

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

% **Date of decision: 15th October, 2018**

+ **RSA 165/2016, CM No.22887/2016 (for stay), CM No.43712/2016**
(u/O XLI R-27 CPC) & CM No.31144/2017 (u/S 151 CPC).

KANHAIYA LAL & ORS **..... Appellants**

Through: Mr. Om Prakash, Adv.

versus

MULI DEVI (DECEASED) THR HER LRS & ORS **..... Respondents**

Through: Mr. Sharvan Dev, Adv. for R-4.

Mr. Parvinder Chauhan, Adv. for
DUSIB with Mr. R.C. Meena, Dy.
Director (JJR), DUSIB.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 14th March, 2016 in RCA No.73/2015 (Unique Case ID No.02401C0480052015) of the Additional District Judge-II (Central)] of dismissal of First Appeal under Section 96 of the CPC preferred by the appellants against the judgment and decree [dated 29th July, 2015 in CS No.475/14 (Unique ID No.02401C0154042003) of the Court of Civil Judge-05 (Central)] of dismissal of suit filed by the appellants/plaintiffs for declaration, mandatory and permanent injunction.

2. This appeal came up first before this Court on 3rd June, 2016, when the Trial Court records were ordered to be requisitioned. On the next date of hearing i.e. 19th August, 2016, the counsel for the appellants / plaintiffs sought time to file an application under Order XLI Rule 27 of the CPC and the proceedings were adjourned to 24th November, 2016. On 24th November,
RSA No.165/2016

2016, notice of the appeal as well as the application under Order XLI Rule 27 of the CPC was ordered to be issued. The appellants/plaintiffs filed IA No.31144/2016 for directions and vide subsequent order dated 8th January, 2018 the counsel for Delhi Urban Shelter Improvement Board (DUSIB), though not a party to this appeal, was directed to produce some records.

3. The counsel for DUSIB states that the records are not available and have not been received from Delhi Development Authority (DDA).

4. The counsel for the respondents/defendants states that this Second Appeal is pending for the last nearly two years, without any substantial question of law having been framed or without any satisfaction having been recorded in any of the orders, of the appeal entailing any substantial question of law.

5. The counsel for the appellants/plaintiffs has been heard and the Trial Court records requisitioned, perused.

6. The appellants/plaintiffs instituted the suit, from which this appeal arises, pleading (i) that the five appellants/plaintiffs are sons of one Parma and co-owners of property No.B-18, Aruna Nagar, Majnu Ka Tilla, Delhi – 110 054; (ii) that the appellants/plaintiffs became owners of the property on demise on 19th March, 1989 of their father Parma, and on demise on 21st September, 1997, of their mother Shanti Devi; (iii) that the respondents/defendants are the wife and children of Ram Sahay, brother of the said Parma and are in occupation of portions of the said property as licensees; (iv) that the respondents/defendants had also raised constructions adjacent to the property; (v) that Parma, predecessor of the appellants/plaintiffs, had constructed a *jhuggi* at Maurice Nagar, Delhi, prior

to 1958 and was residing there along with his family members; (vi) that the said *jhuggi* along with adjoining *jhuggis* were demolished by Municipal Corporation of Delhi (MCD) and alternate accommodation at the said Plot No.B-18, Aruna Nagar, Majnu Ka Tilla, Delhi allotted in lieu thereof; (vii) Shri Parma, predecessor of the appellants/plaintiffs, raised construction on the said plot and allowed his brother Ram Sahay and his family members i.e. the respondents/defendants to also reside along with him in the property so constructed; (viii) that it was Parma, predecessor of the appellants/plaintiffs alone who had been paying licence fee with respect to the said property; and, (ix) however, after the demise of Parma, predecessor of appellants/plaintiffs, predecessor of the respondents/defendants paid the licence fee for one month only but thereafter stopped paying inspite of repeated requests made by the appellants/plaintiffs; (x) that the appellants/plaintiffs had inadvertently sought eviction of the respondents/defendants under the provisions of the Delhi Rent Control Act, 1958 and in which proceedings the respondents/defendants denied relationship of landlord and tenant between the parties; and, (xi) that Ram Sahay, predecessor of the respondents/defendants had also filed a Civil Suit with respect to the property. Hence, the suit from which this Second Appeal arises, (i) for declaration that the appellant/plaintiffs were the absolute owners of the property; (ii) for mandatory injunction directing the respondents/defendants to demolish the unauthorised constructions raised in the property and to handover vacant peaceful possession of the rooms of the property in their possession to the appellants/plaintiffs; (iii) permanent injunction restraining the respondents/defendants from parting with possession of the portions of the property in their possession; and, (iv) recovery of arrears of licence fee.

7. The respondents/defendants contested the suit by filing a written statement pleading, (i) that the appellants/plaintiffs on the one hand were claiming the respondents/defendants to be tenants and on the other hand claiming the respondents/defendants to be licensees; (ii) the respondents/defendants were co-owners of the property along with the appellants/plaintiffs and residing in the property in their own right; (iii) that several litigations between the parties were already pending consideration; and, (iv) that relief of possession, in the garb of mandatory injunction, could not be granted. Besides this, several other pleas were also taken but the need to detail the same at this stage is not felt.

8. On the pleadings aforesaid of the parties, the following issues were framed in the suit on 15th March, 2004:-

- “(i) Whether the plaintiff is entitled to get a decree for declaration against the defendant as prayed? OPP*
- (ii) Whether the plaintiff is entitled to get a decree of mandatory injunction against the defendant as prayed for? OPP*
- (iii) Whether the plaintiff is entitled to get a decree of permanent injunction against the defendant as prayed for? OPP*
- (iv) Whether the plaintiff is entitled to get a decree for a sum of Rs.4,320/- with cost as license fee and damages in respect of the use of occupation of the suit premises? OPP*
- (v) Whether the present suit is not maintainable in the present form because on the one hand plaintiffs are claiming that the defendants are the tenants in the*

suit premises and on the other hand they claimed defendants to be the license? OPD

(vi) Whether there is no cause of action in favour of the plaintiff and against the defendant? OPD

(vii) Whether the present suit is liable to be stayed u/s 10 of the CPC? OPD

(viii) Whether the suit has not been properly valued for the purposes of court fees and jurisdiction? OPD

(ix) Whether the present suit for relief for prosecution (sic for possession) is not maintainable as the property is situated in Slum areas and no permission from the competent court of Slum has not been obtained under section 19 of the Slum Area Act? OPD

(x) Whether the suit is barred by the Law of limitation? OPD

(xi) Relief.”

9. The Suit Court, on the basis of the pleadings aforesaid and the evidence led by the parties found, observed and held, that (i) the plaintiffs had failed to place on record and / or prove any document of title to the property; the plaintiffs had only placed on record notice issued by MCD to their predecessor qua the suit property and certain receipts issued by the MCD to the predecessor of the plaintiffs for deposit of various charges but the same did not constitute title in law to an immovable property; (ii) the plaintiffs were thus not entitled to a declaration of being absolute owners of the property; (iii) it was the admitted position that the plaintiffs, prior to institution of the suit, had filed a petition under Section 14(1)(a) of the Delhi Rent Control Act, 1958 for eviction of the defendants from the said premises

pleading the defendants to be tenants under the plaintiffs in the said premises; it was however the plea of the plaintiffs that the said petition for eviction was filed inadvertently; (iv) however the plaintiffs had failed to plead or prove as to under what circumstances, the plaintiffs, at the time of filing of petition for eviction under the Rent Act, were forced to believe the respondents / defendants to be their tenants and as their licensees, at the time of instituting the suit; (v) there was no evidence to show that the petition for eviction under the Rent Act was filed inadvertently; (vi) it thus appeared that the claim of the appellants / plaintiffs, of the respondents / defendants having been inducted into the premises as licensees, was only to avail of the jurisdiction of the Civil Court; (vii) the appellants / plaintiffs were taking different stands at different times and had not approached the Court with clean hands; (viii) in the suit, it was the case of the appellants / plaintiffs that their predecessor had given the portion of the property in possession of the respondents / defendants to the predecessor of the respondents / defendants on a monthly licence fee of Rs.20/- and which also the respondents / defendants had stopped paying after one month of the death of their predecessor; (ix) though the appellants / plaintiffs had placed on record documents aforesaid from MCD but had not examined any witness from the MCD to prove the said documents; (x) the respondents / defendants had placed on record a letter dated 11th January, 1984 issued by the MCD in favour of their predecessor, for getting transferred ownership rights of the property; however the defendants also had not examined any witness from MCD to prove the said letter; (xi) the argument of the counsel for the appellants / plaintiffs was that the documents from MCD filed by the appellants / plaintiffs were more than 30 years old and therefore entitled to

be admitted in evidence; (xii) however as held by the Supreme Court in ***Om Prakash Vs. Shanti Devi*** (2015) 4 SCC 601, the period of 30 years is to be reckoned not from the date of filing of the document but from the date when the same is tendered into evidence; so seen, the letter dated 11th January, 1984 could be considered as 30 years old document; (xiii) however the said documents, neither of the appellants / plaintiffs nor of the respondents / defendants, showed ownership of either of the parties; (xiv) the appellants / plaintiffs having failed to establish that they had a better right or interest in the property than the respondents / defendants, the suit had to fail; (xv) the appellants / plaintiffs had also failed to prove that the respondents / defendants were trying to create third party interest in the property; (xvi) since the appellants / plaintiffs had failed to prove that the respondents / defendants were licensees, the appellants / plaintiffs were also not entitled to recover any amounts from the respondents / defendants; (xvii) the respondents / defendants had failed to prove that the proceedings in the suit were liable to be stayed under Section 10 of the CPC; (xviii) the appellants / plaintiffs, in the garb of mandatory injunction, were claiming the relief of possession without paying appropriate court fees thereon; (xix) the respondents / defendants, in an earlier suit filed by them in the year 1994, had claimed themselves to be the owners of the property; and, (xx) the subject suit filed in the year 2003 for declaration and mandatory injunction, was barred by time. Resultantly, the suit was dismissed.

10. The First Appellate Court, on appeal by the plaintiffs, has in the first 29 of the 34 page judgment merely reproduced the judgment of the Suit Court and held that no infirmity was found therein and then added that (i) the respondents / defendants had proved the letter dated 11th January, 1984

issued by the DDA to Ram Sahai being the predecessor of the respondents / defendants, offering the ownership rights in the property to Ram Sahai and which proved that Ram Sahai was the owner of the property; (ii) the said document had not been controverted by the appellants / plaintiffs; (iii) the respondents / defendants had also proved various receipts relating to the period 1962 to 1968 establishing that their predecessor Ram Sahai was residing in the property since prior to 1960, thereby falsifying the plea of the appellants / plaintiffs that Ram Sahai, predecessor of the respondents / defendants was residing in his native village and came to Delhi in the year 1971 and resided in the property as licensee of predecessor of the appellants / plaintiffs; (iv) the appellants / plaintiffs had failed to prove any document which showed that the property was ever allotted to their predecessor; on the contrary, as aforesaid, the respondents / defendants had proved the letter issued by DDA in favour of their predecessor; (v) that had the respondents / defendants been dishonest, they would have on the basis of said letter claimed ownership of the entire property instead of only the portions in their possession and rather had only claimed themselves along with the appellants / plaintiffs to be the co-owners of the property; (vi) in several litigations pursued by the appellants / plaintiffs and their predecessor prior to the filing of the subject suit also, the appellants / plaintiffs and their predecessor had failed to prove their ownership of the property; (vii) even if it were to be believed that the predecessor of the appellants / plaintiffs had in year 1971 inducted the predecessor of the respondents / defendants into possession of the property, as is evident from the pleadings in the earlier litigation, the said possession became hostile in the year 1990 and the subject suit filed for declaration and injunction in the year 2003 was even otherwise barred by

time, having been filed after 13 years; and, (viii) the appellants / plaintiffs at several places in his evidence had claimed respondents / defendants to be in occupation on rent of Rs.20/- per month, contradicting the claim of the respondents / defendants being licensees.

11. The counsel for the appellants / plaintiffs has drawn attention to page 138 of the paper book, being a photocopy of letter dated 19th January, 1984 of DDA to Parma Ram, predecessor of the appellants / plaintiffs, informing of the decision to transfer ownership rights to Parma Ram being one of the original allottees of Aruna Nagar Colony and informing Parma Ram of the charges to be paid and other formalities to be complied therefor.

12. The said letter was admittedly neither produced nor proved before the Suit Court or before the First Appellate Court. The appellants / plaintiffs now, under application aforesaid being CM No.43712/2016 under Order XLI Rule 27 of the CPC, seek to lead evidence with respect thereto. However, the reasoning given therein is, that the counsel engaged by the appellants / plaintiffs for the purposes of the first appeal (and which counsel has preferred this second appeal also) instructed the appellants / plaintiffs to look into old records and on so looking through, the appellants / plaintiffs found the said letter and which is similar to the letter dated 11th January, 1984 proved as Ex.DW1/12 by the respondents / defendants, as issued to their predecessor; that the appellants / plaintiffs filed the said letter as annexure to the memorandum of first appeal but inadvertently failed to file any application under Order XLI Rule 27 of the CPC before the First Appellate Court; resultantly, the First Appellate Court in its judgment has not dealt

with the said letter, and, the said letter was not in the knowledge of the appellants / plaintiffs till so found.

13. I am afraid the aforesaid pleas do not make out a case under Order XLI Rule 27 of the CPC. The suit was instituted on 22nd September, 2003 and remained pending till 29th July, 2015 i.e. for nearly 12 years. Even before the First Appellate Court, admittedly no application under Order XLI Rule 27 of the CPC was filed. Merely annexing to the memorandum of first appeal, a document which did not form part of the trial court record, was of no avail. The only inference is that the appellants / plaintiffs, even then did not intend to lead any additional evidence with respect to the said letter. Order XLI Rule 27 of the CPC is not meant to allow litigants to give a complete go-bye to the stages prescribed in the CPC for doing a particular act and to do whichever act required to be done in the course of a suit, at whatever time, at the *ipse dixit* of such litigant. Merely because a new advocate is engaged in appeal is no ground to allow applications under Order XLI Rule 27 CPC especially when such new advocate also admittedly did not deem it appropriate to seek an opportunity for leading additional evidence with respect to the letter then found. The only inference is that the appellants / plaintiffs want to keep the suit alive on some pretext or the other. In this respect, it cannot also be lost sight of that the suit, from which this appeal arises, itself was filed after several rounds of litigation between the parties / their predecessors and in which rounds of litigation also the appellants / plaintiffs had been held unable to prove their ownership / title to the property. The appellants / plaintiffs, inspite of losing earlier litigations, filed the suit from which this appeal arises and in which the issue of

ownership / title was gone into yet again. No case under Order XLI Rule 27 of the CPC is made out. CM No.43712/2016 is dismissed.

14. I may even otherwise observe that the letter which is now sought to be proved, at best shows the predecessor of the appellants / plaintiffs to be an allottee of the subject property. However, mere allotment does not constitute title. In fact, vide the said letter, ownership was offered and which offer was not accepted. The appellants / plaintiffs thus, on the basis of the said letter also cannot prove their ownership.

15. Similarly, as admitted by the appellants / plaintiffs in CM No.43712/2016 supra, the said letter sought to be produced is identical to the letter dated 11th January, 1984 proved by the respondents / defendants as Ex.DW1/12 in the name of the predecessor of the respondents / defendants. The letter sought to be proved by the appellants / plaintiffs does not negate Ex.DW1/12. Rather, DW1/12 is earlier in point of time, being of 11th January, 1984. The only inference is, of the predecessor of the appellants / plaintiffs as well as the predecessor of the respondents / defendants, who were brothers, being co-allottees / joint-allottees of the property.

16. The counsel for the appellants / plaintiffs has next drawn attention to para no.29 of the judgment of the Suit Court, where the Suit Court has held that the appellants / plaintiffs had failed to prove on record any document to prove their better right, title or interest in the property and has contended that the Suit Court has not properly construed the documents proved by the appellants / plaintiffs. It is contended that the appellants / plaintiffs proved documents of payment of licence fee.

17. I have of my own perused the proved documents on the Suit Court record requisitioned in this Court and find the appellants / plaintiffs to have proved as Ex.PW1/7 (Colly) and as Ex.PW1/8, receipts issued in the names of the appellants / plaintiffs, of charges deposited with respect to the property and which charges in some of the receipts are described as licence fee. However, the receipts are of different amounts and do not indicate the months for which licence fee is deposited. The same, in my opinion also do not prove any better title of the predecessor of the appellants / plaintiffs to the property. Such receipts are issued without verification of any records and merely record the name of the tenderer as disclosed by the tenderer himself. In fact, there are similar receipts on record in the name of the predecessor of the respondents / defendants also and which receipts are also found to have been filed under index of documents filed by the counsel for the respondents / defendants.

18. The nature of the colony / locality cannot also be lost sight of. It is a rehabilitation colony where those uprooted from other sites were relocated or occupation of government land where was permitted. It is not in dispute that appellants / plaintiffs as well as respondents / defendants and their respective predecessors have been squatting / living for decades. Considering the said aspect, both have equal right to continue in occupation and no case of dispossessing respondents / defendants therefrom, at the instance of appellants / plaintiffs, is made out.

19. I therefore do not find any case of perversity on the part of the Suit Court and the First Appellate Court in appreciating the evidence.

20. The counsel for the appellants / plaintiffs has next argued that the onus of proving joint-allotment was on the respondents / defendants and which the respondents / defendants failed to discharge. It is contended that the findings in this regard by the Suit Court are perverse, amounting to a substantial question of law.

21. I am unable to agree. The appellants / plaintiffs had approached the Court with the case of sole allotment in favour of their predecessor and which the appellants / plaintiffs failed to prove.

22 Findings in the judgment of the Suit Court and the First Appellate Court, of the respondents / defendants having proved a case of joint allotment, are on the basis of Ex.DW1/12 proved by the respondents / defendants, being a letter of the DDA offering ownership rights in the subject property to the predecessor of the respondents / defendants.

23. The appellants / plaintiffs, by now seeking to prove a similar / identical letter dated 11th January, 1984 in favour of their predecessor, are in fact admitting a case of joint allotment. Even today, there is no explanation whatsoever of how, if there was no join allotment, letter Ex.DW1/12 aforesaid came to be issued in favour of the predecessor of the respondents / defendants.

24. The counsel for the appellants / plaintiffs has next drawn attention to para no.6 of the judgment of the First Appellate Court, where the First Appellate Court has listed the judgments, referred to during the course of hearing of the first appeal by the counsel for the appellants / plaintiffs, and has argued that the said judgments have not been discussed in the judgment of the First Appellate Court.

25. Merely because the counsel bombards the Court with a large number of judgments, does not compel the Court to discuss each and every of the said judgments, adding to the judgment writing of an already overburdened Court. Moreover, the counsel for the appellants / plaintiffs, save for contending so, has not cited before me the said judgments to show that any of them was relevant to the issue under adjudication and the First Appellate Court thus committed a gross irregularity in not dealing with the same. The same alone shows the frivolous nature of the said argument.

26. The counsel for the appellants / plaintiffs, being unable to argue any other substantial question of law, has referred me to the seven substantial questions of law as formulated in the memorandum of appeal but I am unable to find any of them to be qualifying as substantial question of law, on which this appeal ought to be admitted.

27. No other argument has been urged.

28. As aforesaid, during the pendency of this appeal, notice was issued to DUSIB to trace out and produce the records relating to allottees of Aruna Nagar Colony. In response thereto, DUSIB has filed an affidavit dated 17th May, 2018 stating that (i) records pertaining to allotments with respect to Aruna Nagar Colony are not available; (ii) Aruna Nagar Colony came into being sometime in the year 1958-1959 when the encroachers / homeless people existing at Maurice Nagar, Delhi University and Timar Pur were allotted plots of 40 sq.yds. by the L&DO; (iii) vide letter dated 2nd December, 1988, the Ministry of Urban Development, Government of India, declared Aruna Nagar Colony as a Jhuggi Jhopri Resettlement Colony; (iv) thereby the said colony came under the management of the erstwhile Slum

and JJ Wing, being the predecessor of DUSIB; (v) however no handing over of records was carried out; (vi) after declaration of Aruna Nagar as a Jhuggi Jhopri Resettlement Colony, same was taken over by General Wing of the MCD “in the year 1988-99” for maintenance in the wake of a resolution of the Standing Committee of the MCD; (vii) the Slum and JJ Wing was shuffled many times between DDA and MCD; (viii) On enquiry, it was learnt that no records of Aruna Nagar Colony were available with DDA, L&DO or MCD either.

29. The appeal does not raise any substantial question of law. There is no merit therein.

Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

OCTOBER 15, 2018

‘pp/gsr’..

(Corrected and released on 21st November, 2018)