

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

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Date of decision: 6th July, 2018

+ **RSA 218/2017, CM No.31188/2017 (u/O XLI R-27 r/w S-151 CPC and S-165 of Evidence Act), CM No.31189/2017 (u/O 15A R-1&2 CPC) and CM No.31190/2017 (u/O XLI R-5).**

MANMOHAN BEDI

..... Appellant

Through: Mr. S.K. Bhalla, Adv.

versus

RAMESH KUMAR GURIA

..... Respondent

Through: Mr. K.K. Malhotra, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment [dated 15th April, 2017 in RCA No.61224/16 (Old No.37/2013) of the Court of Additional District Judge – 13, Central District, Tis Hazari Courts, Delhi] dismissing the First Appeal under Section 96 of the CPC filed by the appellant against the judgment and decree [dated 26th September, 2013 in Suit No.530/2002/1998 of the Court of Senior Civil Judge (West), Tis Hazari Courts, Delhi] of dismissal of the suit filed by the appellant/plaintiff for recovery of possession of immovable property with *mesne* profits.

2. The appeal came up first before this Court on 29th August, 2017, when it was adjourned to 7th September, 2017 and on which date notice thereof was issued to the respondent and the Trial Court record requisitioned. The record of the Suit Court as well as the record of First Appellate Court has been received and the counsel for the respondent has been appearing.

3. The counsel for the appellant / plaintiff was heard for the purposes of

ascertaining whether any substantial question of law arises, and simultaneously therewith the Trial Court record also gone into. Finding the following substantial question of law:

“Whether a person found to be the owner of immovable property can be denied the relief of recovery of possession thereof from a person admittedly in possession thereof, for the reason of failing to prove trespass by the person in possession.”

to be arising for adjudication, the counsel for the respondent / defendant was heard thereon. However, when after informing the counsel for the respondent / defendant that the appeal is entitled to be allowed, I started dictating this judgment, the counsel for respondent / defendant contends that the appeal was not listed for final hearing today and only for considering whether any substantial question of law arises.

4. The aforesaid contention of the counsel for the respondent / defendant is not accepted as the counsels were extensively heard earlier on the substantial question of law aforesaid and only whereafter the dictation of the judgment was commenced. The counsel for the respondent / defendant then did not seek adjournment to address on the substantial question of law which was found to arise for adjudication. The counsel for respondent / defendant, after fully arguing, on coming to know of the way the wind is blowing, wants to take another chance. The number of cases before the Courts does not, in today's date, permit the luxury of hearing the counsels on two separate occasions. Once the counsels, after notice of the appeal has been issued, have been fully heard on the substantial question of

law to which their attention is drawn, the Second Appeal can be disposed of by framing the substantial question of law which arises, in the judgment disposing of the appeal itself. Though in the yesteryears, after framing the substantial question of law, appeal was were admitted for hearing and listed in the category of 'Regulars', to be heard in due course, but with the changed times, the said luxury is no longer available. Moreover, the present appeal arises from a suit which was instituted on 29th October, 1998 and the lis is already 20 years old and the said fact also does not allow the respondent / defendant to, after knowing that the order is going against him, seek another round. The counsel for the respondent / defendant has also not objected to the substantial question of law framed. Supreme Court in ***Kanan Vs. V.S. Pandurangam*** (2007) 15 SCC 157 was concerned with a judgment allowing Second Appeal without a substantial question of law. It was held that the judgment was not liable to be set aside on this ground on this ground alone, if no prejudice was caused on this account. It was reasoned, that both parties knew what the question in the appeal was, and non framing of substantial question of law caused no prejudice. It was further held that to hold that every judgment of the High Court in Second Appeal would be illegal and void merely because no substantial question of law was formulated, would amount to taking an over technical view, which would further burden the judiciary. Again, in ***Arshad Sheikh Vs. Bani Prosanna Kundu*** (2014) 15 SCC 405 the Supreme Court was concerned with a judgment allowing Second Appeal with the substantial question of law being formulated in the judgment itself and not at the time of issuing notice of the appeal or at the stage of admission of the appeal. Reiterating the earlier view, it was held that the substantial question of law if not

formulated at initial stage, can be formulated even at the time of argument, so long as proper opportunity to meet the point is given and no prejudice is caused.

5. The counsel for the respondent / defendant then stated that he needs to make further submissions and has been heard further.

6. The appellant / plaintiff instituted the suit from which this appeal arises, pleading (i) that the appellant / plaintiff along with his brother Jagmohan Bedi is the owner of property no.10703/35-38 & 42 measuring 250 sq. yds. at Quila Qadam Sharief, Nabi Karim, Pahar Ganj, New Delhi vide registered Sale Deed dated 8th July, 1987 executed by one Shri Om Prakash in favour of the appellant / plaintiff and his brother; (ii) that the property, at the time of purchase, was in possession of several tenants; (iii) that the property comprises of a front and a rear portion with each portion having several rooms; (iv) that for accessing the rear portion of the property, there is a common open *gali* about 4 feet wide, connecting rear portion of the building to the main *gali* leading to Nabi Karim on the one side and to Quila Motia Khan on the other side; the said common open *gali* forms part of the private land of the property in the ownership of the appellant / plaintiff; (v) that the said *gali* was in common use of all the occupants of the building; (vi) one Shri Nathu Ram, father of the respondent / defendant, is a tenant in a part of the rear portion of the building; (vii) that the respondent / defendant, taking advantage of his residence in the building along with his father Nathu Ram, in or about 1993 forcibly encroached upon the common open *gali* and started breaking the front door affixed upon the *gali* and which was objected to by the appellant

/ plaintiff and his brother and Police was also called; (viii) that the respondent / defendant gave undertaking in writing on 1st November, 1993 and the situation became normal; (ix) again, after about one year from the above incident, the respondent / defendant started covering the roof of the *gali* and affixing gates on both sides of the *gali* and which was again objected to by the appellant / plaintiff and his brother; and, (x) however the respondent / defendant, taking advantage of his connections with the Police, succeeded in covering the said private *gali* and in affixing doors on the two sides thereof.

7. Hence, the suit for recovery of possession the said private *gali* with *mesne* profits.

8. The respondent / defendant contested the suit by filing the written statement pleading, (i) that the appellant / plaintiff had earlier filed an application under Section 19 of The Slums Area (Improvement and Clearance) Act, 1956 (Slums Act) before the Competent Authority constituted under the said Act, seeking permission for eviction of the father of the respondent / defendant but which application was dismissed because the claim of the appellant / plaintiff and his brother, of ownership and landlordship of the property, was not accepted; (ii) that the appellant / plaintiff is neither the owner of the property nor has any right to the property; (iii) Delhi Development Authority (DDA) is the owner of the property and has been charging damages for use and occupation of the property from Shri Nathu Ram, father of the respondent / defendant; (iv) that the respondent / defendant is occupying the premises along with his father; (v) that the suit was not properly valued for the purposes of court

fees and jurisdiction; (vi) that the suit was bad for non-joinder of necessary parties; (vii) Shri Nathu Ram, father of the respondent / defendant, is in possession of the private *gali* for the last more than 50 years along with two rooms in the rear portion of the property and the said *gali* was never used by any of the occupants of the property; (viii) Shri Nathu Ram, father of the respondent / defendant, was not a tenant under the appellant / plaintiff and was in occupation of the property in his own right; (ix) no incident as alleged happened in November, 1993; and no undertaking dated 1st November, 1993 was ever furnished by the respondent / defendant (x) the respondent / defendant had not encroached upon any *gali*; and, (xi) the respondent / defendant was not in possession of the private *gali* and his father Nathu Ram was in possession thereof.

9. Though the appellant / plaintiff filed replication, but the need to refer thereto is not felt.

10. On the pleadings aforesaid, the following issues were framed in the suit:-

- “(i) Whether the plaintiff is the owner of the suit property? OPP*
- (ii) Whether the suit has not been properly valued for the purpose of court fees & jurisdiction? OPD*
- (iii) Whether the defendant has encroached upon the suit property as alleged in February, 1998? OPP*
- (iv) Whether the plaintiff is entitled to the relief of possession of the suit property? OPP*
- (v) Whether the plaintiff is entitled to the recovery of mesne profits, if so, at what rate and for what period? OPP*
- (vi) Whether the plaintiff is entitled to the relief of permanent injunction as prayed? OPP*

(vii) Relief.”

11. The appellant / plaintiff, besides examining himself, examined his brother Jagmohan Bedi and one other witness. The respondent / defendant examined himself only.

12. The Suit Court dismissed the suit, recording / reasoning (i) that the appellant / plaintiff had proved the Sale Deed executed by Om Prakash in favour of the appellant / plaintiff and his brother as Ex.PW1/1; (ii) the appellant / plaintiff had also proved the earlier Sale Deeds with respect to the property as Ex.PW1/2 and Ex.PW1/3; (iii) the appellant / plaintiff had also proved judgments in suits filed by the appellant / plaintiff for recovery of rent against other tenants in the property as Ex.PW1/10 to Ex.PW1/13; (iv) the respondent / defendant in his cross-examination admitted that his father was a tenant under Om Prakash, earlier owner of the property, and had also admitted the counterfoils of the rent receipts bearing the signatures of his father Nathu Ram on rent receipts issued by Om Prakash; (v) however, it was the stand of the respondent / defendant that the DDA was the owner of the property and the respondent / defendant had proved as Ex. DW1/1 and DW1/2 the receipts of payment of damages for occupation of the property to the DDA; (vi) the respondent / defendant had also proved as Ex.DW1/4 the letter of DDA by which DDA had given notice under Sub Section (2)(2A) of Section 7 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (PP Act) asking the father of the respondent / defendant to pay damages to the DDA; (vii) the brother of the appellant / plaintiff also in his cross-examination had admitted that DDA had issued notices to all the occupants of the subject property measuring

250 sq. yds.; (viii) that once the respondent / defendant had taken a plea that DDA was the owner of the property, it was incumbent upon the appellant / plaintiff to implead DDA as a party to the suit; (ix) the appellant / plaintiff had also not given any reason as to why the Nathu Ram, father of the respondent / defendant was not impleaded; (x) that the Competent Authority (Slum) had also dismissed the application of the appellant / plaintiff and his brother, under Section 19 of the Slums Act, for permission for instituting petition for eviction of the father of the respondent / defendant, on the ground that DDA had been treating the property as its own; (xi) the appellant / plaintiff had not adduced any evidence to show that the respondent / defendant, in the year 1993 had encroached upon the *gali*; and, (xii) that since the appellant / plaintiff had not challenged the order of the Competent Authority under the Slums Act, the appellant / plaintiff was not the owner of the property.

13. Accordingly, issues no.(i), (iv) and (vi) aforesaid were decided against the appellant / plaintiff and in favour of the respondent / defendant.

14. However issue no.(ii) was decided in favour of the appellant / plaintiff and issue no. (iii) was decided in favour of the respondent / defendant. Resultantly, the suit was dismissed.

15. The First Appellate Court though has dismissed the appeal preferred by the appellant / plaintiff but, set aside the finding (that the appellant / plaintiff had failed to prove his ownership of the property) of the Suit Court on issue no. (i), reasoning that, (a) the respondent / defendant had admitted ownership of Om Prakash; (b) the appellant / plaintiff had proved the registered Sale Deed executed by Om Prakash in favour of the appellant /

plaintiff and his brother; and, (c) the respondent / defendant had not proved that the property stood vested in the DDA. The First Appellate Court however has held that the appellant / plaintiff had not proved encroachment of private *gali* by the respondent / defendant in the year 1994, as pleaded in the plaint. Resultantly, the appellant / plaintiff has been denied the relief of recovery of possession and *mesne* profits.

16. The respondent / defendant has not challenged/impugned the judgment of the First Appellate Court to the extent in favour of the appellant / plaintiff and holding the appellant/plaintiff to be the owner of the property, of the private *gali* wherein possession was sought in the suit. No agreement with respect thereto has been made.

17. Hence, the substantial question of law aforesaid.

18. The counsel for the appellant / plaintiff referred to ***Sky Land International Pvt. Ltd. Vs. Kavita P. Lalwani*** 191 (2012) DLT 594, in turn referring to dicta of the Supreme Court in ***Maria Margarida Sequeria Fernandes Vs. Erasmo Jack de Sequeria*** 2012 (3) SCALE 550 holding, that a title suit for possession has two parts – first, adjudication of title and second, adjudication of possession; if the title dispute is removed and the title is established, then the suit in effect becomes a suit for ejectment and where the defendant must plead and prove why he must not be ejected. The counsel for the appellant / plaintiff has contended that the respondent / defendant neither pleaded nor proved any title to remain in occupation of the private *gali* and the appellant / plaintiff has been wrongly denied the decree.

19. Though the respondent / defendant has not challenged the finding of

First Appellate Court, of ownership of the appellant / plaintiff. I may even otherwise record that the Suit Court erred in relying upon the order of the Competent Authority under the Slum Act for holding that the appellant / plaintiff did not have title to the property. The reasoning of the Suit Court, that the appellant / plaintiff having allowed finding of Competent Authority under the Slum Act to the effect that the appellant/plaintiff had no title to the property, to attain finality, had no title to the property, is totally erroneous. The Suit Court erred in considering the order of the Competent Authority (Slum) as binding upon him and / or as a binding precedent on him and in ignoring the registered Sale Deed proved by the appellant / plaintiff in his favour from Om Prakash, whom the respondent / defendant also admitted to be the earlier owner of the property and under whom the respondent / defendant admitted to be a tenant in the property. The domain of enquiry by the Competent Authority under the Slum Act, in exercise of powers under Section 19 thereof, is limited to, whether alternative accommodation within the means of the tenant would be available to him if were to be evicted and whether eviction is in the interest of improvement and clearance of slum areas. The Competent Authority is not a Court and not empowered to adjudicate title to immovable property. It was for the respondent / defendant to prove, as to how the property stood vested in the DDA and which the respondent / defendant neglected to do. It was not even the plea of the respondent / defendant that DDA, pursuant to such vesting of the property in DDA, had taken over possession of the property or had initiated any proceedings against the appellant / plaintiff and his brother for divesting them of title to the property.

20. Moreover ,if at all DDA has any right, title and interest in the

property, this judgment will not come in the way of DDA exercising its rights.

21. The finding of the First Appellate Court, of the appellant / plaintiff, inspite of being the owner of the property, being not entitled to recovery of possession of the said private *gali*, for the reason of having not proved encroachment thereof by the respondent / defendant, is erroneous for the following reasons:-

- (i) that it was/is not in dispute that the aforesaid private *gali* is a part of the property subject matter of the Sale Deed executed by Om Prakash in favour of the appellant / plaintiff;
- (ii) the respondent / defendant in his written statement did not specifically deny that the said private *gali* earlier was open to sky;
- (iii) a bare perusal of the site plan of the property proved by the appellant / plaintiff (the respondent / defendant neither disputed the said site plan nor filed any site plan of his own) shows the front portion of the property to be divided in two equal portions by a 4 feet wide long passage from the front end of the property to about the central open portion of the property and whereafter exists rear portion of the property;
- (iv) the site plan also shows the portions on both sides of said passage to be comprising of several rooms, with two rows of three rooms each on one side and two rows of two rooms each on the other side;

- (v) the site plan also shows the rear portion to be again comprising of several rooms and of which it is not in dispute that one room is in tenancy of Nathu Ram, father of the respondent / defendant;
- (vi) it is also not in dispute that Nathu Ram is also a tenant in another room above the room on the ground floor on the property;
- (vii) the placement and the size of the passage / private *gali*, being the property in dispute, is also such as to lead to no iota of doubt of the same being a passage and / or a private *gali* leading from the front side of the property to the central open courtyard or open atrium in the middle of the property, so as to provide a passage from the front side of the property to the said central courtyard / atrium to the rear portion of the property;
- (viii) the said passage is incapable of independent use or being appurtenant to or part of the rooms aforesaid in tenancy of father of respondent / defendant and by its characteristics is meant as passage for common use of all occupants of the property; and,
- (ix) it appears that the other tenants / occupants of the property have not raised any objection to the exclusive possession of the respondent / defendant of the said passage for the last so many years, for the reason of there being another opening to the central atrium of the property.

22. The counsel for the respondent / defendant, on being asked as to in what right is the respondent / defendant in occupation of the passage aforesaid, states that the father of the respondent / defendant is a tenant, besides in the rooms aforesaid, with respect to the said passage / private *gali* also.

23. The counsel for the appellant / plaintiff has however drawn attention to the report of survey conducted by the House Tax Department of the Municipal Corporation of Delhi (MCD) proved on the suit file and which records the father of the respondent / defendant to be a tenant with respect to the two rooms only and not with respect to any passage.

24. The respondent / defendant is not found to have cross-examined the appellant / plaintiff on the aforesaid aspect.

25. Moreover the respondent / defendant, in his written statement, has not even pleaded that his father is a tenant with respect to the said passage / private *gali* in addition to the rooms in his tenancy.

26. Faced therewith, the counsel for the respondent / defendant contends that the appellant / plaintiff, in his application before the Competent Authority (Slum), admitted the father of the respondent / defendant to be a tenant with respect to the said passage / private *gali* as well.

27. However, a perusal of Ex. DW1/5, being the copy of the said application or of DW1/6, being the order of the order of the Competent Authority (Slum) thereon, does not show it to be so.

28. The rent receipts, admittedly issued by the Om Prakash in favour of the Nathu Ram father of the respondent / defendant, do not contain any

description of the tenanted portion.

29. In the absence of any plea by the respondent / defendant, of any right to occupy the passage aforesaid, once the appellant / plaintiff is found to be the owner, the orders of the Court below denying the decree for possession of the appellant / plaintiff for the reason of the appellant / plaintiff having not proved encroachment / trespass by the respondent / defendant thereof, cannot be sustained.

30. It is not as if the respondent / defendant does not claim the said passage / private *gali* to be in his possession or claims the same to be in possession of the appellant / plaintiff only.

31. Once it is found that the appellant / plaintiff is the owner of the property and the respondent / defendant is in possession thereof and without disclosing any right to such possession, a decree for possession has to follow.

32. The submission made by the counsel for the respondent / defendant in the second round as aforesaid, after knowing the order to be going against him, is that the appellant / plaintiff has not been able to prove that the respondent / defendant came into possession in the year 1994. Attention is drawn to evidence to contend that the respondent / defendant claimed to be in possession since the time Om Prakash was the owner of the property.

33. However, the counsel for the respondent / defendant on being told that no plea of the suit claim being barred by limitation had been taken, contends that a plea of limitation can be taken at any time and everybody knows that after 12 years the suit for possession cannot be filed.

34. That is a layman's perception.

35. A suit for possession of immovable property is governed by Articles 64 & 65 of the Schedule to the Limitation Act, 1963. The subject suit is a suit for possession based on title and is governed by Article 65, which though provides the limitation for filing thereof of 12 years but commencing from the date when the possession of the defendant becomes adverse to that of the plaintiff. It has been held in *Dagadabai Vs. Abbas* (2017) 13 SCC 705, *Annasaheb Bapusaheb Patil Vs. Balwant* (1995) 2 SCC 543 & *T. Anjanappa Vs. Somalinagappa* (2006) 7 SCC 570, that for possession of the defendant to become adverse to the plaintiff, the defendant has to admit the ownership of the plaintiff. The respondent / defendant did not admit ownership of the appellant / plaintiff and thus the plea of adverse possession is not open. Even otherwise, no plea of adverse possession has been taken in the written statement of the respondent / defendant. Rather, the plea of the respondent / defendant was of being in possession in his own right and which is a plea of lawful possession of the premises. It has been held in *Mohan Lal Vs. Mirza Abdul Gaffar* (1996) 1 SCC 639, *PT Munichikanna Reddy Vs. Revamma* (2007) 6 SCC 59, *LN Aswathama Vs. P. Prakash* (2009) 13 SCC 229, *Pushpa Rathi Vs. Jugnu Bansal* 2017 SCC OnLine Del 10881 & *Karnataka Board of Wakf Vs. Government of India* (2004) 10 SCC 779 that the plea of lawful possession cannot coexist with a plea of adverse possession. For this reason also, the plea of adverse possession is not available to the respondent / defendant.

36. It thus has to be held that the appellant / plaintiff is entitled to the relief of recovery of possession of the aforesaid passage / private *gali*

shown in the site plan proved as Ex. PW1/1 on record of the Trial Court.

37. The counsel for the respondent / defendant at this stage draws attention to the cross-examination of the appellant / plaintiff where the appellant / plaintiff has admitted that Nathu Ram, father of the respondent / defendant was a tenant “in the property in dispute” and that the property “is one property and is a “*katra*”. On the basis thereof it is contended that the appellant / plaintiff has admitted the father of the respondent / defendant to be a tenant in the passage / private *gali* also.

38. I am unable to agree.

39. It is the admitted position that Nathu Ram, father of the respondent / defendant is a tenant in two rooms aforesaid in the property. The purpose of cross-examination is not to hoodwink a witness. An Advocate, by using legalese, cannot make a witness say something and use it for some other purpose. If the counsel for the respondent / defendant, in cross-examination of the appellant/plaintiff, wanted to put it to the appellant / plaintiff that Nathu Ram was a tenant in the passage / private *gali* besides in the two rooms, it ought to have been so put. However, the counsel for the respondent / defendant shied away from doing so and used a vague expression like ‘property in dispute’, which is unlikely to be known to persons other than in the profession of law. Once it is not in dispute that Nathu Ram was a tenant in two rooms in the properties, the reference to ‘property in dispute’ could be to the said two rooms also and such ambiguous cross-examination cannot be taken advantage of by the counsel at the time of hearing.

40. That leaves the aspect of *mesne* profits.

41. The appellant / plaintiff has claimed *mesne* profits @ Rs.2,000/- per month.

42. The counsel for the respondent / defendant draws attention to the cross-examination by the respondent / defendant of PW3, a property broker examined by the appellant / plaintiff, to contend that he has admitted the letting value of the property to be Rs.50 per month.

43. The same is again in mis-appreciation of evidence. The question which was put by the counsel was “if in the locality, some tenants were also paying Rs.50/- per month as rent” and to which the witness agreed. The property is situated in the old walled city area where old tenancies exist. The father of the respondent / defendant also is claimed to be a tenant for over 50 years. Merely because some tenants are continuing at old rates of rent would not be a measure of *mesne* profits, the measure thereof under Section 2(12) of the CPC is the benefit which the person in unauthorised occupation has reaped from such possession. Considering the fact that the subject property, according to the cross-examination by the counsel for the respondent / defendant himself, is a ‘*katra*’ and considering the prevalent letting values, the claim for *mesne* profits @ Rs.2,000/- per month cannot be said to be excessive; rather it is on a much lower side.

44. Accordingly the question of law framed as aforesaid is answered by holding that on title of the appellant/plaintiff to immovable property having been established, in the absence of the respondent/defendant pleading any title thereto, the plaintiff is entitled to a decree for recovery of possession of the property/part thereof in possession of respondent/defendant, even if the appellant/plaintiff failed to prove the factum of trespass.

45. The appeal is allowed.

46. The judgment and decree of the First Appellate Court, to the extent of denying the decree of possession and *mesne* profits to the appellant / plaintiff, is set aside and a decree is passed in favour of the appellant / plaintiff and against the respondent / defendant, of recovery of possession of portion shown as passage / private *gali* in site plan of property no.10703/35-38 & 42 measuring 250 sq. yds. at Quila Qadam Sharief, Nabi Karim, Pahar Ganj, New Delhi proved as Ex. PW1/1 before the Trial Court. A decree for *mesne* profits is also passed in favour of the appellant / plaintiff and against the respondent / defendant @ Rs.2,000/- per month, with effect from the date of institution of the suit from which this appeal arises and till the date of dispossession of the respondent / defendant from the portion of the property qua which the decree for possession is passed. The respondent / defendant to also pay costs of Rs.50,000/- to the appellant / plaintiff.

Decree sheet be drawn up.

JULY 6, 2018

‘pp’..

RAJIV SAHAI ENDLAW, J.