

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

% **Date of decision: 31st May, 2016.**

+ **RFA No.24/2004, CM No.388/2004 (u/O 33 R-1 CPC), CM No.389/2004 (for stay) & CM No.17155/2005 (for directions)**

SANGEETA CHATURVEDI

..... Appellant

Through: Mr. Raman Kapur, Sr. Adv. with Mr. Varun Kapur, Adv.

Versus

MANOJ CHATURVEDI

..... Respondent

Through: Mr. Tarun Sharma & Ms. Meenu Sharma, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree dated 28th October, 2003 of the Court of the Additional District Judge (ADJ), Delhi in Civil Suit No.86/2002, (i) of recovery of possession of Flat No.A-7, Lovely Apartments, Mayur Vihar, Phase-I, Delhi; (ii) of recovery of *mesne* profits / damages for use and occupation in the sum of Rs.18,000/- with effect from 1st July, 2001 to 30th June, 2002 and @ Rs.2,500/- per month from the date of filing of the suit i.e. 30th July, 2002 till the date of delivery of possession; and, (iii) of injunction restraining the appellant from allowing entry / stay of

her friends and relatives in the said flat and from inducting anyone else into possession thereof.

2. Notice of the appeal was issued and *status quo* possession directed to be maintained. Vide order dated 23rd August, 2004, Mr. Raman Kapur, Advocate (now Senior Advocate) was requested to assist the Court on behalf of the appellant. The Trial Court record was requisitioned. Considering that the parties are husband and wife, attempts at mediation were made but remained unsuccessful. Finally, on 30th May, 2006, the appeal was admitted for hearing and the ad-interim order dated 14th January, 2004 made absolute till the decision of the appeal. The parties were again referred to mediation but which again failed. On 23rd July, 2013, it was informed (a) that the claim of the appellant/wife to the subject flat is on account of the same being her matrimonial home; (b) that besides this proceeding, divorce proceedings as well as maintenance proceedings were also pending between the parties; (c) that electricity connection to the subject flat stands disconnected and there are arrears of over Rs.2,50,000/- to be paid for restoration thereof; and, (d) that the brother of the appellant/wife is married to the sister of the respondent/husband and that marriage has also run into problem. Attempt at mediation again made also failed. Vide order

dated 6th April, 2015, both parties were directed to file their affidavits of assets, income and expenditure. Though the appellant/wife filed an affidavit but the respondent/husband did not file any affidavit and the counsel for the respondent/husband on 8th September, 2015 contended that the subject matter of this appeal being not concerned with the aspect of maintenance, there was no need therefor. The respondent/husband on 8th September, 2015 also offered that upon the appellant/wife vacating the flat, the respondent/husband would in addition to the maintenance already fixed / decided and / or being already paid, pay additional sum of Rs.7,000/- per month to the appellant/wife for her lifetime. However, the said proposal was also not acceptable to the appellant/wife. In this view of the matter, on 17th November, 2015, the counsels were heard on merits of the appeal and were also permitted to file written submission and judgment was reserved. Neither party has chosen to file written arguments, though brief synopsis of submissions of the counsel for the appellant/wife is on record.

3. The only claim of the appellant/wife to remain in possession of the subject flat being on the ground that the same is her matrimonial home, need to burden this judgment with the details of pleadings, evidence and findings returned by the learned ADJ, is not felt. Suffice, it is to state that the learned

ADJ, on the basis of the evidence led has disbelieved the same, finding that the respondent/husband since prior to his marriage on 31st January, 1992 with the appellant/wife had been living at Sita Ram Bazar, Delhi and had purchased the subject flat only in the year 1999 and the parties had never lived as husband and wife in the subject flat. I may in this regard notice the plea of the respondent/husband, of the appellant/wife though staying away from him, on coming to know of the purchase by him of the said flat, having illegally and forcibly trespassed thereinto.

4. What is not in dispute is:

- (i) that the parties in the last nearly 25 years since their marriage have hardly lived together as husband and wife and there are no children of the marriage;
- (ii) that the parties for the last several years are embroiled in, besides this litigation, litigation for dissolution of their marriage and qua maintenance etc.;
- (iii) that there is no possibility of any settlement, owing to the allegation of the appellant/wife of the respondent/husband being in an incestuous relationship and the differences in the marriage of the

brother of the appellant/wife with the sister of the respondent/husband;

(iv) that the appellant/wife though in possession of the subject flat is also not residing therein and is residing at Bhusawal, Maharashtra;

(v) that the subject flat, if not since the time of purchase in the year 1999 (as contended by the respondent/husband) at least since 2001 (when according to the appellant/wife the parties resided therein as husband and wife) i.e. for the last over 15 years has been lying unused;

(vi) that to make the subject flat habitable, arrears of electricity charges and maintenance charges will have to be paid and expenses incurred in making the same habitable.

5. What is however peculiar is that the respondent/husband has not disclosed any home to which the appellant/wife can/may claim as her matrimonial home. The respondent/husband has also shied away from filing the affidavit of his assets as he was directed to file. In this view of the matter, I would be reluctant to sustain the decree for recovery of possession of the said flat and for recovery of *mesne* profits against the appellant/wife, especially when the matrimonial disputes between them are still at large.

6. However, at the same time allowing the appeal and setting aside of the decree would also not serve any purpose. The appellant/wife is unable to make any use of the said flat, for the reason of the same being without an electricity connection and the maintenance charges thereof having also not been paid and owing where to it was informed that the Co-operative House Building Society, of which the said flat is a part, is creating hindrances in use thereof. At the same time, the respondent/husband has also been unable to reap any benefits of the said flat. There is also no possibility of the respondent/husband recovering any monies under the decree for recovery of *mesne* profits from the appellant/wife.

7. Thus, in either situation, the property is wasted with neither party benefiting therefrom.

8. Though this is a civil appeal (as distinct from a writ petition under Article 226 of the Constitution of India in exercise of jurisdiction whereunder the Court is empowered to pass such orders as are just), the decision whereof has to be within the confines of the procedure prescribed by the CPC and on the basis of the pleadings, issues framed and the evidence led, but after having given considerable thought I am of the view

that this Court in proceeding to decide the appeal in this fashion would not be doing justice, which is the primary function of this Court.

9. Though this is a litigation pertaining to rights in immovable property but in reality qualifies as a matrimonial litigation and with respect whereto the Supreme Court in ***B.S. Joshi Vs. State of Haryana*** AIR 2003 SC 1386 held should not be encouraged and a hyper-technical view which would be counter-productive and would act against the interest of women should not be taken and should be attempted to be brought to an end.

10. I am, in the aforesaid facts, of the view that justice would be done by modifying the judgment and decree of recovery of possession and *mesne* profits against the appellant/wife into a decree for partition of the subject flat between the appellant/wife and the respondent/husband with each having 50% undivided share therein and by directing sale of the subject flat in 'as is where is' condition and sharing / distribution of the net sale proceeds between the appellant/wife and the respondent/husband equally and by further directing that the said factum be taken into consideration / account in the divorce and maintenance proceedings between the parties, particularly in the context of fixation of maintenance / alimony, if any payable by the respondent/husband to the appellant/wife.

11. In doing so, I further draw strength from Order VII Rule 7 of CPC which empowers this Court to grant relief other than that which is sought for, which may be found just as if it had been asked for. I am of the view that in exercise of such power, the Court instead of granting the relief of recovery of possession of the entire flat claimed by the respondent/husband would be entitled to grant the relief to the respondent/husband of recovery of value of half of the flat only. Strength in this regard is also drawn from Section 27 of the Hindu Marriage Act, 1955 which though in a proceeding under that Act (and which this is not) entitles the Court to make appropriate provision as it deems just and proper with respect to the property. I may also mention that the dispute of the present nature between the husband and wife also qualifies as a family dispute within the meaning of Section 7 of the Family Courts Act, 1984. Order 41 Rule 33 of CPC also empowers this Court as appellate court to make an order or decree as the case may require.

12. Accordingly, (i) the judgment and decree insofar as for recovery of possession of Flat No.A-7, Lovely Apartments, Mayur Vihar, Phase-I, Delhi and for recovery of *mesne* profits is set aside; (ii) instead a decree for partition of the aforesaid flat by sale thereof and of distribution of net sale proceeds thereof equally between the appellant/wife and the

respondent/husband is passed; and, (iii) the decree insofar as for injunction against the appellant/wife however is sustained with the clarification that the said decree for injunction shall not come in the way of sale, as aforesaid of the flat.

The parties are left to bear their own costs.

Decree sheet be drawn up.

MAY 31, 2016
'bs'

RAJIV SAHAI ENDLAW, J.

