

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

+ **RFA No. 620/2017**

% **9th November, 2017**

BHAGWATI DEVI & ORS. Appellants

Through: Ms. Amita Gupta, Mr. Ruga
Ram and Ms. Priti Yadav,
Advocates.

versus

SANJEEV KUMAR & ORS. Respondents

Through: Mr. Naveen Kumar Chaudhary,
Advocate

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendants in the suit impugning the judgment of the trial court dated 22.3.2017 by which the trial court has decreed the suit for possession and *mesne* profits filed by the respondents/plaintiffs with respect to the suit property being one room in the property no. 4295, Gali Barna, Basti Nandram,

Sadar Bazar, Delhi. Trial court has also granted *mesne* profits at Rs.1000/- per month on the arrears of *mesne* profits.

2. The facts of the case are that the respondents/plaintiffs pleaded that they are the owners of the suit property as they are the legal heirs of late Sh. Thakur Dass who was owner of the suit property. It was pleaded that appellants/defendants are the legal heirs of one Sh. Beni Prashad who died on 6.8.2012 and that both Sh. Beni Prashad and appellants/defendants were in unauthorized use and occupation of the suit property being enclosed area of one room in property no. 4295, Gali Barna, Basti Nandram, Sadar Bazar, Delhi, and which is shown in red in the site plan filed with the plaint. I may note that the respondents/plaintiffs have claimed that the room or the area in question is not even a room because the case of the respondents/plaintiffs was that late Sh. Beni Prashad, predecessor-in-interest of the appellants/defendants was residing in a temporary structure erected on a side wall of the roof of the property of the respondents/plaintiffs and their predecessor-in-interest and taking benefit of that fact Sh. Beni Prasad had got prepared certain documents with respect to the suit property. The structure/room had

become dangerous and MCD had demolished the same but Sh. Beni Prashad again occupied the same and fixed a tarpaulin over the structure. Accordingly, pleading that the appellants/defendants were in illegal occupation of the suit property the subject suit for possession and *mesne* profits was filed.

3. Appellants/defendants contested the suit and pleaded that they and their predecessor-in-interest were tenants in the suit property since about 80-90 years. It was pleaded that the rent of the property was initially Rs.5/- per month and thereafter it was increased to Rs.80/- per month. Suit was therefore pleaded to be barred by Section 50 of the Delhi Rent Control Act, 1958. To the extent that respondents/plaintiffs are the legal heirs of Sh. Thakur Dass, the same is not disputed. In fact, the appellants/defendants in the written statement have given a family tree of the respondents/plaintiffs and as per the family tree (as detailed in paras 6 and 7 of the impugned judgment) respondents/plaintiffs are admittedly the co-owners of the suit property.

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

ISSUES

- (i) *Whether the plaintiffs are entitled for decree of possession in respect of property bearing No.4295, Gali Barna, Basti Nandram, Sadar Bazar, Delhi as prayed for? OPP*
- (ii) *Whether the plaintiffs are entitled for a decree of permanent injunction as prayed for? OPP*
- (iii) *Whether the plaintiffs are entitled for recovery of mesne profits/damages @ Rs.4000/- per month from the date of filing of the suit till handing over the suit property to the plaintiff? OPP*
- (iv) *Whether the defendants are in unauthorized possession of the suit property? OPP*
- (v) *Whether the defendants are in possession of the suit property as tenants? OPD*
- (vi) *Relief.”*

5. Trial court took up all the issues for discussion together and these issues were decided in favour of the respondents/plaintiffs by observing as under:-

“10. To prove his case, Sh. Sanjeev Kumar, plaintiff no.1 appeared as PW-1 and testified his affidavit Ex.PW-1/A. On the other hand, defendant appeared as DW-1 and testified his affidavit Ex.DW-1/A.

11. PW-1 testified that the suit property was owned by Sh. Thakur Dass in terms of the sale deed Ex.PW-4/1 whose translated copy has been proved by PW-5 as Ex.PW-5/1 and the suit property was declared dangerous in terms of the order dated 14.07.2005 Ex.PW-1/4 passed by MCD. The defendants filed a suit for permanent injunction which is pending. The plaintiffs also filed a suit for permanent injunction, which was dismissed with liberty to file afresh in terms of the order dated 09.11.2010 Ex.PW-1/5. Defendants also filed petition under section 44 of the DRC Act bearing no. 41/2012 which is pending. The plaintiffs have sought possession of the suit property from the defendants being illegal occupants of the same as neither the defendants nor their predecessor in interest Sh. Beni Prasad were either inducted as a tenant or a licensee at any point of time.

12. The defence of the defendants is that Sh. Beni Prasad predecessor in interest of the defendant was inducted as a tenant qua the suit property and DW-1 has testified that the said tenancy was created by the forefathers of the plaintiffs about 80-90 years back on a monthly rent of Rs.5/- which was later on enhanced to Rs.80/- p.m. DW-1 has proved on record Ex.DW-1/5 to Ex.DW-1/21 which all are stated to be rent

receipts in the name of the grandfather of the husband of defendant no.2 in the evidence affidavit Ex.DW-1/A but those are photocopies of the water and electricity bills and remaining documents Ex.DW-1/22 to Ex.DW-1/45 were de-exhibited as originals of the same were not available. Therefore, the defendants have not placed any documents on record nor lead any oral evidence except self serving statement of DW-1 that tenancy was created in favour of the defendants or their predecessor in interest by forefathers of the plaintiffs. Even the document Ex.DW-1/5 to Ex.DW-1/21 are photocopies only and even if they are presumed to have been proved, though not admitted, as photocopies are not admissible per se, but the said documents only prove the possession of the defendants over the suit property. The defendants have claimed the possession through the tenancy for which they failed to lead any evidence. Therefore, the defendants cannot be held to have become the owners of the suit property by way of adverse possession in as much as no such case has been pleaded by the defendants in their pleadings. Therefore, the defendants are neither tenants nor licensee over the suit property.

13. The arguments raised by Id. counsel for the defendants that the plaintiffs were not the owners of the suit property deserves to be rejected at the outset in as much as the sale deed Ex.PW-4/1 although, did not contain the particular number of the suit property but the vendee in the said sale deed is Sh. Nain Sukh, who is admitted to be the forefather of the plaintiffs in para 3 of preliminary objections of the written statement. Otherwise also, the defendants are also claiming to be tenants and the tenants are estopped from challenging the title of the landlord by virtue of Section 116 of the Evidence Act. Therefore, this contention is hereby rejected. Similarly, the contention regarding that the plaintiffs are not the owners of whole of the suit property, is concerned, the same deserves to be rejected in as much as the co-owner can seek possession for and on behalf of the other co-owners, each co-owner is owner of each and every part of the property owned by all the co-owners. Therefore, this contention is also deserve to be rejected and is hereby rejected.

14. So far as mesne profit is concerned, no evidence has been lead by the plaintiffs that the suit property can fetch a mesne profit/ damages @ Rs.4,000/- p.m. I deem it appropriate to award Rs.1,000/- p.m. to the plaintiffs as mesne profit for use and occupation of the suit property by the defendants alongwith 9% interest from the date of filing of the present suit till its realization.” (underlining added)

6. It is seen that the fact that respondents/plaintiffs are the owners cannot be disputed in view of the sale deed Ex.PW4/1. In any

case admittedly the respondents/plaintiffs are co-owners as they are the legal heirs of the original owner of the suit property namely Sh. Thakur Dass. Therefore, the suit could only have been dismissed if appellants/defendants proved their tenancy of the suit property. In this regard it is noted that the appellants/defendants had proved on record what they claimed were the rent receipts Ex.DW1/5 and Ex. DW1/21 and which were in the name of the father-in-law of the defendant no. 1 i.e. father of the husband of defendant no. 1. The water and electricity bills were proved by the appellants/defendants Ex.DW1/22 to Ex.DW1/45. These documents Ex.DW1/5 to Ex.DW1/21 and Ex.DW1/22 and Ex.DW1/45 were de-exhibited by the trial court because they were only photocopies. The appellants/defendants have therefore filed an application in this Court under Order XLI Rule 27 CPC to take on record and allow the appellants/defendants to prove the original rent receipts and the electricity/water bills. The application under Order XLI Rule 27 CPC being C.M. No. 24371/2017 reads as under:-

“IN THE HIGH COURT OF DELHI AT NEW DELHI
(CIVIL APPELLATE JURISDICTION)
CM NO. 24371 OF 2017
IN
R.F.A.NO. 620 OF 2017

In matter of:-

Smt. Bhagwati Devi and others

Appellants

Vs

Sh. Sanjeev Kumar and others

Respondents

APPLICATION UNDER ORDER 41 RULE 27 FOR PLACING ON
RECORD ORIGINAL RENT RECEIPTS, ELECTRICITY AND
WATER BILLS

MOST RESPECTFULLY SHOWETH:-

1. That Appellants are filing the above-mentioned appeal against the judgment and decree dated 22nd March, 2017 passed in Civil Suit No. 612802 of 2016 by Addl. District Judge-07 (Central), Tis Hazari Courts, Delhi.

2. That Appellants had placed on record photocopies of Rent Receipts, Electricity and Water Bills and handed over the originals of these documents to clerk of their Counsel; who misplaced them by keeping them in wrong file. Thus, Appellants could not place on record of trial court the originals of Rent Receipts, Electricity and Water Bills.

Prayer:-

It is, therefore, most respectfully prayed that this Hon'ble Court be pleased to permit Appellants to place on record originals of Rent Receipts, Electricity and Water Bills on facts and circumstances as mentioned above.

Pass such other and further orders as deemed fit and proper on facts and circumstances of the case."

7. In my opinion, this application is an apology for an application under Order XLI Rule 27 CPC because it is seen that the appellants/defendants had sufficient time in the trial court to prove the original rent receipts but they failed to do so. In any case however I would take that the documents are not de-exhibited but they stand exhibited because these documents should be taken as originals and not photocopies. The issue is that whether even if these so called rent receipts/documents Ex.DW1/5 to Ex.DW1/21 are to be taken as

proved, whether the same should be taken as discharge of onus of proof that the appellants/defendants and their predecessor-in-interest were tenants of the suit property.

8. A reference to the affidavit by way of evidence on the basis of which the rent receipts are proved is the affidavit by way of evidence of Smt. Bhagwati Devi, appellant no. 1/defendant no. 1 and these rent receipts are proved as per para 12 of the affidavit by way of evidence of Smt. Bhagwati Devi. This para 12 of the affidavit by way of evidence reads as under:-

“12. That in the present case the suit has been filed by the plaintiffs against the defendants alleging that the defendants in unauthorized use and occupation of the portion of the property No.4295 Gali Barna, Basti Nand Ram, Sadar Bazar, Delhi-110006, and therefore the present suit filed for the recovery of the possession in Civil court, The case of the defendant is that there exists a relationship of landlord and tenants between the plaintiffs and the defendants as the premises was let out to the fore fathers of the defendants by the forefathers of the plaintiff about 80-90 years ago on a monthly rent of Rs 5/- which later on was increased from time to time, up to 80/- per month, so there is dispute between the parties as to whether the premises in dispute were let out or it was unauthorisedly occupied by the defendants. In view of these facts the Rent Controller have the exclusive jurisdiction to decide the status of the parties to the suit of relationship of landlord and tenant and not the Civil court. The suit of the plaintiff is, therefore liable to be dismissed on this ground along being barred under section 50 of the Delhi Rent Control Act. The rent receipts in the name of the grand father of the husband of the defendant No. 2 (i.e. father in law)”

9. In my opinion, merely giving of exhibit marks to these documents and taking the documents as proved, would not amount to

discharge of onus of proof that the appellants/defendants and their predecessor-in-interest were tenants in the suit property for various reasons.

(i) The first reason is that at the time of exhibiting the rent receipts as Ex.DW1/5 to Ex.DW1/21 there is no identification of the signatures of the landlord on these rent receipts Ex.DW1/5 to Ex.DW1/21. All that is stated in the affidavit by way of evidence of Smt. Bhagwati Devi is that these rent receipts are in the name of the father of the husband of the defendant no.1 i.e father-in-law of defendant no.1. As per Section 47 of the Indian Evidence Act, 1872 a document is proved by identifying signatures of the executant of a document by a person before whom the document is signed or the person who proves the document is proved to have regularly seen the executant signing other documents or that this witness who proves the document is aware of the signatures of the executant on account of regularly corresponding with the executant of the documents. None of these aspects are mentioned in para 12 of the affidavit of evidence filed by Smt. Bhagwati Devi, appellant no. 1/defendant no.1, and therefore it cannot be held that these documents are proved or even if proved they have

any value. The fact that documents are proved and what is the weight to be attached to the documents are two totally separate aspects. Therefore merely because documents are 'proved' and exhibit numbers are given to the same would not mean that this Court has to accept that on the basis of these documents tenancy was created especially when the signatures of the landlord are not even identified and proved on Ex.DW1/5 to Ex.DW1/21.

(ii) Another reason for not accepting the so called rent receipts Ex.DW1/5 to Ex.DW1/21 is that these rent receipts are only some interspersed rent receipts of different months from 1961-1974. Obviously payments were made in cash being of a small amount, however from the year 1974 till the suit is filed in the year 2014 there is not even a single rent receipt which is filed for this 40 year long period showing that the appellants/defendants or their predecessor-in-interest were accepted as tenants of the suit property in this period of no less than 40 years. Therefore, in my opinion, this is another reason for holding that the so called rent receipts Ex.DW1/5 to Ex.DW1/21 are not rent receipts which are issued in favour of the

appellants/defendants or their predecessor-in-interest by the owner landlord of the suit property.

(iii) There is yet another reason for holding that the appellants/defendants have failed to discharge the onus of proof upon them that they were tenants of the suit property inasmuch as ordinarily a tenancy of a person is recorded in the survey report of a local municipal corporation. This is all the more so in the present case because the tenancy in favour of the appellants/defendants or their predecessor-in-interest is pleaded to be of around 80-90 years old. Such long tenancy without doubt would be recorded in various survey reports which were carried out by the MCD over different years, and if the appellants/defendants or their predecessor-in-interest were tenants then surely their existence as tenants in the suit property would have been recorded in the survey reports of the municipal corporation. Appellants/defendants have however not filed any survey report or for that matter any other record of the municipal corporation to show that the appellants/defendants or their predecessor-in-interest were shown as tenants of the suit property.

10. In my opinion, electricity bills and water bills cannot help the appellants/defendants to discharge onus of proof of tenancy once the case of the respondents/plaintiffs is that the so called subject suit room came up only because the predecessor-in-interest of the appellants/defendants Sh. Beni Prashad was using the side of the wall of the property of the respondents/plaintiffs, and so Sh. Beni Prashad managed to create documents with respect to the suit property. Also, the respondents/plaintiffs have claimed that the suit property is not even a room but is a sort of a structure of four walls with tarpaulin and the appellants/defendants have led no evidence whatsoever to show that the subject structure is a proper room with a proper roof. No doubt, in an earlier litigation respondents/plaintiffs could have called the suit premises a room, however statement as regard a room has to be understood with the facts of the case and which really has the factual position that the room in question is basically four walls with a tarpaulin. I may also note that the counsel for the respondents/plaintiffs has drawn attention to pages 100 to 101 of the paper book of this appeal and which is a statement dated 19.5.2012 of Sh. Beni Prashad in an earlier litigation wherein Sh. Beni Prashad has

admitted that walls had collapsed. However, in my opinion, irrespective of the type of the structure, once the appellants/defendants have failed to prove any tenancy in their favour, and the rent receipts filed by the appellants/defendants cannot be believed and given weight to create a tenancy, it is accordingly to be held and therefore so held that the appellants/defendants have failed to prove tenancy of the suit property in their favour.

12. In view of the aforesaid discussion, the appeal is without merit and is accordingly dismissed. C.M. No. 24371/2017 under Order XLI Rule 27 is in fact infructuous because this Court is taking the fact that instead of the photocopies of the rent receipts these can be taken as originals and proved as Ex.DW1/5 to Ex. DW1/21.

13. The appeal is therefore dismissed leaving the parties to bear their own costs.

NOVEMBER 09, 2017/ib/Ak

VALMIKI J. MEHTA, J