

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

% *Judgment reserved on : 9th February, 2015*
Judgment delivered on : 13th February, 2015

CS(OS) 623/2010

SURENDRA KUMAR GUPTAPlaintiff
Through: Mr. Suryakant Singla with Mr. Shanto
Mukerjee, Advocates

Versus

MUKESH KUMAR GUPTADefendant
Through: Mr. Randhir Jain, Advocate

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1. The present suit has been filed by the plaintiff Surendra Kumar Gupta against his brother Mukesh Kumar Gupta. It is a suit for recovery of possession, mesne profits/damages and for injunction.

2. The plaintiff had purchased half undivided share in House No. E-262, Greater Kailash Part II, New Delhi from Smt. Kamla Kundra vide sale deed dated 18th December, 1974. This is a registered document. It is stated to be the self acquired property of the plaintiff. It is on a plot of land admeasuring 250 square yards upon which initially

there was one and a half storeyed building built upon it.

3. Devinder Nath Gupta, half brother of the plaintiff had purchased the remaining half undivided share in the afore-noted property vide a separate sale deed dated 18th December, 1974 from Smt. Kamla Kundra. This was also a registered document.

4. Thereafter, the plaintiff and his half brother Devinder Nath Gupta entered into a partition deed dated 18th January, 1980 duly registered. In terms of this partition, Devinder Nath Gupta became the absolute owner of the ground floor of the property. The plaintiff became the absolute owner of the first floor and the terrace as the value of the ground floor was more than the value of the first floor and the terrace. Devinder Nath Gupta had paid Rs. 39,300/- to the plaintiff to set off the difference.

5. At the time of purchase of the suit property, the first floor had only two rooms, a toilet, kitchen and a lounge. In the year 1988, the plaintiff completed the construction on the first floor and also constructed a two room set on the second floor at his own expenditure. Thereafter, in the year 1999, the plaintiff completed the construction on the second floor and made the barsati floor.

6. The defendant is the real brother of the plaintiff. After the

construction of the second and the barsati floor in the year 1999, the defendant who was living at Naya Bans, Khari Baoli, Delhi had requested the plaintiff to accommodate him on the second floor as the accommodation in Naya Bans, Khari Baoli, Delhi was not suitable. He requested the plaintiff to permit him to occupy the second floor as a licensee which permission was accordingly granted by the plaintiff to the defendant.

7. The plaintiff had permitted the defendant to occupy the second floor in the suit property as a licensee. There was only one electricity connection at that time. Since the defendant was living there as a licensee, the defendant was requested to obtain a separate electricity meter which was accordingly obtained. The defendant is since then occupying the property. However, under compelling circumstances, the plaintiff in need of the accommodation, sent a notice dated 23rd February, 2010 revoking the licence of the defendant and required him to vacate the suit property; failure to do so would render him liable to pay damages at the rate of Rs. 50,000/- per month. The defendant not being willing to vacate the suit property and nor agreeing to pay Rs. 50,000/- per month as damages, the plaintiff was compelled to file the CS (OS) No.623/2010

present suit.

8. Written statement was filed by the defendant. His defence in the written statement was twofold. His first submission was that the suit property was purchased out of joint family funds by the father of the parties. The second defence set up by the defendant was that he was tenant in his own right in the suit property and not a licensee as alleged by the plaintiff. Contention of the defendant was that he is living in the suit property since 1985 and being the younger brother of the plaintiff was also his partner in the business firm M/s Mega Enterprises, he was entitled to stay in the suit property. His brother (plaintiff) was charging him Rs. 1000 per month as rent which amount was being paid regularly by the defendant to the plaintiff. The suit which is filed by the plaintiff is wholly malafide and is liable to be dismissed.

9. Replication was filed by the plaintiff reiterating the averments contained in the plaint and disputing the contentions raised in the written statement.

10. On 9.12.2010, the following issues were framed:-

(i) Whether the defendant is a tenant in the suit property as alleged in the written statement? OPD

(ii) Whether the plaintiff is entitled to the decree of possession in respect of the second floor of E-262, Greater Kailash-II, New Delhi? *OPP*

(iii) Whether the plaintiff is entitled to any mesne profits/damages from the defendant? If so, at what rate and for what period? *OPP*

(iv) Whether the plaintiff is entitled to the decree of injunction? *OPP*

(v) Relief.”

11. Relevant would it be to note that no separate issue qua the defence of the defendant that this property was purchased out of joint family funds was framed. The contention of the defendant that he is a tenant in the suit property as alleged in the written statement, was an issue; the onus to discharge this issue was upon the defendant.

12. The plaintiff has produced two witnesses; the plaintiff himself and his son-in-law Rajiv Gupta, examined as PW-2. The defendant in support of his case has adduced only one witness i.e. the defendant.

13. Oral and documentary evidence relied upon by the parties has been perused. Arguments have also been heard.

14. Issue wise findings read as under:-

Issue Nos 1 & 2

15 The onus to discharge issue No.1 was upon the defendant and the onus to discharge issue No.2 was upon the plaintiff. It was the defendant who had to prove that he was a tenant in the suit property as was the defence set up by him in his written statement. The defendant was examined as DW-1. He reiterated the averments made in his written statement stating that he was a tenant in the suit property i.e. at the second floor w.e.f 1985 at a monthly rent of Rs.1,000/- per month and he has been paying this rent regularly. The plaintiff thereafter refused to accept the rent and the same was deposited by the defendant in the Court of Mr.Kuldeep Narayan, Additional Rent Controller; he had an electricity connection which is in his name; he also has a telephone connection in the suit premises. It was reiterated that the parties i.e. the plaintiff and the defendant had a joint family business and the suit property was purchased out of the funds of the family business. DW-1 had filed a suit before the Senior Civil Judge for permanent injunction and it was only thereafter that the present suit has been filed which is a counter blast to that suit.

16 DW-1 was subjected to a lengthy cross-examination. He admitted that the ration card at the address of the suit property was issued to him in the year 1999; the election card is of the year 2004. He did not remember the number of the telephone or the details of the telephone installed in the suit property; it was volunteered that earlier the plaintiff and the defendant shared a common telephone. He admitted that he had a passport which has been issued to him in the year 1981 which was at his earlier residential address i.e. 391, Naya Baans, Delhi. He had got the passport renewed and even in the application seeking renewal, he had given his residential address as Naya Baans. The passport was proved as Ex.DW-1/P-1 evidencing that it was renewed in the year 1999 where also the address of the defendant was given as Naya Baans and not the address of the suit property. DW-1 admitted that the suit property was purchased from Smt. Kamla Kundra and the property was in the name of the plaintiff. He admitted that a partition deed had been executed between Devender Nath Gupta and the plaintiff (Ex.PW-1/4) substantiating the stand of the plaintiff that the suit property which had initially been purchased by the two half brothers i.e. the plaintiff and Devender Nath Gupta was partitioned in the year 1980 and the ground

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floor had fallen to the share of Devender Nath Gupta and the first floor had fallen to the share of the plaintiff. The partnership deed executed between the plaintiff and the defendant (EX.DW-1/P2) executed on 01.9.1992 indicated the address of the defendant as Naya Baans, Delhi DW-1 also admitted that he had received legal notice Ex.PW-1/12 which was not replied to by him. He denied the suggestion that he is a licensee and his license was validly terminated by Ex.PW-1/12. He admitted that initially there was one electricity connection; he had applied for a separate connection in the year 1999.

17 To answer these issues, testimonies of PW-1 and PW-2 are also relevant. PW-1 was the plaintiff. He reiterated that the suit property is in his name. He proved the documents of title including the sale deed Ex.PW-1/1 dated 18.12.1974 (duly registered). This property was purchased in the name of the plaintiff and Devender Nath Gupta by two separate sale deeds; this property was subsequently partitioned by a partition deed Ex.PW-1/4 dated 29.02.1980. The assessment order evidencing that this property was assessed to house tax and was in the name of the plaintiff was proved as Ex.PW-1/3. PW-1 reiterated that at

the time when he purchased this property only the ground floor and a portion of the first floor had been built up and consequent to the partition, the mutation had taken place of the first floor and barsati floor in favour of DW-1 by the MCD and proved as Ex.PW-1/5. PW-1 constructed the second floor and barsati floor out of his own expenses and the construction was completed in 1999. The assessment orders assessing his property to house tax proved as Ex.PW-1/6 to Ex.PW-1/10 evidence that the constructions in the second and barsati floor was done in 1999; Ex.PW-1/7 reflects that the rateable value (RV) of the property had gone up w.e.f. 01.4.2000 in view of this additional construction. PW-1 reiterated that his brother was earlier living in Naya Baans in the year 1999, he requested him to occupy the second floor as a licensee without any occupational charges. There was one electricity connection in the suit property but since the load was not adequate for the three floors, the defendant got a separate electricity connection in his name which was in the year 1999.

18 In his cross-examination PW.1 admitted that the defendant was his brother. He however denied the suggestion that there was a joint

family business although he admitted that both, the plaintiff and the defendant were carrying on a partnership business. It was reiterated that plaintiff had shifted to Greater Kailash in 1965 and the defendant in November, 1999 and before that he was a resident of Naya Baans. He admitted that he had received a notice from the Court of Additional Rent Controller to which he had filed objections. This Court has been informed that these proceedings were initiated by the defendant under Section 27 of the Delhi Rent Control Act seeking permission of the Court to deposit rent in Court. The amount so deposited was never withdrawn by the plaintiff as the stand of the plaintiff all along has been that the defendant is only a licensee and not a tenant as was sought to be set up by the defendant by moving this petition under Section 27 of the DRCA. Admittedly these proceedings were initiated before the Rent Controller after the notice Ex.PW-1/12 had been served upon the defendant. Thus the submission of the learned counsel for the plaintiff that these proceedings were started only to set up a false plea of tenancy has been established. It is also not in dispute that the suit filed by the defendant seeking permanent injunction had been disposed of on the statement made by the plaintiff that he would not dispossess his

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brother/defendant without due process of law as the present suit i.e. CS(OS) No.623/2010 had already been filed by him. These proceedings also do not in any manner advance the defence of the defendant.

19 Relevant would it be to note that the defence set up by the defendant was initially twofold. The first defence was that the suit property had been purchased out of the joint family funds and the second defence is that he was a tenant in his own right. No issue was framed on the first defence. Issue was framed only on the defence that he was a tenant.

20 Admittedly, no documentary evidence filed by the defendant to substantiate this defence that he was a tenant in the suit property. If he was paying monthly rent, there would have been some documentary evidence; even presuming that there was no receipt exchanged between the brothers, the monthly deduction from the bank statement of the defendant could have been brought on record. There is no such evidence either. That apart, the submission of the defendant that he was occupying the property since 1985 is wholly negated by his own admission wherein he has admitted that he was given the ration card of

the suit property in the year 1999; telephone installed in the premises was also of the year 1999; his passport, renewed sometime in the 1990s, also reflected his address of Naya Baans, Delhi. So also the partnership deed (Ex.DW-1/2) executed in September, 1992. Obviously till 1999, the defendant continued to be a resident of Naya Baans and he came to occupy the suit property only in the year 1999 and that is why his election card and telephone connection were of the same period. The electricity connection in the name of the defendant was also of the year 1999. Thus the submission of the defendant that he is in occupation of the suit property since 1985 is wholly negated.

21 Ex.PW-1/12 is the legal notice dated 23.01.2010 which was admittedly received by the defendant. This has been admitted by him. He did not file any reply to the said notice. In terms of this notice, the license of the defendant stood terminated within 15 days from the receipt of this notice i.e. w.e.f. 12.03.2010.

22 The defendant on all counts having failed to prove that he was a tenant in the suit property; he is held to be a licensee. A license has been defined under Section 52 of the Indian Easement Act, 1882. It is a contract for the use of the property in a certain way and on certain terms

while possession and control of the property remains upon the owner. This is the concept of a license and what is evident from the evidence which is adduced before this Court that the plaintiff and the defendant shared a relationship of licensor and a licensee. A license does not create any interest in favour of the licensee. It is the gratuitous; a personal arrangement. It can be terminated at the will of the licensor. This is clear from Section 60. Revocation may be expressly or impliedly. The termination notice i.e. Ex.PW-1/12 which was admittedly received by the defendant had revoked the license giving 15 days time to the defendant to vacate the suit property i.e. up to 12.3.2010, failing which the defendant would have to pay the damages at the market rate. License stood validly revoked. The defendant had failed to vacate the suit property.

23 Defendant being only a licensee in the suit property and not a tenant, the plaintiff is entitled to a decree of possession.

24 Both these issues are decided accordingly.

Issue No. 3

25 The plaintiff has led evidence on this score which is in the nature of his own testimony (PW-1) and that of his son-in-law (PW-2). Legal CS (OS) No.623/2010

notice Ex.PW-1/12 was proved; defendant did not file any reply to the notice. In terms of Ex.PW-1/12, the license of the defendant stood terminated w.e.f. 12.03.2010 and the defendant was directed to vacate the suit property within fifteen days from its receipt failing which mesne profits at the rate of Rs.50,000/- per month (as per the prevailing market rent) was claimed. The son-in-law of the plaintiff (Rajiv Gupta) was examined as PW-2. His testimony was relevant to substantiate the stand of the plaintiff on mesne profits. PW-2 was also a resident of E-383, Greater Kailash-II, New Delhi i.e. a property in the vicinity. He on oath deposed that similar premises could fetch Rs.50,000/- per month in the market. This witness was also subject to a lengthy cross-examination but nothing could discredit this version. Both of them have reiterated that a property of such like nature could fetch monthly rent of Rs.50,000/- per month. Admittedly the suit property is built on a 250 square yard plot. It comprises of two bed rooms, a kitchen and a lounge. In the cross-examination of PW-1, this stand has been reiterated. PW-1 denied the suggestion that the prevailing rental value is not Rs.50,000/- per month. The same suggestion was given to PW-2 who has also denied it. DW-1 has not led any evidence to discredit this version. He did not know what

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was the rate of house tax. He also does not know what was the cost of construction of barsati floor. He also had not idea what would be the rent of such accommodations. He denied the suggestion that it would be Rs.50,000/- per month.

26 There is no documentary evidence filed by either parties. However, this Court need not delve into any further inquiry (in terms of Order 20 Rule 12 of the Code) in view of the fact that apart from the oral evidence adduced, this Court also takes judicial notice that the property is located in the heart of Delhi in a posh locality and the disputed portion comprises of a large accommodation of three bed rooms, a kitchen and a lounge. Vice-versa this Court also notes that trends in real estate have been depressed. The property was constructed in the year 1999 i.e. almost 10 years ago; it has no lift and access to the second floor is through the stairs.

27 In MANU/DE3765/2013 Hindustan Paper Corporation Vs. Kanta Manocha judicial notice had been taken of the market rent prevailing in the vicinity; it was noted that judicial notice is required to be taken because of the difficulties in finding evidence of letting of similar

premises, especially residential, as owners as well as tenants of the residential premises hesitate from disclosing the terms of their occupation to strangers; inasmuch as the evidence of letting of identical premises being rarely available. The Supreme Court in (2011)12 SCC 18 Saradamani Kandappan Vs. S. Rajalakshmi had held that though the third quarter of the 20th Century saw a very slow but steady increase in prices of immovable property but a drastic change occurred from the beginning of the last quarter and a galloping increase in prices of immovable properties has taken place with prices increasing steeply, by leaps and bounds and judicial notice can be taken thereof. Thus it would be fair to assess Rs.20,000/- as the rental value of such a property which is the mesne profits that the defendant is liable to pay to the plaintiff w.e.f. the date of termination of his license i.e. w.e.f. 12.3.2010 up to the date of the decree.

28 Accordingly a decree in the sum of Rs.9,40,000/- (Rs.20,000/-x 47) is passed in favour of the plaintiff and against the defendant with future damages at the same rate till the defendant vacates the suit property. In case of default, the plaintiff would be entitled to interest at the rate of 9% per annum on this outstanding.

29 Issue No. 3 is decided accordingly.

Issue No.4

30 The plaintiff has not pressed this issue.

31 It is disposed of accordingly.

Relief

32 The suit of the plaintiff is decreed. He is entitled to a decree of possession as also the mesne profits calculated at the rate of Rs.20,000/- and in case the amount is not paid, simple interest at the rate of 9% per annum on the outstanding. Costs of the suit are also awarded in favour of the plaintiff. Decree sheet be drawn. File be consigned to the record room.

INDERMEET KAUR, J

FEBRUARY 13, 2015
Sd/A