

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

**Date of decision: 1<sup>st</sup> October, 2013.**

+ **RFA No.47/2007**

**MOORTI DEVI** ..... **Appellant**

Through: Mr. T.C. Sharma, Adv.

Versus

**PAWAN MEHRA (DECEASED)**

**THROUGH LR'S & ANR**

..... **Respondents**

Through: Mr. Pramod Kumar Sharma, Adv. for  
R-1.

Mr. Satish Mehra, R-2 in person.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**RAJIV SAHAI ENDLAW, J.**

1. The appeal impugns the judgment and decree dated 17<sup>th</sup> November, 2006 of the Court of Additional District Judge (ADJ), Delhi in Suit No.342/2003 filed by the respondent/plaintiff. By the said decree, the appellant/defendant has been directed to hand over the possession to the respondent/plaintiff of the portion of the property beyond the premises in her tenancy comprising of two rooms, kitchen and open space and the appellant/defendant has also been restrained from raising any construction over the property.

2. Notice of the appeal was issued and vide *ex-parte* ad-interim order

dated 26<sup>th</sup> April, 2007, the execution of the decree stayed, subject to the appellant/defendant maintaining *status quo* qua possession and construction of the suit property. The appeal was on 19<sup>th</sup> September, 2007 admitted to hearing and the ad interim order confirmed. The respondent/plaintiff died during the pendency of the appeal and vide order dated 9<sup>th</sup> July, 2010, his legal heirs were substituted. One Mr. Satish Mehra, paternal uncle of the deceased respondent applied for impleadment as a party in the present appeal and which application was allowed vide order dated 9<sup>th</sup> July, 2010; though no amended memo of parties as directed is filed. The hearing of the appeal was expedited owing to the one of the legal heirs of the respondent/plaintiff being a senior citizen. The counsel for the appellant, counsel for the legal heirs of the deceased respondent/plaintiff and the newly impleaded respondent Mr. Satish Mehra appearing in person have been heard.

3. The deceased respondent/plaintiff instituted the suit from which this appeal arises, pleading:

- (i) that he was one of the co-owners of property No.WZ-436, popularly known as old Pili Kothi, Tihar, New Delhi;
- (ii) that the appellant/defendant's husband Mr. Chhatar Singh was

a tenant in respect of two rooms, kitchen and open space in between, which was a part of quarters of Pili Kothi, under Mr. Dina Nath Mehra, the grandfather of the deceased respondent/plaintiff;

(iii) that after the death of Mr. Dina Nath Mehra his two sons i.e. Mr. Satish Mehra (respondent No.2) and Sh. Suresh Mehra became owners/landlords of the property;

(iv) that the said Mr. Satish Mehra and Mr. Suresh Mehra were Non-Resident Indians settled in United States of America (USA) since long;

(v) that the father of the deceased respondent/plaintiff was managing the property and had filed an eviction petition against the said Mr. Chhatar Singh and obtained a decree for eviction in respect of the space shown in blue colour in the site plan;

(vi) that the certified copies of the record relating to the eviction petition will be obtained and be placed on record;

(vii) that at the request of Mr. Chhatar Singh, the said decree of eviction from the Court of the Additional Rent Controller, Delhi was not executed and Mr. Chhatar Singh was allowed to remain as a tenant in respect of the portion aforesaid of the property after

enhancing the rent to Rs.100/- per month;

(viii) that Mr. Chhatar Singh died and the appellant/defendant was accepted as a tenant in his place;

(ix) that somewhere in 1980-81, disputes arose between the co-owners and which were subject matter of a suit for partition being CS(OS) No.282/1981 of this Court; a decree dated 9<sup>th</sup> March, 1987 of partition was passed therein but remained unenforced as the same was challenged in appeal and which appeal remained pending till 1998;

(x) that while the said CS(OS) No.282/1981 was pending disposal, it was noticed that certain persons were trying to encroach upon the property and an application in that regard was filed in the said suit and vide order dated 17<sup>th</sup> April, 1998 a boundary wall around the property was permitted to be constructed;

(xi) that subsequently, respondent No.2 Mr. Satish Mehra was appointed as an Arbitrator to resolve all the disputes between the co-owners and the respondent no.2 Mr. Satish Mehra passed an award on 24<sup>th</sup> December, 1998 and which was final and binding on the parties; under the said award, the deceased respondent/plaintiff had acquired title as co-owner in respect to the property;

(xii) that the appellant/defendant was able to take forcible possession of one room and open space with tin shed in the property without the consent and permission of the co-owners including the deceased respondent/plaintiff;

(xiii) that the appellant/defendant was a trespasser in the portion occupied beyond her tenancy premises;

(xiv) that the appellant/defendant in order to legalize her possession of the portion trespassed upon by her, applied for grant of electricity connection and submitted an affidavit and indemnity bond, where she claimed to be in possession of a plot of land admeasuring 50 sq. yds. in the property for the past one year or so.

Accordingly, the suit for recovery of possession of the portion of the property trespassed upon by the appellant/defendant and for permanent injunction to restrain her from dealing therewith, was filed.

4. The appellant/defendant contested the suit, by filing a written statement, on the grounds:

(a) that the suit was bad for non-joinder of other owners of the property and the deceased respondent/plaintiff being admittedly a co-owner was not entitled to maintain the same;

- (b) denying that the deceased respondent/plaintiff was a co-owner;
- (c) denying the site plan filed by the deceased respondent/plaintiff;
- (d) denying that the appellant/defendant or her husband were tenant in respect of two rooms, kitchen and open space only and pleading that the appellant/defendant and her husband were tenant in respect of three rooms, store, verandah, kitchen, tin shed, open space, W/C and bathroom under the tin shed all comprising a single dwelling unit at a monthly rent of Rs.25/- since 1959;
- (e) denying that any eviction petition was filed against the husband of the appellant/defendant or that after the eviction order, the rent was increased;
- (f) denying that the appellant/defendant had trespassed over any portion of the property;
- (g) though admitting that the appellant/defendant had applied for provisional/temporary electricity connection but pleading that as she could not afford electricity in the entire premises, she had applied on Standard Farms/Affidavit supplied by advice received from the Delhi Vidyut Board (DVB) office;
- (h) pleading that she was in occupation of the premises as a tenant.

5. The deceased respondent/plaintiff filed a replication to the written statement aforesaid, denying the contents of the written statement and reiterating his case.

6. On the pleadings of the parties, the following issues were framed on 23<sup>rd</sup> August, 2005:

- “1. Whether the suit is without cause of action or is liable to be dismissed? (OPD)
2. Whether the suit covered by DRC Act and the same is not maintainable for permanent injunction on the suit property for the purpose of stoppage of illegal construction on adjoining land? (OPD)
3. Whether the suit is bad for non joinder of necessary parties? (OPD)
4. Whether the plaintiff is entitled to a decree for possession as prayed for? (OPP)
5. Whether the plaintiff is entitled for the decree of permanent injunction as prayed? (OPP)
6. Whether the possession of defendant is as trespasser on the land shown in RED colour in the site plan and plaintiff is entitled for possession of the same as prayed? (OPP)
7. Relief.”

7. The deceased respondent/plaintiff besides himself examined four other witnesses.

8. The appellant/defendant besides herself examined two other witnesses.

9. The learned ADJ, decreeing the suit in favour of the deceased respondent/plaintiff and against the appellant/defendant vide the impugned judgment has held/observed/found:

- (i) that the deceased respondent/plaintiff had established that he was a co-owner of the property and was thus entitled to maintain the suit;
- (ii) that the suit was not barred by the provisions of Delhi Rent Control Act, 1958;
- (iii) that the non-joinder of the other co-owners was not fatal to the interest of the deceased respondent/plaintiff;
- (iv) that the report of the Local Commissioner (LC) appointed and from the factum of the appellant/defendant applying for new electricity connection qua 50 sq. yds. which she claimed to be in her possession for the last one year or so, established that the appellant/defendant had trespassed into 50 sq. yds. of property;
- (v) that if the appellant/defendant had been occupying the entire premises in her possession for 30-40 years prior to the institution of the suit, it was unbelievable that she would apply for electricity

connection with respect to 50 sq. yds. only and not with respect to the entire portion in her tenancy;

(vi) that the factum of the construction at the instance of the appellant/defendant being underway had been established from the report of the LC;

(vii) that since there was no sanction for construction, the same was unauthorized.

Accordingly, a decree for recovery of possession as well as for permanent injunction aforesaid was passed.

10. The counsel for the appellant/defendant has argued:

(A) that though the deceased respondent/plaintiff in the plaint had relied on an eviction petition stated to have been earlier filed against the husband of the appellant/defendant and site plan in which eviction petition would show the portion in the tenancy of the appellant/defendant, but no record of the said eviction petition was produced;

(B) that no reliance can be placed on the report of the LC who was not even authorized to prepare any site plan;

(C) that the LC along with his report filed the same site plan as the

deceased respondent/plaintiff, apparently on a copy of the said site plan being supplied by the deceased respondent/plaintiff to the LC;

(D) that the impugned judgment is based solely on the affidavit/indemnity bond submitted by the appellant/defendant to the DVB for a temporary electricity connection;

(E) that the site plan filed by the deceased respondent/plaintiff does not even show the two rooms admitted to be in the tenancy of the appellant/defendant and thus falsifying the said site plan.

11. The counsel for the legal heirs of the deceased respondent/plaintiff per contra has from the site plan shown the tenancy portion and the portion in front thereof encroached upon by the appellant/defendant and has contended:

(I) that there is another electricity connection in the tenancy premises (and which fact is denied by the counsel for the appellant/defendant) but admits that there is no evidence with respect thereto;

(II) that the appellant/defendant did not challenge the report of the LC nor filed any objections thereto.

12. The respondent No.2 Mr. Satish Mehra appearing in person has

argued:

- (a) that there are several quarters in the property with each having two rooms;
- (b) that the appellant/defendant has broken the wall separating the quarter in her tenancy from the adjacent quarter and encroached upon the adjacent quarter also;
- (c) that admittedly the appellant/defendant, on the date of filing of the affidavit/indemnity bond before the DVB, was in occupation of the premises for 35-40 years; she still in her affidavit/indemnity bond wrote that she was in occupation for a period of one year only; that occupation of 35-40 years could not be mixed up with an occupation of one year only and it has thus to be necessarily held that the 50 sq. yds., qua which the electricity connection was applied for, was the portion encroached upon by the appellant/defendant one year prior to so applying for the electricity connection;
- (d) that though the appellant/defendant denied that any construction was underway on the property, but the LC appointed by the Trial Court reported construction material lying at site and construction underway.

13. That the counsel for the appellant/defendant in rejoinder has contended that the appellant/defendant is an illiterate and uneducated lady and was only interested in getting an electricity connection and signed whatever documents were put before her for the said purpose and her statement of being in occupation of 50 sq. yds. since one year only, cannot thus so bind her.

14. The respondent No.2 Mr. Satish Mehra has after the close of hearing and in the absence of the counsel for the appellant/defendant handed over a synopsis/written arguments together with a copy of the judgment of the Division Bench of the Patna High Court in *Sharfuddin Vs. Bibi Khatija* AIR 1988 Patna 58 on the aspect of one co-owner being entitled to maintain the suit for possession against a trespasser. In the said written argument, it is further stated that:

- (i) that the appellant/defendant had admitted to the LC that she was a tenant of Mr. Amar Nath, father of the deceased respondent/plaintiff;
- (ii) that the report dated 23<sup>rd</sup> October, 1986 of the LC appointed in the partition suit showed that the quarter No.5 comprising of two

rooms, one bathroom, one kitchen and open space/verandah was in the tenancy of the appellant/defendant and the appellant/defendant had in her written statement admitted that the adjacent properties were in symmetry.

Though certain other arguments on the other pleas in the written statement of the appellant/defendant are also made but since the appellant/defendant has confined her argument only to the extent of the tenancy premises, need is not felt to deal therewith.

15. I may at the outset state that though the respondent No.2 Mr. Satish Mehra was, with no objection of the appellant/defendant, impleaded as the respondent but this being a first appeal arising from a suit which was between the deceased respondent/plaintiff and the appellant/defendant and to which the respondent No.2 Mr. Satish Mehra was not a party, the respondent No.2 Mr. Satish Mehra can be heard supporting the case of the deceased respondent/plaintiff only insofar as on the basis of the existing material and not in his independent right.

16. The dispute as aforesaid, is confined to the extent of the premises in the tenancy of the appellant/defendant, with the question for adjudication being, whether the entire portion which is presently in occupation of the

appellant/defendant is part of the tenancy premises of the appellant/defendant as contended by the appellant/defendant or only a part thereof with the appellant/defendant having encroached upon the remaining portion, as contended by the deceased respondent/plaintiff. If the said question is decided in favour of the deceased respondent/plaintiff, then the appellant/defendant is liable to deliver possession of the encroached portion to the deceased respondent/plaintiff/his legal heirs.

17. The deceased respondent/plaintiff in the plaint did not plead existence of other quarters similar to the quarter/premises in the tenancy of the appellant/defendant/her husband or the appellant/defendant having broken down the wall separating the quarter in her tenancy from the adjacent quarter. On the contrary, it was simply stated that while the appellant/defendant was a tenant in the portion shown in blue colour in the site plan filed along with the plaint, she had trespassed on to the portion shown in red colour in the said site plain. A perusal of the site plan filed by the deceased respondent/plaintiff showed the combined red and blue portions to be comprising of a room admeasuring 10 ft. X 12 ft. under construction, an ACC sheet shed spread over both blue and red portions and a store and a kitchen in the blue portion and a verandah and a tin shed in the

red portion. The said site plan neither shows any adjacent quarters or accommodation therein nor shows two distinct premises; rather, the same shows the built up portion in the red and blue portions as one.

18. The Trial Court vide *ex-parte* ad interim order dated 26<sup>th</sup> May, 2000 restrained the appellant/defendant from carrying out any construction work in the property and to ensure that no further construction was carried on appointed a LC to prepare a report about the construction existing in the property and construction which was being carried out. A report of the visit to the property on 27<sup>th</sup> May, 2000 was filed by the LC to the effect that a large part of the old structure of the red portion was demolished and new construction was about to be completed; that old walls of the blue portion had also been damaged and whole roof thereof had been changed. The LC along with his report filed the same site plan as filed by the deceased respondent/plaintiff along with the plaint.

19. The deceased respondent/plaintiff in his affidavit by way of examination-in-chief deposed that the appellant/defendant has forcibly taken over possession of one room and open space with tin shed adjacent to tenanted premises by breaking the wall. He also proved the report of the LC appointed in the partition suit by the High Court of Delhi. In his cross-

examination, he admitted that no measurement of the accommodation in tenancy of the appellant/defendant had been given in the site plan filed along with the plaint and that the said site plan had been got prepared only by measuring from outside and denied the suggestion that the said site plan was prepared without visit to the site. He further admitted that the premises were not let out in his presence and that the affidavit/indemnity bond filed by the appellant/defendant with the DVB came in his possession in the year 2000. He denied the suggestion that similar accommodation existed in *six* quarters in the property.

20. The deceased respondent/plaintiff also examined a witness from DVB who proved the affidavit/indemnity bond admittedly submitted by the appellant/defendant to the DVB for electricity connection. Though other witnesses were also examined, but their testimonies are not relevant qua the extent of the tenancy premises.

21. The appellant/defendant in her examination-in-chief deposed that the entire portion in her possession was part of the tenancy premises. In her cross-examination, a suggestion was given that all the quarters in the property were not similar.

22. As would be apparent from the aforesaid, the only evidence on record

and on the basis whereof the learned ADJ has decreed the suit for possession is the affidavit/indemnity bond submitted by the appellant/defendant to the DVB describing herself to be occupant for the last one year of an area of 50 sq. yds. in the property. I am unable to, on the basis of the said affidavit/indemnity bond, hold that the appellant/defendant is not a tenant with respect to the said 50 sq. yds. of the property. There is no site plan filed by the deceased respondent/plaintiff describing the measurements of the portion claimed to be in the tenancy of the appellant/defendant. On the basis of the site plan filed by the deceased respondent/plaintiff, no finding whatsoever of the extent of the tenancy premises and the extent of the portion on which the appellant/defendant has encroached upon can be returned. Rather, on the basis of said site plan no executable decree even can be passed for possession as it cannot be demarcated therefrom which is the tenancy portion and which encroached portion, as there are no measurements. Else there is no evidence of what was the portion let out. There is no date of such encroachment by the appellant/defendant or explanation for no complaint thereof being made. As far as the report of the LC is concerned, the same is only with respect to demolition and construction activity being underway. Merely because

demolition and construction activity was underway, is not enough to draw a presumption that the appellant/defendant had encroached over a portion of the property beyond that in her tenancy. The said report would entitle the deceased respondent/plaintiff only to the relief of injunction claimed and may entitle the deceased respondent/plaintiff to on the basis thereof file an eviction petition under the Delhi Rent Control Act, 1958, the rent of the premises being less than Rs.3,500/- per month. There is no cross-examination of the appellant/defendant with respect to the affidavit/indemnity bond submitted to the DVB.

23. All that can be observed is that though the story, convincingly argued by the respondent No.2 Mr. Satish Mehra in person, of the appellant/defendant taking advantage of the *inter se* disputes between the co-owners having broken down the wall supporting the quarter in her tenancy and adjacent unoccupied quarter, is a plausible one, but I am afraid that in the absence of proof and which there is none, no decree for possession can be given.

24. The counsel for the appellant/defendant is correct in his contention that the respondent No.1/plaintiff pegged his case in the plaint on the description of the tenancy premises in the eviction petition earlier filed, but

failed to prove the record of the said eviction petition and did not even give any explanation for non production thereof.

25. Further, on the one hand it is argued that the accommodation in all quarters is identical and the accommodation in tenancy of appellant/defendant is described as of two rooms etc.; on the other hand while it is argued that the appellant/defendant has encroached on adjoining quarter but the encroached accommodation is described as comprising of one room etc. only and not of two rooms etc.

26. I am therefore unable to concur with the reasoning given by the learned ADJ. Neither the report of the LC nor the affidavit/indemnity bond submitted by the appellant/defendant to the DVB justify the conclusion drawn of trespass. Accordingly, the impugned judgment and decree dated 17<sup>th</sup> November, 2006 insofar as granting a decree for recovery of possession of the red portion shown in the site plan of property to the deceased respondent/plaintiff is set aside. However, a case of the appellant/defendant having carried out unauthorized addition, alteration or construction in the property is made out and the grant of the decree for injunction is justified.

27. The appeal is accordingly partly allowed; the decree insofar as for recovery of possession is set aside and the suit for the said relief is

dismissed. However, the decree for permanent injunction shall remain. In the facts and circumstances, no costs.

Decree sheet be drawn up.

**RAJIV SAHAI ENDLAW, J.**

**OCTOBER 01, 2013**

bs