

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

+ **RSA No.65/2017 and C.M. No.7516/2017 (stay)**

% **10th August, 2017**

MAHENDER KUMAR & ORS. Appellants

Through: Mr. Mohd. Habib, Advocate.

versus

SURINDER KUMAR Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal under Section 100 of Code of Civil Procedure, 1908 (CPC) is filed by the defendants in the suit impugning the concurrent judgments of the courts below; of the Trial Court dated 2.12.2013 and the First Appellate Court dated 14.9.2016; by which the suit filed by the respondent/plaintiff was decreed for possession of the suit property bearing no.D-99, Dakshin Puri, New Delhi.

2. The subject suit was filed by the respondent/plaintiff pleading that he was the exclusive owner of the suit property. The suit

was instituted by the respondent/plaintiff through his wife Smt. Sobha as his attorney. It is pleaded that the appellant no.1/defendant no.1 was the younger brother of the respondent/plaintiff and out of love and affection the respondent/plaintiff had allowed the appellant no.1/defendant no.1 and his family to stay in the suit premises as licencees. It is further pleaded in the plaint that the respondent/plaintiff when he asked the appellants/defendants to vacate the suit property, they failed to do so, and therefore respondent/plaintiff sent a legal notice dated 25.2.2006, and whereafter the subject suit was filed.

3. The main defence of the appellants/defendants was that the suit was not maintainable as the suit property is an HUF property and it was allotted by the DDA in favour of the father of the respondent/plaintiff and also the appellant no.1/defendant no.1 in lieu of the removal of a jhuggi/hutment. It was pleaded that the suit property was constructed exclusively by the appellant no.1/defendant no.1 from his own funds and that his family is in possession of the suit property since the date of allotment. As per the written statement of the appellants/defendants there were two properties being D-98 and D-

99 which were constructed as one property and having one staircase. It was pleaded by the appellants/defendants that father of the respondent/plaintiff and the appellant no.1/defendant no.1 out of love and affection for the respondent/plaintiff had obtained allotment of the suit property in the name of the respondent/plaintiff under a family settlement. Suit was hence prayed to be dismissed.

4. After pleadings were complete the trial court framed the issues and parties led evidence, and which aspects are noted in the judgment of the trial court as under:-

“Upon completion of pleadings, the following issues were framed on 07/08/2008:-

1. Whether the plaintiff has no locus standi to file and maintain the present suit? (OPD).
2. Whether the plaintiff has not come to the court with clean hands? (OPD).
3. Whether the suit of the plaintiff is liable to be dismissed under the provisions of Order 7 Rule 11 CPC? (OPD).
4. Whether the suit filed by the plaintiff is barred under the provisions of Section 41 of Specific Relief Act? (OPD).
5. Whether the appropriate court fees has not been filed by the plaintiff? (OPD).
6. Whether the suit of the plaintiff is barred under the provisions of Order 32 of CPC? (OPD).
7. Whether the suit of the plaintiff is bad for mis-joinder and non-joinder of necessary parties? (OPD).
8. Whether the plaintiff is entitled to the relief of eviction? (OPP).
9. Whether the plaintiff is entitled to the relief of possession? (OPP).
10. Whether the plaintiff is entitled for the relief of permanent injunction? (OPP).
11. Whether the plaintiff is entitled to the relief of mandatory injunction? (OPP).
12. Relief.

AR of plaintiff Smt. Shobha deposed as PW1 in support of her case. PW1 relied upon the following documents:-

- i) Affidavit of evidence is Ex.PW1/A.
- ii) Power of Attorney executed by plaintiff in favour of Smt. Shobha is Ex.PW1/1.
- iii) Original receipt No.180582 dated 28/08/1975 in Book No.1806, issued by DDA to the plaintiff is Ex.PW1/2.
- iv) Original Voucher dated 28/08/1975 is Ex.PW1/3.
- v) Receipt No.329245 dated 23/05/2003 in Book No.3293, issued by DDA to the plaintiff is Ex.PW1/4.
- vi) Bills dated 30/09/2002 and 31/03/1996, issued by DJB to the plaintiff are Ex.PW1/5 and Ex.PW1/6 respectively.
- vii) Original bill dated 30/06/2001, issued by DJB to the plaintiff is Ex.PW1/7.
- viii) Legal notice dated 25/02/2006 is Ex.PW1/8.”

5.(i) The main issue was issue no.9 with respect to entitlement of the respondent/plaintiff to possession of the suit property, and this issue was held in favour of the respondent/plaintiff as the trial court found, and rightly so, that the respondent/plaintiff was the owner in terms of the documents Ex.PW1/2 to Ex.PW1/4 and which documents were issued by the DDA with respect to ownership of the respondent/plaintiff. The only way the appellants/defendants could have dislodged the case of the respondent/plaintiff that the appellants/defendants were not licencees but owners was by the appellants/defendants proving their assertions with respect to existence of the joint hindu family and a family settlement. It is seen that no evidence was led with respect to existence of the joint hindu

family and family settlement. There was only an oral testimony of the appellant no.1/defendant no.1 who deposed as DW-1 and which was not enough for discharge of the onus of proof of existence of an HUF once allotment of the suit property was found in the name of the respondent/plaintiff. Trial court also rightly notes that in fact DW-1/appellant no.1/defendant no.1 in his cross-examination admitted that he did not even know what is a Hindu Undivided Family and that the other property D-98 was in the name of his younger brother Sh. Ashok Kumar who had already sold the property. Trial court also rightly notes as against the appellants/defendants that DW-1 admitted that he had never issued a notice to the DDA to protest against the allotment of the suit property solely in the name of the respondent/plaintiff.

(ii) I completely agree with the conclusions of the trial court inasmuch as once ownership of the suit property by means of documents from DDA are found to be of the respondent/plaintiff, then, there is heavy onus of proof for being discharged by the appellants/defendants of existence of HUF and appellants/defendants in this regard failed because except oral self-serving testimony of the appellant no.1/defendant no.1/DW-1 no evidence was led and that in

fact the appellant no.1/defendant no.1 admitted that he did not know the meaning of HUF and the other property D-98 which was in the name of the younger brother Sh. Ashok Kumar was sold by Sh. Ashok Kumar.

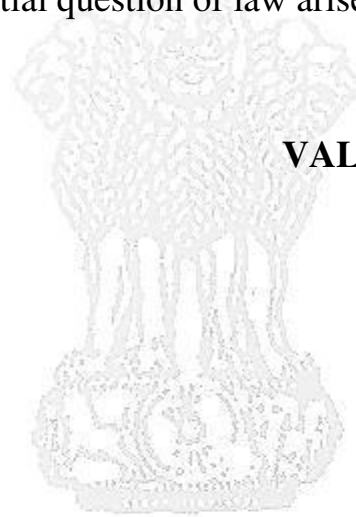
6. I may also note that before the first appellate court an argument with respect to whether the suit was properly filed by the respondent/plaintiff through his wife was urged, and in this regard the first appellate court has rightly held that suit cannot be dismissed on the ground of the suit having been filed through the wife inasmuch as appellants/defendants have not even pleaded in the written statement with respect to lack of authorization in favor of the wife of the respondent/plaintiff to file the suit, and also that the power of attorney in favor of the wife of the respondent/plaintiff in fact was proved and exhibited as Ex.PW1/1. Also, I may note that in the facts of the case such as the present really the issue boils down to proof of ownership by documents of the suit property and which was done by the respondent/plaintiff in terms of the documents proved and exhibited as Ex.PW1/2 to Ex.PW1/4.

7. Learned counsel for the appellants/defendants argued that the appellant nos.2 to 4 were minors when the suit was filed, however, I fail to understand how this argument at all can be raised in this second appeal because no such ground was ever raised in the written statement, no such issue accordingly framed and therefore none of the judgments of the courts below at all have dealt with this aspect.

8. No substantial question of law arises. Dismissed.

AUGUST 10, 2017
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VALMIKI J. MEHTA, J



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