the pltf. was the owner of the aforesaid property who died several years ago and his sons being legal heirs divided the suit property by mets and bounds.

28. In view of the contradictory stand taken by the pltf suit of the pltf. is liable to be dismissed as she has not come with cleanhands.

29. Ld. cl. for pltf. on the contrary has argued that the deft. has no where stated while filing the WS to the suit of pltf. for Permanent inj. and u/s 6 of Specific Relief Act that

Alla Bux was the owner of the suitproperty as according to him Sh. Alla Bux was the tenant of Ministry of Rehabilitation and had been paying rent and after his death his sons started paying rent. It is stated by the cl. that pltf. is an illiterate lady and when she came to know about this fact, she amended the suit and brought this fact to the knowledge of the court and the court after considering the arguments of both the parties allowed the amendment. Even otherwise the pltf. has not sought any relief against DDA and has only sought relief qua restraining the deft. from dispossessing her and when she was dispossessed she amended the suit u/s of the Specific Relief Act so. The pltf. has not come to the court with cleanhands for suppressed the material facts and the suit of the pltf. is maintainable u/s 6 of the Specific Relief Act.

30. Admittedly the pltf. initially claimed to be the owner but afterwards when she realised her mistake amended the suit and claimed herself to be the tenant of Ministry of Rehabilitation. Ld. Predecessor of this court while allowing the app. of the pltf. considered this argument and allowed the amendment and directed the pltf. to amend the suit accordingly. It is also not in dispute that pltf. is an illiterate lady. She is also widow and issueless lady. Further the pltf. has not sought any relief against the DDA or not sought any declaration that she is the owner and only sought relief of inj. and when she was dispossessed, she amended her suit u/s 6 of Specific Relief Act. The stand of the deft. since beginning is that the suit property belongs to Ministry of Rehabilitation. It was given on rent to Sh. Alla Bux so by incorporating this plea it cannot be held in any way that the pltf. has not come with clean hands or suppressed the material facts or suit of the pltf. is not maintainable u/s 6 of the Specific Relief Act. as the pltf. has taken two contradictory stands. In view of my above, discussion, both these issues are decided against the deft.

35. L.C. inspected the spot and gave a detailed report wherein he found two portions on the ground floor, one portion consisting of one room in possession of Smt. Khatoon Begum while other portion consisting of one small room in

possession of Jeenat Begum. He found the wooden stair case though he did not find any room on the roof but found the roof in possession of the deft. as his household goods were lying there in a bamboo structures covered with tirpal. The L.C. inspected the site on 15.12.93 at 3.20 p.m. He had inspected the spot after giving notice to the parties. No one filed the objections to the report of the L.C U/o 26 rule 10 CPC this report of the L.C. and the evidence taken by him shall be the evidence in the suit and shall form part of the record.

36. Admittedly the pltf. amended the suit alleging that she was dispossessed from the roof at the night of 14.12.93 before the inspection by the L.C. But in this regard, it is relevant to mention that the deft. had filed the W.S. On 21.10.93 claiming his possession over the roof. Further he had moved an app. for appointment of the L.C on 21.10.93 which was opposed by the pltf. wherein she categorically denied that there was chappar on the roof. From the report of the L.C I find that there was chappar which is covered with tirpal and he found household articles of the deft. The stand of deft. since beginning is that after his marriage he shifted to the roof and since then he has been living over there. Pltf. is not in possession of any document or evidence to show that she was in exclusive possession of the roof as she did not examine any witness nor produced any document in support of her claim. Had there been intention of the deft. to dispossess the pltf. from the suit property he would not have waited for two months for appointment of the L.C. And could have dispossessed the pltf. then and there after filing of WS. Now the question arises why she opposed to the appointment of the L.C on app. of the deft. when she was in possession. The pltf. has no answer to this. Deft. during evidence has produced Panchnama Ex.DW1/13 which bears the sign. of number of persons. Perusal of the said panchnama reveals that there was dispute between the parties over some properties and it was also found that the deft. except that property is not in occupation/possession of any property. Though deft. produce the birth certificate of his

children but from these certificates no inference can be drawn that the deft. has been living on the roof in chappar since 1978. In the birth certificate and other docs. relied upon by the deft. the address of the property has been mentioned which has not been disputed by the pltf. at any time that the deft. never lived in the suit property.

38. Sec.6 of the Specific Relief Act provides that if any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by a suit, recover possession thereof notwithstanding any other title that may be set up in such suit. No such action under this section shall be brought after the expiry of six months from the date of dispossession;

The purpose behind section 6 of the Act is to restrain a person from using force and to dispossess a person without his consent otherwise than in due course of law. The question of title is irrelevant in a proceeding under this section.

39. In the instant case pltf. has failed to prove that she was dispossessed during pendency of the suit or the deft. on 15.12.93 dispossessed her from the roof as alleged and before that she in possession over the roof. In the absence of any evidence/document in this regard. I am of the opinion that pltf. has failed to prove this issue in her favour. Hence the issue is decided against the pltf.”

5. The first Appellate Court allowed the appeal of the respondent/plaintiff by the impugned judgment and held that a co-owner is always deemed to be in possession and therefore, it was held that the trial court erred in holding that the respondent/plaintiff was not in

possession of the terrace. The relevant observations and findings of the first Appellate Court are contained in para 8 of the impugned judgment dated 27.01.2011, which reads as under:-

“8. In this case 8 issues were framed. Issues No. 1 to 6 were decided in favour of the plaintiff and against the defendant and there is no cross objection/cross appeal against finding of these issues. Hence finding on these issues are hereby affirmed. Issue No. 7 is to the following effect: - Whether the plaintiff is entitled to relief sought? OPP. Issue No. 8 was relief. Issue No. 7 was decided against the plaintiff and in favour of defendant and it was held that plaintiff failed to prove its possession within preceding 6 months from the date of dispossession and defendant was in possession of the suit property. Hence plaintiff was not entitled to any relief. The suit property is roof of the premises in which father-in-law of the plaintiff and grand-father of defendant was tenant. The plaintiff is admittedly wife of deceased brother of the defendant's father and Ld. Trial court has held during the course of judgment that plaintiff has locus standi to file the suit being entitled to half of the tenanted premises. Meaning thereby she was co-tenant and was in co-possession. While deciding the issue No. 7 the Ld. Trial court lost sight of the law that every co-sharer is deemed to be in possession of each piece and each inch of land and possession of one co-sharer will be deemed to be the possession on behalf of others. Admittedly, on the ground floor she was entitled to half share as tenant and roof was part of share holding. The Ld. Trial court has dismissed the testimony and the document regarding the possession but did not consider that one co-sharer/co-tenant cannot plead his exclusive possession against the other co-sharer/co-tenant. Thus, finding of Ld. Trial court is based on the wrong assumption of law which cannot be allowed to stand. Thus, finding on this issue is hereby reversed. Same is decided in favour of the plaintiff and against the defendant and she is held to be entitled to decree of possession.”

6. In my opinion, the present second appeal is without merit and is therefore liable to be dismissed inasmuch no substantial question of law arises. The courts below have recorded that both the parties are co-owners/co-tenants of the suit property. Undue emphasis need not be given in the facts of the present case that the two branches are only co-tenants of Ministry of Rehabilitation and not owners, because parties are really in enjoyment of the ownership rights as lessees under the Ministry of Rehabilitation. Enjoyment and possession of such lessee rights from the Ministry of Rehabilitation is an enjoyment of actual ownership rights, to the extent of a lessee's intent, conferred by the Ministry of Rehabilitation. Once it is not disputed that there is a co-ownership of the roof of the entire property including the disputed portion of the roof, and that there is no partition, onus of proof was very heavy upon the appellant/defendant to contend that as a co-owner, he had ousted the other co-owner/plaintiff/respondent from the terrace. It is trite, and so held in a catena of judgments by the Supreme Court, that ouster against one co-owner should not be easily allowed to succeed. In the present case, except the report of the Local Commissioner, which found the appellant/defendant in possession, there is no other documentary evidence, much less of any admitted document of the respondent/plaintiff that the appellant/defendant should be allowed the exclusive possession

of the terrace. In my opinion, in fact even the report of the Local Commissioner, though not objected to, cannot be relied upon to hold that the exclusive possession of the disputed terrace was with the appellant/defendant, inasmuch as, lying of goods and existence of Tirpal/Tarpaulin cannot be proof of exclusive possession. After all, the appellant/defendant as a co-owner, was in joint possession of the terrace and therefore, had a right to use the roof/terrace and merely because his goods are found there, which are covered by Tarpaulin supported by bamboo sticks, would not give exclusive possession to the appellant/defendant. In the facts of the present case, the normal principle of law that possession follows ownership squarely applies, and once it is held that the respondent/plaintiff was a co-owner of the terrace, the respondent/plaintiff rightly can be said to be also in joint possession of the terrace along with the appellant/plaintiff, and if she was sought to be prevented from being in possession and enjoyment of the terrace, the suit for possession was entitled to be decreed.

7. Learned counsel for the appellant, very passionately, argued that the suit originally filed was for injunction and after amendment was one for possession under Section 6 of the Specific Relief Act, 1963 and therefore, against the judgment of the first court, an appeal would not lie. There is no dispute to this proposition of law that with respect to a judgment which would be passed under Section 6 of the Specific Relief

Act an appeal would not lie, and the remedy would only be possible by means of a revision petition under Section 115 of the Code of Civil Procedure, 1908, but I would not agree to the argument on behalf of appellant for two reasons: firstly, an issue as to non-maintainability of the appeal before the First Appellate Court on this argument now raised was never raised before the First Appellate Court. In fact, this argument also has not been raised before this Court in the grounds of appeal. This issue has not been raised because of the reason that the appellant would have understood that really the suit claimed possession on the basis of title, though, the suit was amended to be called one under Section 6 of the Specific Relief Act, 1963. Pleadings before the Mufossil Courts/District Courts are sometimes not well drafted and the courts therefore have adopted a policy of looking to the substance of the plaint instead of only the heading thereof. A reading of the amended plaint shows that there are averments of co-ownership/co-tenancy in the property and therefore, really the suit was a suit for possession based on title. In fact it is the admitted case that both parties are co-owners of the tenancy rights. Therefore, the argument as raised on behalf of the appellant that the first appeal was not maintainable, is really an argument of desperation and is therefore rejected in view of the above.

The second argument which was raised on behalf of the appellant was that the respondent/plaintiff had not proved dispossession of the

subject premises within a period of six months prior to the filing of the suit as required under Section 6 of the Specific Relief Act and therefore, the suit had to be dismissed. In my opinion, this argument is also of a different shade of the argument already advanced. I already held above, that in substance, the suit was a suit for possession on the basis of title and the suit cannot be said to be under Section 6 of the Specific Relief Act. Section 6 of the Specific Relief Act comes into play when a person in possessory title is dispossessed by another person who does not have ownership title of the property. When therefore, such a suit is filed by a person in possessory title against a third person, who dispossessed the earlier person in possessory title, and the later person does not have ownership/title to the property then, such suits are entertained under Section 6 of the Specific Relief Act, 1963. In suits claiming possession on the basis of title, and in the present case possession is claimed on the basis of co-ownership/co-tenancy in the property, it is not possible to accept the argument as advanced by the learned counsel for the appellant.

8. In view of the above, I hold that: once there is an admitted co-ownership/co-tenancy of the roof, ouster has not been proved beyond all doubt by consent and the report of the Local Commissioner cannot be used for holding the appellant/defendant to be in exclusive possession merely because his goods are lying there, it follows that the

respondent/plaintiff who was co-owner of the suit property has rightly been held entitled to possession of the terrace.

9. One aspect however, has to be clarified. The First Appellate Court has granted decree for possession with respect to the entire terrace. Once it is held that both the parties are co-owners/co-tenants, and are thus entitled to joint possession and enjoyment of the terrace, the decree really which should have been passed would only be one for entitling the respondent/plaintiff to joint possession with the appellant/defendant of the terrace in question. I, therefore, while dismissing the appeal, clarify that the decree which has been passed by the First Appellate Court is modified that both the parties will be held entitled to joint possession and enjoyment of the subject terrace/roof situated in the premises bearing no. 7191, Gali Garhiya, Quresh Nagar, Sadar Bazar, Delhi.

10. With the aforesaid observations, the appeal is dismissed and disposed of accordingly.

SEPTEMBER 26, 2011

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VALMIKI J. MEHTA, J.