

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

+ **RFA No. 230/2018 & CM No. 8638/2018**

% **10th May, 2018**

DINESH KUMAR Appellant

Through: Mr. Ravi Dagar, Advocate.

versus

MITHLESH & ANR. Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. No one appears for the respondents. They are proceeded *ex-parte* for the purpose of disposal of this first appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugning the judgment of the trial court dated 27.1.2017 dismissing the suit for possession and damages filed by the appellant/plaintiff. In fact, the reason for non-appearance of the respondents/defendants is that in the trial court itself, both in their written statement/pleading as also evidence led, the respondents/defendants had stated that they were not in possession of the suit premises.

2. The facts of the case are that the appellant/plaintiff filed the subject suit for possession against the two respondents/defendants. Respondents/defendants are husband and wife. The case in the plaint was that the appellant/plaintiff is the owner of the suit property being one flat shown in red colour in the site plan being Private Flat No. 15, 3rd Floor, Municipal No. 207-B, Dabri Village, Near Vaishali, Gali No.2, New Delhi. One Sh. Neeraj Maan (name wrongly written as Sh. Satbir Singh Maan in the plaint and in the affidavit by way of evidence) approached the appellant/plaintiff, inasmuch as Sh. Neeraj Maan was a closed friend of the appellant/plaintiff, that Sh. Neeraj Maan was having a collaboration agreement for construction of the property of the respondents/defendants, and therefore, respondents/defendants be allowed to stay in the suit property of the appellant/plaintiff for a period of six months, and this was allowed by the appellant/plaintiff. Since after expiry of six months, the respondents/defendants failed to vacate the suit property, therefore they were served with the legal notice dated 4.6.2012, which too failed to yield the desired result, and therefore the subject suit was filed.

3. In the written statement of the respondents/defendants the case of the respondents/defendants was that the suit property was not owned by the appellant/plaintiff but was owned by Sh. S.S. Maan, the father of Sh. Neeraj Maan, and Sh. S.S. Maan had allowed the respondents/defendants to stay in the suit property on account of collaboration agreement entered into by the respondent no.1/defendant no.1 with Sh. S.S. Maan. Disputes and differences had arisen between the respondents/defendants and Sh. S.S. Maan and in fact the electricity and water connection of the suit property were disconnected in March 2012 by Sh. S.S. Maan. In para 4 of the written statement, it is specifically pleaded that the respondents/defendants are not residing in the suit premises since more than one year before filing of the written statement, and consequently it was pleaded that how can the respondents/defendants be said to be illegal occupants.

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

- “(i) Whether the suit of the plaintiff is without cause of action and suit of the plaintiff is liable to be dismissed under order 7 Rule 11 CPC? OPD
- (ii) Whether the suit of the plaintiff is not properly valued for the purpose of court fee? OPD
- (iii) Whether the plaintiff is entitled for a decree of possession against the defendants for the accommodation consisting of two bed

rooms, one drawing room, two toilets, one kitchen which is shown in Red colour in the site plan being private Flat No. 15, built on third floor in Municipal No. 207 B, Dabri Village, near Vaishali, Gali No.2, New Delhi? OPP

- (iv) Whether the plaintiff is entitled for a decree of damages and mesne profit in the sum of Rs.1000/- against the defendant towards damages and mesne profits for the period 04/06/2013 till the date of filing of the suit alongwith interest? OPP
- (v) Relief.”

5. Appellant/plaintiff led evidence and examined four witnesses including Sh. Neeraj Maan, son of Sh. S.S. Maan. The original owner of the land on which the suit property has been proved to be of the father of the appellant/plaintiff one Sh. Dharamvir Singh Solanki. The Lal Dora certificate in favour of Sh. Dharavir Singh Solanki has been proved through the Record Keeper Clerk from the Revenue Department and which has been proved and exhibited as Ex.PW1/2. Smt. Prem Wati wife of late Sh. Dharamvir Singh Solanki and Sh. Harvinder Singh Solanki son of Sh. Dharamvir Singh had executed a registered Relinquishment Deed in favour of the appellant/plaintiff as regards the suit property and which has been proved on record as Ex.PW1/1.

6.(i) Trial court has very surprisingly dismissed the suit by returning a finding that the suit had to be dismissed because there is no

specific evidence led by the appellant/plaintiff that respondents/defendants were in possession of the suit property at the time of filing of the suit. Trial court however noticed that there is no dispute as to the ownership of the appellant/plaintiff of the suit property. Trial court has also dismissed the suit by holding that though legal notice dated 28.5.2013 was proved as Ex.PW1/4 with the postal receipts as Ex.PW1/5 to PW1/8, yet since respondents/defendants denied that they were personally served, hence trial court held, most surprisingly, that the notice Ex.PW1/4 should be held to be not served. Trial court has also dismissed the suit by observing that appellant/plaintiff had stated in his cross-examination that he did not know what was written in his affidavit by way of evidence.

(ii) In my opinion, reasons given by the trial court are unacceptable reasons for dismissing the suit once the fact is proved on record that the suit property is owned by the appellant/plaintiff and respondents/defendants have no ownership rights in the suit property. Also all these aspects were undoubtedly either admitted or proved in the trial court, either in view of the pleadings of the

respondents/defendants or the evidence led on behalf of the appellant/plaintiff. Therefore, the trial court ought not to have dismissed the suit by simply holding that appellant/plaintiff has failed to prove the possession of the respondents/defendants of the suit property on the date of filing of the suit and that appellant/plaintiff in his cross-examination had said that he did not know what was written in the affidavit by way of evidence. Once otherwise facts are established on record a suit cannot be dismissed on technical grounds, more so when the suit is for possession of a property, and ownership of the appellant/plaintiff of the suit property is proved and even otherwise admitted on record.

7. In view of the aforesaid discussion, the impugned judgment of the trial court dated 27.1.2017 is set aside. Suit of the appellant/plaintiff for possession of the suit property being Private Flat No. 15, 3rd Floor, Municipal No. 207-B, Dabri Village, Near Vaishali, Gali No.2, New Delhi is decreed in favour of the appellant/plaintiff and against the respondents/defendants. Since the appellant/plaintiff however has failed to prove the *mesne* profits, no *mesne* profits hence can be awarded. Appeal is accordingly allowed and disposed of by

decreeing the suit for possession as stated above. Decree sheet be prepared. Trial court record be sent back.

MAY 10, 2018/ib

VALMIKI J. MEHTA, J

