

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

% **Date of decision: 23rd July, 2018**

+ **RSA 158/2017, CM No.21057/2017 (for stay) & CM No.6788/2018 (u/O XXXIX Rule 2A CPC).**

AKIL AHMAD **..... Appellant**

Through: Mr. Jai Kumar Sinha, Adv.
versus

ABDUL HAKIM **..... Respondent**

Through: Mr. Sanjay Singh,, Adv. for R-1.
Mr Akhil Sachar with Ms.
Sunanda Tulsyan, Adv. for R-2.
Mr. Ashish Uppal, Adv. for R-3.
SI Indrapal Singh, PS
MadhuVihar.
SI Hawa Singh (Main IO), Crime
Branch.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment [dated 23rd March, 2017 in RCA No.294/16 (CNR No.DLET01-00-2016) of the Court of District Judge (East), Karkardooma Courts, Delhi] of dismissal of First Appeal under Section 96 of the CPC preferred by the appellant/plaintiff against the order [dated 19th May, 2016 in CS No.6445/2016 (Case ID No.02402C0024922013) of the Court of Additional Civil Judge (East), Karkardooma Courts, Delhi] of rejection of plaint in the suit filed by the appellant/plaintiff for permanent injunction restraining respondent/defendant from forcibly dispossessing the appellant/plaintiff from property No.A-188, Main

Chandar Vihar, Khasra No.256/4, measuring 100 sq. yds., Mandawali, Delhi – 110 092 as shown in the site plan filed along with plaint.

2. This Second Appeal came up before this Court first on 29th May, 2017, when, without indicating the substantial question of law which arises, notice thereof was ordered to be issued and the respondent/defendant, till further orders, restrained from dispossessing the appellant/plaintiff from the property in possession of the appellant/plaintiff at the address aforesaid.

3. The respondent appeared and sought time to engage an Advocate and the Trial Court record was requisitioned.

4. The appellant/plaintiff has filed CM No.6788/2018 under Order XXXIX Rule 2A of the CPC, also impleading the Station House Officer (SHO), Police Station Madhu Vihar, Mandawali, Delhi – 110 092 therein and in pursuance whereof SI Indrapal Singh, PS MadhuVihar and SI Hawa Singh (Main IO), Crime Branch are appearing.

5. The counsel for the appellant/plaintiff and the counsel for the respondent/defendant have been heard and the Trial Court record requisitioned perused.

6. A perusal of the Trial Court record shows that the respondent/defendant was proceeded *ex parte* in the suit from which this appeal arises and vide *ex parte* order dated 12th February, 2013 the respondent/defendant was restrained from forcibly dispossessing the appellant/plaintiff from the property and the appellant/plaintiff relegated to leading *ex parte* evidence. Thereafter an application was filed by the respondent/defendant for setting aside of the *ex parte* and

which application was allowed on 19th May, 2016, and on the same day, arguments were heard on the plea of the counsel for the respondent/defendant of the suit being not maintainable and vide order of the same day, the plaint was rejected.

7. The appellant/plaintiff instituted the suit, from which this appeal arises, pleading (i) that he was on 19th January, 1998 adopted by the respondent/defendant and his wife Sayda Begum and was residing in the property as their son; (ii) that Sayda Begum died, leaving a Will bequeathing the property exclusively to the appellant/plaintiff; and, (iii) that the respondent/defendant wanted to sell the property and was attempting to forcibly dispossess the appellant/plaintiff therefrom. Hence the suit for permanent injunction restraining forcible dispossession.

8. The Suit Court rejected the plaint, reasoning that there is no concept of adoption in Muslim law and thus the appellant/plaintiff was not related to the respondent/defendant and the Will even if any in his favour could not be for more than 1/3rd share in the property. It was thus held that the appellant/plaintiff could not claim to have become the owner of the property.

9. The First Appellate Court, in appeal, though has held that on coming into force of the Juvenile Justice (Care and Protection of Children) Act, 2000 even a Muslim can adopt and has also in this regard relied on *Shabnam Hashmi Vs. Union of India* (2014) 4 SCC 1, but has further held that since adoption claimed by the appellant/plaintiff was of prior to coming into force of the said Act and as the Act is not retrospective, there was no merit in the appeal.

10. The counsel for the appellant/plaintiff contends that the respondent/defendant, in violation of the *ex parte* order dated 29th May, 2017 in this appeal, has dispossessed the appellant/plaintiff from the first floor in his occupation of the property aforesaid.

11. The counsel for the respondent/defendant, under instructions from the respondent/defendant present in Court, states that the appellant/plaintiff is in possession of the three rooms on the ground floor of the property and the first floor is under the lock and key of the respondent / defendant. It is also stated that the respondent/defendant has already instituted a suit for recovery of possession of the portion of the property in occupation of the appellant/plaintiff from the appellant/plaintiff.

12. The counsel for the appellant/plaintiff, under instructions from the appellant/plaintiff also present in Court, states that the appellant/plaintiff is in possession of three shops on the ground floor and was earlier also in possession of two rooms on the first floor and from possession of which he has been divested.

13. SI Hawa Singh, who was the Investigating Officer (IO) of the *kalandra* which was recorded on complaint, on enquiry states that when the Police was called, both, appellant/plaintiff and the respondent/defendant were on both the floors and he is unable to state in which rooms.

14. The counsel for the appellant/plaintiff states that the appellant/plaintiff has been dispossessed from the rooms on the first floor inspite of the interim order in this appeal.

15. In the aforesaid state of affairs, it is not deemed appropriate to frame any substantial question of law in this Second Appeal, when the suit from which this appeal arises, was only for permanent injunction and in which, as per *Anathula Sudhakar Vs. P. Buchi Reddy* (2008) 4 SCC 594, no title was to be investigated and the only question was whether the appellant/plaintiff was in settled possession. From the stand of the respondent/defendant before the First Appellate Court, as recorded in the judgment of the First Appellate Court, it appears that the appellant/plaintiff was allowed to stay in one room only but in August, 2012 trespassed into three rooms, the possession of the appellant / plaintiff of three rooms, at least since August, 2012 is admitted.

16. It is thus deemed appropriate to dispose of this Second Appeal as under:-

- (i) The validity of the Will, if any, of Sayda Begum set-up by the appellant/plaintiff in his favour need not be gone into, in the suit for injunction in which only settled possession is to be protected.
- (ii) The respondent/defendant having admitted the respondent/plaintiff to be in possession of three rooms on the ground floor, is restrained by a decree of permanent injunction from forcibly dispossessing the appellant/plaintiff therefrom save by due process of law.
- (iii) As far as the claim of the appellant/plaintiff with respect to the two rooms on the first floor is concerned, the appellant/plaintiff is granted liberty to, in the suit for

possession aforesaid, agitate the same and if required also make a counterclaim with respect thereto, inasmuch as there is nothing before this Court, to hold that appellant / plaintiff, on 29th May, 2017, was in possession of two rooms also, on first floor and which will need enquiry by recording evidence.

- (iv) The decree for permanent injunction in favour of the appellant/plaintiff is however made conditional on the appellant/plaintiff not trespassing over any other part of the property and making the claim for possession of the two rooms on the first floor or any other portion of the property only in accordance with law.

17. Decree sheet be drawn up.
18. The parties are left to bear their own costs.
19. A copy of this judgment along with a copy of the order of the Suit Court and the First Appellate Court be sent to the Committee of the Inspecting Judges of the Suit Court.
20. Suit Court record be sent back.

RAJIV SAHAI ENDLAW, J.

JULY 23, 2018
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