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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 31st May, 2018
+ **RFA 451/2017 & CM APPL. 16370/2017**
MEENA & ORS Appellants

Through: Mr. K. G. Seth, Advocate along with
Appellant/Ms. Meena Jaswant in
person.

versus

RAM KISHAN GUPTA Respondent

Through: Mr. Hemant Malhotra, Mr. Sachin
Gupta & Mr. Sharad Malhotra,
Advocates (M-9810294870).

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This appeal has been preferred against the judgment and decree dated 22nd February, 2017 by which a decree of possession has been passed against the Appellant/Defendant (*hereinafter referred as Defendant*) in respect of the First Floor of property bearing Municipal No.52, measuring 170 sq yds, Lal Dora (1908-09) Abadi of Kalu Sarai, Khasra No.288/249/2 Min, Opp. Azad Apartment, IIT Gate, New Delhi-110016.

2. In brief, the case of the Plaintiff/Respondent (*hereinafter referred as Plaintiff*) is that by virtue of registered sale deed executed on 5th May, 2008 by the previous owner Sh. Ramesh Chandra Gupta, the Plaintiff became the owner of the property. The Defendant-Smt. Meena is the wife of Mr. Binder who was working as a driver with the Plaintiff and the family was allowed to stay in the suit property as it was lying vacant. The husband of the Defendant passed away and after his demise, repeated requests were made to the Defendant to vacate the suit property. On 3rd January, 2010, the

Defendant was asked to vacate, however, despite the same, she did not vacate the premises. Hence, the present suit was filed seeking the following reliefs:

“(a) Pass a decree of Possession in favour of the plaintiff and against the defendant, thereby directing the defendant to remove her goods and belongings alongwith her sons and further to vacate and handover the vacant, peaceful and physical possession of the suit premises, as shown in red colour in the site plan, situated on the first floor of the property bearing no.52, Kalu Sarai Opp. Azad Apartment, IIT Gate, New Delhi, to the plaintiff

(b) Pass a decree for recovery of the damages and mesne profits @ Rs.5,000/- per month in favour of the plaintiff and against the defendant for the unauthorized occupation of the suit premises, as shown in red colour in the site plan, situated on the first floor of the property bearing no.52, Kalu Sarai Opp, Azad Apartment, IIT Gate, New Delhi, from the date of filing of the suit till vacation of the suit premises by the defendant.

(c) Pass a decree of Permanent Injunction in favour of the plaintiff and against the defendant, thereby restraining the defendant from transferring or parting with the possession of the suit premises or creating any third party interest over the suit premises, as shown in red colour in the site plan, situated on the first floor of the property bearing no.52, Kalu Sarai Opp. Azad Apartment, IIT Gate, New Delhi, to any third person other than the plaintiff.”

3. In the written statement, the basic contention of the Defendant is that she had filed a suit for injunction in which she had agreed that the owner of the property is the Waqf Board and that suit was dismissed and the findings in the said suit would bind the present suit. The case of the Defendant is that

she had possession of the First Floor from Late Sh. Bhagwan who was the real owner and her husband had paid a sum of Rs.2 lakhs and got the ownership documents. The said documents were then burnt in a fire. Thereafter, it is her case that her husband was paying Rs.2,000/- per month as further instalments, which was deducted from his salary by Late Sh. Bhagwan. It was further pleaded in the written statement that the suit property is a government property and that the Plaintiff is not the owner of the property. The documents of ownership relied upon by the Plaintiff are forged and fabricated.

4. In the suit, an application was filed by the Delhi Waqf Board seeking impleadment on the ground that the Trial Court had no jurisdiction and that the parties should be directed to approach the Waqf Board Tribunal, Patiala House Courts. The Defendant also filed an application under Order I Rule 10 seeking impleadment of the Waqf Board. The same came to be decided vide order dated 24th January, 2015. In the said two applications, the Trial Court passed the following order:

“I have heard the argument and perused the record. The plaintiff filed the present suit for possession and other consequential relief on the basis of his title which he derived under a registered Sale Deed dated 05.05.2008 from one Sh. Ramesh Chand Gupta and while replying to this application he has provided the title chain claiming that initially the said property was custodian property. In my opinion, the plaintiff is the master of his own suit as per the Principle of Dominiol Litius and he cannot be forced to initiate a litigation with Delhi Wakf Board if he does not wish to. If Delhi Wakf Board is a necessary party and plaintiff does not implead it as defendant, then his suit is liable to be dismissed for non-joinder of necessary party and

plaintiff shall be responsible for the same. As far as the rights of DWB is concerned, needless to say that even if the plaintiff succeed in his suit, the said judgment shall be a judgment in personam and shall not be binding upon DWB and the same in no manner would effect the independent right of DWB. Therefore, no purpose would be served by impleading Delhi Wakf Board as a party. For obtaining the relief sought by the plaintiff it is the plaintiff who has to prove his title over the suit property to the satisfaction of this court and defendants can always prove that the property belong to Delhi Wakf Board, hence I do not find any merits in the applications under consideration, therefore same are dismissed. Ordered accordingly.”

5. Thereafter, evidence was led in the suit on behalf of the Plaintiff by the following witnesses:

- Sh. Ram Kishan Gupta- PW-1;
- Sh. Ishwar Chand Sharma- PW-2, UDC, Assessment and Collection Department of MCD, R.K. Puram, Delhi;
- Sh. Josebius Ekka- PW-3, Section Officer, BSES;
- Sh. Kapil Gupta- PW-4, son of Late Sh. Bhagwan Gupta.

6. The Defendant appeared as DW-1 and also filed the evidence of her son Sh. Tejpal Singh as DW-2, Sh. Jaswant Singh, DW-3 and one Sh. Aas Mohammed and Smt. Sharda as DW-4 and DW-5 respectively. Both DW-4 and DW-5 did not appear for cross-examination. The Trial Court, after hearing the parties and perusing the evidence decreed the suit for possession. The Trial Court further granted time to the Defendant to vacate the suit property on or before 22nd February, 2017, failing which damages @ Rs.5,000/- per month would be liable to be paid along with the interest @ 9% per annum.

7. In the present appeal, notice was issued on 12th May, 2017 and it was recorded that the Plaintiff has not yet filed execution in the matter.

8. On 18th January, 2018 it was requested that since the parties are senior citizens, the matter may be heard. On 22nd March, 2018 arguments were heard in part. The main contention of the Defendant was that the property is a Waqf property and the Plaintiff is not the owner of the same. The allegation of the Plaintiff was that the Defendant has no right to remain in occupation of the suit property. It was further alleged that the Defendant was earlier living in one room which was divided into two parts but now she has encroached upon further area in the First Floor. Accordingly, a Local Commissioner was appointed on 22nd March, 2018 to determine the nature and extent of the property occupied by the Defendant. The Local Commissioner submitted his report. Some extracts of the report of the Local Commissioner read as under:

"7. There was a big argument between both the parties as Respondent stated that one room on the First Floor being used by Appellant was encroached on by Appellant to which she denied and stated that she has been in possession of this room for years from the very beginning and Respondent is not even the owner of this property to question her as it is a waqf property. Also, Appellant and his Counsel asked to take into account state of rooms on Ground Floor as well to prove that neither are the Respondents owners of property nor have they stayed in those rooms ever. Though, Respondents argued that this is not subject matter of inspection to be done as per order of this Hon'ble High Court, I have clicked pictures of rooms on Ground Floor in possession of Respondents as well and same has been

annexed herein as Annexure B (colly).

8. Furthermore the Appellant agreed that they are in occupation of two rooms on F' floor (roof of Ground Floor) along with verandah area which was mostly covered with garbage. Both the parties had a big argument as for determining the measurement of First Floor in possession with the Appellants. Also, aggressive dogs growling and barking and all over the First Floor of Suit Premises and seemingly guarding two rooms on it made it impossible to take any measurements of the First Floor so as to determine exact area of property in possession of the Appellants. According to the Respondents, the room being used as kitchen by Appellant is one which has been encroached by the Appellant to which Appellant has strong objection as she holds that she has been in possession of this room from the very beginning. In the name of boundary, property has wall made of stones on backside."

9. The Local Commissioner's report shows that the Defendant had kept a number of dogs which made it impossible for the Local Commissioner to execute the Commission and to measure the extent of the property in her possession. Accordingly, on 25th April, 2018, the Defendant was directed to remove all the stray animals which she had kept on the First Floor of the property and measurements were directed to be done. The Local Commissioner's report has now been received. The finding of the Local Commissioner is as under:

"6. I started taking measurements of the First Floor of Suit Premise which measured as follows:

First room

29.2 ft. (Length) x 11.7 ft. (Breadth) = 341.64 Square Foot

Second room (Kitchen)

*6.9 ft. (Length) x 7.2 ft. (Breadth) = 49.68 Square Foot
Verandah Area*

11 ft.(Length) x 29.5 ft.(Breadth) = 324.5 Square Foot

7. There was an exchange of words with the son of Respondent, as he argued that measurement of Verandah area on First Floor was not subject matter of inspection, as it was in joint possession of both Appellant and Respondent and according to him same has been held in earlier local commission too, but still I took measurement of Verandah area too.

8. In my opinion Appellant is in possession of two rooms on First Floor and verandah area (of which the Respondent strongly claims to be in joint possession with Appellant), wherein Room no. 1 is having an area of 341.64 Square Foot, and whereas Room no. 2 (being used as kitchen by Appellant) thereby having an area of 49.68 Square Foot and verandah area measuring at 324.5 Square Foot.”

The Local Commissioner has also attached photographs of the property along with the report.

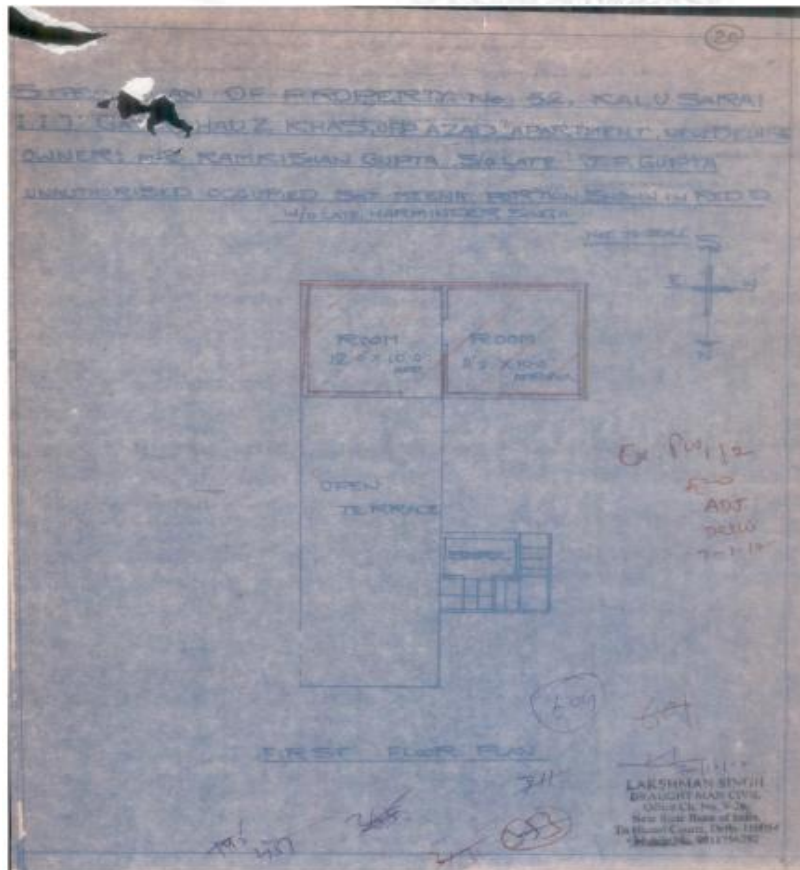
10. Even before this court, the allegation of the Defendant is that the Plaintiff does not have any ownership right in the suit property, however, the suit property is an evacuee property. According to the Defendant, evacuee property is a government property which has to be auctioned and no one can claim rights in the same. He has relied upon the judgment of the Supreme Court in ***Saraswati Devi (dead) by LR v. Delhi Development Authority and Others (2013) 3 SCC 571*** to submit that in this judgment, the procedure for transferring of title of evacuee is laid down and since the Plaintiff has not purchased the property in auction, they cannot legally claim that the suit property belongs to them.

11. The allegation that the suit property is a Waqf property is based on the submission by the Ld. Counsel for the Defendant that the Plaintiff went to the

Waqf Office and made a statement there that the property is an evacuee property. However, no document has been placed on record in support of these submissions that the suit property is an evacuee property.

12. Further submission of the counsel for the Defendant is that a subsequent suit has been filed by this very Plaintiff in respect of the same property and hence he cannot be allowed to pursue two suits in respect of the same subject matter.

13. In response, counsel for the Plaintiff submits that the subject suit was filed in respect of one big room which was subsequently partitioned into two rooms as depicted in Ex.PW1/2 which is the site plan. The said site plan is extracted herein below:



14. From the site plan, it is claimed that the present suit relates to the two rooms which are shaded in red and according to the Local Commissioner also, these are the two rooms which are in the possession of the Defendant which were together described as the first room in para 6 of the report. The Local Commissioner has stated that room no.2 is being used as kitchen by the Defendant and there is a *verandah* area measuring 324.5 sq. ft.

15. Insofar as the second suit is concerned, counsel for the Plaintiff has submitted that the same does not relate either to the two rooms or the open terrace but to a small store room which is depicted in the site plan above. In the affidavit by the plaintiff, exhibited as Ex PW1/A, it stated as under:

“19. I say that I have also filed a separate suit under Sec. 6 of the Specific Relief Act, 1963 for possession/restoration of the said storeroom against the defendants. The said suit being CS No. 269/2015, titled as Sh. Ram Kishan Gupta Vs. Smt. Meena & Others is presently pending before the Id. Court of Ms. Tanvi Khurana, Civil Judge- 01, South District, Saket, New Delhi.”

Thus, in the second suit, the issue is in respect of the Store room, as per the site plan above.

16. Insofar as impleadment of the Waqf board is concerned, the same was rejected by the Trial Court on 24th January, 2015 and there is no appeal against the said order which has attained finality. The Waqf Board sought impleadment which was dismissed and the Defendant cannot be seen to be making arguments on behalf of the Waqf Board.

17. The admitted position as candidly admitted by the Ld. Counsel for the Defendant is that the Defendant has no longer any rights in the suit property but according to him, Plaintiff is not the owner of the property. This being

the position, the Trial Court having perused the documents on record as also the written statement placed on record and the oral evidence, has come to the conclusion that the Plaintiff is the owner of the suit property. The Trial Court has also held that the Defendant is a trespasser and an unauthorized occupant and accordingly the suit was decreed.

18. This court has perused the evidence on record. The arguments made about the property being a Waqf Board property has been dealt with in detail in the Trial Court's judgment. There is no evidence forth coming whatsoever to show that the suit property is a Waqf Board property. In any event, the Defendant being the wife of the driver who was working with the Plaintiff, cannot be seen to take contrary pleas. She herself came into the possession due to the fact that she and her husband were living in the suit property with the permission of the Plaintiff. Under such circumstances, the arguments about Waqf Board being the owner, that too from the Defendant cannot be entertained. The Defendant is a mere licensee and upon the termination of licence, the Defendant becomes an unauthorized occupant.

19. There is no evidence on record to show that any rent has been paid by the Defendant to the Plaintiff. The argument that she is a tenant is also rightly rejected. In view of the above discussion, there is no merit in the present appeal. The appeal along the pending application is dismissed.

20. The Trial Court had directed the Defendant to vacate the property on 27th July, 2017. Thereafter damages would be liable to be paid. However, since the appeal was under consideration, no damages would be liable to be paid by the Defendant. If the Defendant hands over the possession of the suit property within 8 weeks from today, no damages would be liable to be paid. However, upon the expiry of 8 weeks, the Defendant would be liable to pay

a sum of Rs.5,000/- per month till the date of handing over of possession.

PRATHIBA M. SINGH
JUDGE

MAY 31, 2018

Rahul

