

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

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Date of decision: 8th April, 2016

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RFA No.608/2006

MOHINI KOHLI

..... Appellant

Through: Mr. R.P. Sharma and Mr. Vaibhav Mehra, Advs.

Versus

SUBHASH CHANDER KOHLI

..... Respondent

Through: Mr. Siddharth Pandit, 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 19th July, 2006 of the Court of the Additional District Judge (ADJ) (Fast Track Court), Tis Hazari, Delhi of dismissal of Suit No.10/2006 (instituted on 7th September, 1992) filed by the appellant for recovery of possession of immovable property and damages for use and occupation.

2. Notice of the appeal was issued and Trial Court record requisitioned. The appeal, on 5th May, 2008 was admitted for hearing. Upon non appearance of either of the parties on 2nd December, 2009 and 3rd December, 2009, the appeal was dismissed in default but restored to its original position vide order dated 14th December, 2010 and again ordered to be listed for hearing in the category of 'Regulars' as per turn. The appellant applied for early hearing and

the appeal listed for hearing on an actual date. However thereafter again there was a spate of adjournments. Finally on 8th October, 2015 though attempt to hear arguments in the appeal was made but neither the counsel for the appellant nor the counsel for the respondent were possessed of the suit file and were unable to answer the enquiries made. In the circumstances, judgment was reserved. No arguments in writing also have been filed by the counsels for the parties. Be that as it may, I proceed to decide the appeal after perusing the Trial Court record.

3. The appellant filed the suit from which this appeal arises pleading (i) that her husband Col. O.P. Kohli was the owner of property no.H-2/11, Krishna Nagar, New Delhi; (ii) that the appellant and her three daughters namely Ms. Bela Awasthi, Ms. Beena Chandiok and Ms. Jyotsna Bhatnagar being the legal heirs of Col. O.P. Kohli executed a Memorandum of Family Settlement dated 2nd May, 1992 confirming the oral settlement dated 27th January, 1992 that the suit property will be owned and held exclusively by the appellant and that her daughters will have no concern with the said property; (iii) the husband of the appellant also left a Will bequeathing the said property in favour of the appellant; (iv) that the respondent/defendant is the brother of the husband of the appellant/plaintiff and has been occupying the said

property along with his family members as a licensee; (v) that the appellant vide legal notice dated 1st April, 1992 terminated the licence of the respondent/defendant and called upon him to vacate the premises and had informed him that upon his failure to do so the appellant would claim Rs.5,000/- per month as damages; (vi) that the respondent/defendant is also liable to return the original title deed etc. of the property in question; and, (vii) that the respondent/defendant has no right to continue to occupy the property. Reliefs, of recovery of possession of property, recovery of Rs.90,000/- as arrears of licence fee with interest and of recovery of future *mesne* profits/damages for use and occupation were claimed in the suit.

4. The respondent/defendant contested the suit by filing a written statement pleading (i) that Col. O.P. Kohli (husband of the appellant/plaintiff) had voluntarily vide Will dated 29th July, 1985 willed the said two storeyed property and land underneath in favour of his father Shri B.R. Kohli and mother Smt. Sewa Devi; (ii) the family of Shri B.R. Kohli i.e. all the sons were jointly living in the said property and in joint possession thereof; (iii) in fact the property was acquired out of joint family savings, in the name of Col. O.P. Kohli, to avail cheap loan facility from the Government with which Col. O.P. Kohli was employed; (iv) else Shri B.R. Kohli being the Head of the

family performed the role of *Karta* of the joint family; (v) the loan was also re-paid from the savings of the joint family; (vi) the property is in physical possession of family members left behind by Shri B.R. Kohli; Col. O.P. Kohli was frustrated and fed up with the attitude of his wife i.e. the appellant/plaintiff and his three daughters and for this reason only divested them from the property by executing the Will dated 29th July, 1985; the parents of Col. O.P. Kohli who were otherwise entitled to lay claim to the dues of Col. O.P. Kohli allowed the appellant/plaintiff and her daughters to exclusively avail of the same; (vii) that the relations between the appellant/plaintiff and her husband were strained and the appellant/plaintiff had in the year 1981 walked out of the house of Col. O.P. Kohli and was only receiving maintenance fixed by the higher authorities; (viii) “after the death of Shri B.R. Kohli and Smt. Sewa Devi, who lived and died in the said property, all their legal heirs are in use and possession of the said property”; (ix) the appellant/plaintiff has never stayed in the house from the day she walked out of the house; (x) the respondent/defendant had no knowledge of any other Will of Col. O.P. Kohli or of any family settlement pleaded by the appellant/plaintiff; (xi) Col. O.P. Kohli died in September, 1985 soon after executing the Will dated 29th July, 1985; and, (xii) the respondent/defendant

is entitled to his own proportionate share along with other co-sharers “and is living lawfully in his own right as the owner of the said property and as such is in possession and enjoying the use of the house.”.

5. The appellant/plaintiff filed a replication but need to refer thereto is not felt.

6. On the pleadings aforesaid of the parties, on 1st December, 1996 the following issues were framed in the suit:-

- “1) Whether the plaintiff is the owner of the suit property and has the locus to institute the suit? OPP*
- 2) Whether the suit is bad for misjoinder and non joinder of necessary parties? OPD*
- 3) Whether the defendant’s occupation of the premises in suit was in the capacity of licensee and plaintiff is entitled for compensation for use of Rs.90,000/- upto 30.4.1992 and Rs.15,000/- upto July, 1992 as claimed? OPP*
- 4) Whether the plaintiff is entitled to compensation for use from the defendant during the pendency of the suit, if so at what rate? OPP*
- 5) Whether the deceased Late Col. O.P. Kohli executed Will dated 29.7.1985 as his last Will bequeathing the property in suit to his parents late Sh. D.R. Kohli and late Smt. Sewa Devi? OPD*

- 6) *Whether the property in suit was constructed out of joint family funds and has been in actual possession of the members of the family? OPD*
- 7) *Whether the deceased late Col. O.P. Kohli had excluded the plaintiff and his children from his estate? OPD”*

7. This suit was accompanied with an application for interim relief. Vide order of 1st February, 1996 on the suit application, “considering the fact that defendant is in possession and it would be in the interest of justice” the respondent/defendant was restrained from alienating, parting with possession or letting out of the property to any third party till the disposal of the suit.

8. Issues aforesaid were framed in the absence of the respondent/defendant and the respondent/defendant was proceeded *ex parte* by the same order. However before the appellant/plaintiff could lead her *ex parte* evidence, the respondent/defendant applied for setting aside of the order proceeding *ex parte* against him and finally vide order dated 11th March, 1999 the order proceeding *ex parte* against the respondent/defendant was set aside.

9. Vide order dated 5th August, 1999 on an application of the appellant/plaintiff, a Local Commissioner was appointed to inspect the property and to report with regard to the condition thereof and the factum as to who is in occupation thereof and to, if finds the property to be lying vacant,

put a lock thereon. The Local Commissioner in his report dated 16th September, 1999 of the visit to the property on 16th September, 1999 reported, that the property was found locked from inside; it was opened by Smt. Roshni who claimed that her husband Shri Surjan is working with the owner of the house namely Shri G.R. Kohli and Shri G.R. Kohli had allowed her and her husband to reside in the property and they were residing therein for the previous two years and that Shri G.R. Kohli never resided in the property. It was further reported that two big trunks lying in the property bore the name of Col. O.P. Kohli. It was yet further reported that the property was in a dilapidated condition from outside. The Local Commissioner reported that Shri Surjan and his wife Ms. Roshni are in occupation of the property and the property was being used by them.

10. I.A. No.9149/1998 and I.A. No.2375/1999 were filed by Mr. Satish Kumar Kohli and Mr. G.R. Kohli respectively for impleadment as defendants in the suit. However the said applications, on 30th April, 2001, were dismissed in default for non-appearance of the applicants.

11. The respondent/defendant against stopped appearing and was again vide order dated 9th April, 2002 proceeded against *ex parte*.

12. On account of change of pecuniary jurisdiction of Courts in Delhi, the suit which was till then pending in this Court, was vide order dated 16th January, 2004 ordered to be transferred to the Court of the District Judge, Delhi.

13. Upon Court notice being issued to the parties upon receipt of the suit in the Court of the learned ADJ, the counsel for the respondent/defendant again started appearing and the order dated 9th April, 2002 proceeding *ex parte* against him was again set aside.

14. On 13th April, 2006 Smt. Usha Kohli wife of the respondent/defendant appeared before the Court of the learned ADJ before whom the suit was pending and stated that she had been authorised by her husband to give statement that her husband was left with no interest in the suit property and that he did not want to contest this matter and was also not in possession of the property.

15. The appellant/plaintiff led her *ex parte* evidence by examining herself and her daughter Ms. Jyotsna Bhatnagar who also placed on record affidavit of one Major (Retd.) Vinod Joshi.

16. The learned ADJ has vide impugned judgment dismissed the suit finding/observing/holding:-

- (a) that the respondent/defendant having been proceeded *ex parte*, had not proved the pleas taken in the written statement, neither by leading evidence nor by cross examination of the witnesses of the appellant/plaintiff;
- (b) that the respondent/defendant had failed to prove that the property was purchased from joint family funds and/or that he was having a share in it; accordingly Issues no.2,5,6&7 were decided in favour of the appellant/plaintiff and against the respondent/defendant;
- (c) that the appellant/plaintiff in her evidence proved:-
 - (i) the Sale deed showing that the property was purchased by her husband Col. O.P. Kohli in the year 1961;
 - (ii) that her husband Col. O.P. Kohli had obtained loan from the Army for the purpose of construction of the property;

- (iii) the Will dated 23rd October, 1969 (Ex.PW1/5) executed by her husband Col. O.P. Kohli; this Will is also proved through the affidavit (Ex.PW2/B) of Major (Retd.) Vinod Joshi an attesting witness to the said Will;
 - (iv) that the said Will was executed as per Army Act and Rules and was received by the appellant/plaintiff along with other documents from the Army Office after death of Col. O.P. Kohli; according to this Will the property is bequeathed in favour of the appellant/plaintiff;
 - (v) that though at one time the appellant/plaintiff tried to obtain probate of the Will but later on withdrew the probate petition; and,
 - (vi) the family settlement by which she became exclusive owner of the property.
- (d) the respondent/defendant had failed to prove any Will dated 29th July, 1985 because no evidence was led by him;

- (e) the respondent/defendant had not been able to prove that he has any legal right or title in the property;
- (f) that thus it was proved that Col. O.P. Kohli had purchased the property and after his death on the basis of the Will (Ex.PW1/5) as well as family settlement, appellant/plaintiff had become exclusive owner;
- (g) from the pleadings and the evidence it was not borne out that the respondent/defendant was residing in the property as a licensee but it stood proved that the respondent/defendant was residing in the property as a member of the joint family; living together of family members in a house does not always amount to creation of licence;
- (h) but the fact that the respondent/defendant “is now not living in the suit property” is not denied; the appellant/plaintiff had also in the year 1999 applied for appointment of Local Commissioner pleading that the respondent/defendant had already shifted from the property and the suit property was lying unattended; however the report of the Local Commissioner showed one Shri Surjan

and Ms. Roshni inducted into the property by Shri G.R. Kohli, residing in the property;

- (i) though the said Shri G.R. Kohli wanted to become party to the suit by moving an application for impleadment but the appellant/plaintiff had opposed the said application;
- (j) the appellant/plaintiff had also not challenged the report of the Local Commissioner;
- (k) the appellant/plaintiff at no time moved any application to implead Shri Surjan and Ms. Roshni in the suit;
- (l) that it was not the case of the appellant/plaintiff that the respondent/defendant had handed over the possession of the suit property to the said Shri Surjan and Ms. Roshni during the pendency of the suit;
- (m) though the appellant/plaintiff had moved an application under Order 39 rule 2A of the CPC for taking action against the respondent/defendant and the said Shri Surjan and Ms. Roshni but that application was withdrawn;

- (n) that it thus could not be established from the record that the respondent/defendant had transferred possession of the suit property to Shri Surjan and Ms. Roshni during the pendency of the suit;
- (o) since it had come on record that the respondent/defendant had already left the suit property, so relief of recovery of possession against the respondent/defendant had become infructuous;
- (p) that the appellant/plaintiff had also not disputed the correctness of the statement of Smt. Usha Kohli wife of the respondent/defendant;
- (q) that the appellant/plaintiff had also not informed the Court the date when the respondent/defendant left the property “if he had not left in the year 1992” ;
- (r) Smt. Usha Kohli in her statement recorded on 13th April, 2006 had stated:-

“I am filing special power of attorney on behalf of my husband Subhash Chand Kohli EX P-1. As per instructions of my husband who is not well and is unable to move, I am giving this

statement that my husband has now left no concern in respect of the suit property bearing no.H2/11, Krishna Nagar, Delhi. The possession of this house is also not with my husband. This house was left in the year 1992. My husband has not inducted any one in this house. My husband is also discharging our advocate namely Sh. C.S. Bhandari, Advocate and does not want to retain him any more. My husband shall also not depute any other Advocate to appear on his behalf in future.”

- (s) that there was no ground to disbelieve the fact that the respondent/defendant had left the property in the year 1992 itself.;
- (t) accordingly the relief of recovery of possession could not be granted against the respondent/defendant “due to change of circumstances as it had already become infructuous”; and,
- (u) since the respondent/defendant “had already vacated the suit property in the year 1992 though it is not ascertained in which month he vacated the suit property but keeping in view the fact that he was not a licensee but a family member”, there was no ground to award any future damages to the appellant/plaintiff.

Accordingly the suit was dismissed.

17. As would be obvious from above, the learned ADJ, notwithstanding having found the appellant/plaintiff to be the exclusive owner of the property and notwithstanding having found the respondent/defendant to have no right in the property, has dismissed the suit of the appellant/plaintiff for recovery of possession of the property and for arrears of and future *mesne* profits/damages for use and occupation only for the reason of relief of possession having become infructuous owing to the respondent/defendant having left the property and/or being not in possession of the property in the year 1992 in which the suit was instituted.

18. As far as the latter of the aforesaid two reasons is concerned, the same is not only inconsistent to the earlier reasoning of ‘the suit having become infructuous due to change of circumstances’ but is also contrary to the stand of the respondent/defendant in the written statement and in the suit when he was appearing and which has been quoted by me hereinabove while setting out the facts and proceedings in the suit. The respondent/defendant at no point of time, till he was appearing in the suit, took a stand that the relief of recovery of arrears and future *mesne* profits/damages for use and occupation was not maintainable because he was not in possession of the property. On the contrary the respondent/defendant expressly admitted being in possession of

the property; though he claimed that he was in possession along with other brothers but did not give any names. Not only so, the address of the respondent/defendant in the suit was of the subject property and summons of the suit were served on the respondent/defendant at the said address and he nowhere furnished any other address. A perusal of the suit filed shows the respondent/defendant to have sworn an affidavit on 2nd December, 1996 in support of one of his applications for setting aside of the *ex parte*, showing himself to be resident of the same property. For this reason only, there was also an interim injunction in the suit restraining the respondent/defendant from alienating or parting with possession thereof.

19. The innuendo in the impugned judgment thus, of the respondent/defendant being not in possession of the property at the time of institution of the suit, is clearly contrary to the facts and the record and cannot be sustained.

20. The next question to be considered is, the effect if any on the suit claim, of the respondent/defendant, during the pendency of the suit for recovery of possession of immovable property and for damages for use and occupation thereof, leaving the property. According to the learned ADJ, the

same would make the suit infructuous and disentitle the appellant/plaintiff to any relief.

21. I am afraid the learned ADJ has erred in law on the said aspect also. Once the respondent/defendant at the time of institution of the suit and in fact for several years thereafter also admitted being in possession of the property, if intended to leave the property, either ought to have returned the possession of the property to the appellant/plaintiff who was claiming the same or continues to run the risk of being held liable to deliver possession of the property to the appellant/plaintiff and being liable to the appellant/plaintiff for *mesne* profits/damages for use and occupation in the event of appellant/plaintiff otherwise proving her entitlement to the same. The liability of a person in occupation and possession of the property without any right or title thereto and continuing in possession of the property inspite of demand of the person entitled to possession thereof, for *mesne* profits/damages for unauthorised use and occupation does not come to an end till the possession is so delivered back to the person entitled thereto. Such meter/clock for *mesne* profits/damages for use and occupation does not stop running by merely leaving the premises without delivering possession thereof to the rightful claimant thereto and by either expressly putting somebody else in possession

of property or letting anyone else occupying the property. The plaintiff in such a suit for recovery of possession of property and for *mesne* profits/damages for use and occupation cannot be defeated in such a fashion. If the same were to be allowed, no owner of immovable property would be able to recover possession and *mesne* profits/damages for use and occupation from the person in unauthorised occupation thereof inasmuch as such person in unauthorised occupation after contesting the suit for long on grounds which could not be proved would leave the property and allow the property to be occupied by somebody else and/or induct somebody else into possession of the property thereby making the suit infructuous and compelling the appellant/plaintiff to institute a fresh suit. It is for this reason only that the proforma in the CPC of a decree for recovery of possession of immovable property provides for delivery of possession of the property to the decree holder by removing from the property the defendant/judgment debtor and/or such persons as may be found in the possession of the property.

22. The respondent/defendant in the present case contested the suit from 1992 to 1997 claiming to be in possession of the property as a matter of right. In 1997 though the respondent/defendant left the property but did not deliver back possession to the appellant/plaintiff and the aforesaid Ms. Roshni and

Shri Surjan were found in occupation of the property. Though the said Ms. Roshni and Shri Surjan claim to have been inducted into the property by Shri G.R. Kohli but the said Shri G.R. Kohli though had earlier filed an application for impleadment in the suit but had chosen not to pursue the same. The learned ADJ has erred in holding that the appellant/plaintiff having opposed the impleadment of Shri G.R. Kohli was not entitled to decree against the respondent/defendant. If the said Shri G.R. Kohli claimed any right in the property it was for him to pursue his application, become a defendant in the suit and contest the claim of the appellant/plaintiff. In fact a perusal of the application for impleadment filed by Shri G.R. Kohli also shows that his claim was only of his goods lying in one small room in the property.

23. It cannot be forgotten that Shri G.R. Kohli was admittedly the brother of the respondent/defendant. The possibility of respondent/defendant at the time of vacating the property having allowed Shri Surjan an employee of Shri G.R. Kohli and wife of Shri Surjan namely Ms. Roshni to occupy the property cannot be ruled out. After all the said Ms. Roshni/Shri Surjan or even Shri G.R. Kohli inspite of knowing of the Local Commissioner's visit did not seek impleadment/again seek impleadment in the suit. The only inference is that neither Shri G.R. Kohli nor the other applicant Shri Satish Kohli who had

sought impleadment had/have any right to the property and had applied for impleadment only to assist their brother i.e. the respondent/defendant to delay the suit.

24. The finding/conclusion of the learned ADJ to the effect that owing to the respdnt/defendant having during the pendency of the suit left the property, his liability to deliver possession thereof to the appellant/plaintiff or for *mesne* profits/damages for use and occupation also came to an end is thus also set aside.

25. The appeal thus succeeds and is allowed.

26. The appellant/plaintiff is entitled to a decree for recovery of possession.

27. As far as the claim of the appellant/plaintiff for *mesne* profits is concerned, I am of the view that in the facts and circumstances aforesaid though the appellant/plaintiff is not entitled to recovery of any arrears of *mesne* profits/damages prior to institution of the suit but is certainly entitled to *mesne* profits/damages for use and occupation from the respondent/defendant from the date of institution of the suit till delivery of possession. The suit property as per the Sale Deed of land underneath the same is constructed over land *ad measuring* 194.4/9 sq. yds. and was admitted by the

respondent/defendant to be double storeyed. The claim of the appellant/plaintiff for *mesne* profits from institution of the suit till delivery of possession at Rs.5,000/- per month, taking judicial notice of the prevalent rents of the properties in the locality in which it is situated, is found to be reasonable. Accordingly, the appellant/plaintiff is also entitled to a decree against the respondent/defendant for *mesne* profits at the rate of Rs.5,000/- per month from the month of institution of the suit till delivery of possession.

28. The impugned judgment and decree is thus set aside and the suit filed by the appellant/plaintiff is decreed against the respondent/defendant for recovery of possession of property no.H-2/11, Krishna Nagar, New Delhi and for recovery of *mesne* profits/damages for use and occupation at the rate of Rs.5,000/- per month from the month of institution of the suit till the month of delivery of possession. The appellant/plaintiff shall also be entitled to costs throughout.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

APRIL 08, 2016
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