

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

+ **RFA No. 121/2018**

% **Reserved on : 09th February, 2018**
Pronounced on : 15th February, 2018

MUKESH KHURANA Appellant

Through: Mr. Irfan Ahmed, Advocate.

versus

RAMESHWAR SHARMA & ORS. Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J

CM No. 4815/2018 (Exemption)

Exemption allowed subject to just exceptions.

CM stands disposed of.

CM No. 4816/2018 (Delay in re-filing)

For the reasons stated in the application, delay in re-filing is condoned.

CM stands disposed of.

RFA No. 121/2018 & CM No. 4814/2018 (stay)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant no.2 in the

suit impugning the judgment of the trial court dated 20.9.2017 by which the trial court has decreed the suit for possession and *mesne* profits filed by the respondent no.1/plaintiff in terms of the following relief clause:-

"21. RELIEF:

In view of my findings given on the issues, a decree for possession is passed in favour of the plaintiff and against the Defendants of front portion admeasuring 10'x8' of shop No. X-21, West Patel Nagar, more specifically shown red in the site plan Ex.PW2/2. Plaintiff shall also be entitled to damages @ Rs.7,500/- per month since 01.04.2005 till recovery alongwith interest @ 6% per annum till realization. Plaintiff is directed to pay court fees on the pendente lite damages. No order as to costs. The Defendants shall, however, be entitled to the passage from this front portion to access the tenanted shop of 10'x15' out of shop No. X-21, West Patel Nagar, New Delhi."

2. The facts of the case are that the respondent no.1/plaintiff is the owner of shop no. X-21, West Patel Nagar, New Delhi having purchased the same from the earlier owner Smt. Parvati Devi on 4.9.1992. Ownership of the respondent no.1/plaintiff stands mutated in the records of the L&DO. The husband of the defendant no.1 and the father of the appellant/defendant no.2 was a tenant in a part of the property admeasuring 10'X10' on rent of Rs.80 and that subsequently in March 1990 additional portion of 5'X10' on the back of the tenanted premises was let out making the total area let out as 15'X10'. The defendants however had illegally occupied an area of the

courtyard in front of the tenanted shop covering 10'X8', and therefore, the subject suit was filed to seek possession of this front courtyard illegally taken possession of by the defendants, including the appellant/defendant no.2. Respondent nos. 2 and 3 in this appeal are the other legal heirs of the deceased defendant no.1 and respondent nos. 2 and 3 were substituted in place of the deceased defendant no.1 during pendency of the suit.

3. As per the joint written statement filed by the defendants suit was prayed to be dismissed. It was stated that the defendants were in possession of the suit property since the year 1992 and the suit filed in the year 2008 was beyond limitation. Ownership of the respondent no.1/plaintiff with respect to the shop no. X-21 was also denied. As regards the suit area it was stated that the same is a covered varanda in forming part of shop no.X-21.

4. After completion of pleadings, the following issues were framed in the suit:-

“1. Whether the plaintiff is entitled for recovery of possession of front portion measuring 10'x8' of the shop No. X-21, West (Sh. Rameshwar Sharma v. Smt. Phoola Rani & Anr.) Patel Nagar, New Delhi as alleged ? OPP.

2. Whether the plaintiff is entitled for recovery of damages/mesne profits as claimed ? OPP.

3. Whether the plaintiff is entitled to interest, if so at what rate and for what period? OPP.
4. Whether the suit is barred by limitation ? OPD.
5. Whether the plaintiff has no locus standi to file and maintain the present suit ? OPD.
6. Whether the suit has not been properly valued for the purposes of court fee and jurisdiction ? OPD.
7. Relief.”

5. The issue of limitation has been held by the trial court in favour of the respondent no.1/plaintiff by observing that the defendants in the suit had cast a cloud on title of the respondent no.1/plaintiff by having filed a suit for specific performance which was ultimately dismissed and decided in an appeal filed on 13.7.2007 and even the second appeal before this Court was dismissed and therefore, the subject suit filed on 30.4.2008 is within limitation. The reasoning and conclusion with respect to limitation is given in paras 7 to 9 of the impugned judgment and which paras read as under:-

“7. The onus of proving this issue was on the Defendants. Ld. Counsel for the Defendants has argued that the plaintiff claimed that the Defendants are in unlawful possession of the suit property since 1992 and the present suit was filed in 2008 and as such the same is beyond the period of 12 years, prescribed for filing a suit for recovery of possession of immovable property.

8. Ld. counsel for the Plaintiff, on the other hand, has stated that there was a cloud on the title of the plaintiff because of the suit for specific performance filed by Defendant No.2 against the Plaintiff, wherein the appeal was decided on 13.07.2007 and the second appeal by the Hon'ble Delhi High Court thereafter and as such, present suit is within limitation and plaintiff is entitled to exclude that time consumed in those proceedings and the suit has been filed only after it has been adjudicated

that it is the plaintiff and not Defendant No.2 who is the owner of the property.

9. Admittedly, Defendant No.2 filed the suit for specific performance in 1992 which was decided by the trial court in 2005 and the first appeal (was decided on 17.03.2007 and the second appeal was also decided against Defendant No.2 thereafter. This suit was filed on 30.04.2008 and the plaintiff has every right to exclude the period during which the suit for specific performance filed by Defendant No.2 against the plaintiff was subjudice creating a cloud on the title of plaintiff herein. The present suit is therefore, within limitation and the issue is decided against the Defendants.”

6. I completely agree with the reasoning and conclusion of the trial court that the suit is not barred by limitation. In fact, the suit for possession is not barred by limitation unless adverse possession is pleaded and proved because a person in illegal possession can always be dispossessed by the true owner except of course after the expiry of period of 12 years of commencement and conclusion of adverse possession. There is no defence of adverse possession which is raised by the defendants in the suit including the appellant/defendant no.2 and therefore, for this additional reason also the suit for possession was rightly held to be within limitation.

7. The next issue which is argued on behalf of the appellant/defendant no.2 was that the suit land/courtyard was a public land and therefore respondent no.1/plaintiff does not have any legal right to take possession of this courtyard which belongs to the

Government. In this regard, trial court has in my opinion rightly held that *vide* document Ex.DW2/3 the land in question was offered as an additional allotment to the allottees of the shop, and consequently, this land in front of the shop became part and parcel of the ownership of the shops. Trial court has also rightly held against the appellant/defendant no.2 that appellant/defendant no.2 had taken up a case that the suit property was part of shop no.X-21, and which admissions existed in the written statement of the appellant/defendant no.2 as also in the affidavit by way of evidence of the appellant/defendant no.2, and therefore, it could not be held that the suit courtyard was not owned by the respondent no.1/plaintiff. Once it is held that the suit courtyard was not let out to the defendants in the suit then the respondent no.1/plaintiff was held entitled to possession of the suit courtyard. The relevant observations of the trial court in this regard are contained in paras 17 to 19 of the impugned judgment, and these paras read as under:-

"17. I have heard the submissions, but I do not find any force in it, in view of the admission of the Defendant in the cross-examination as well as in the pleadings that the suit property is a part (Sh. Rameshwar Sharma v. Smt. Phoola Rani & Anr.) shop No. X-21, West Patel Nagar, New Delhi. In the written Statement, in preliminary objection no.2, on page 4, Defendants state, "it is further submitted that prior to execution of agreement to sell dated 10.07.1990, the area of the front side of the property was given by the deceased on rent to the father

of respondent No.1 since 1960s.....". This admission in the written statement, which was further reiterated in the affidavit of evidence in para 3 on running page 4 of Defendant No.2. Further Defendant No.2, in his cross-examination dated 20.12.2012 on page 4, admits that the suit property is veranda in front of X-21, West Patel Nagar, and is a part of X-21, West Patel Nagar. These admissions in the pleadings, in the affidavit of evidence and in the cross-examination of Defendant No.2 is sufficient to hold that the suit property is a part of shop No.X-21, West Patel Nagar, New Delhi. Otherwise also, the documents Ex.DW2/3 shows that the Ministry of Urban Development offered additional allotment of the land in front of the shops to the allottees and since then, the front portion of each and every shop became the part and parcel of shop itself. Further there is no suggestion in the cross-examination to the plaintiff that the suit property is not a part of X- 21 and contrary to it, it has been suggested that the front portion of the property was given on rent to the husband of Defendant No.1 in 1960s. In fact, it is not open to the Defendants to argue that the suit property is not a part of X-21, West Patel Nagar. Further, Defendants claim that the suit property was also let out to them since 1960s, the onus was on them to prove the same. The written statement and affidavit of evidence show that on one hand, it is claimed that the size of the shop leased to late Shri Ram Prakash Khurana admeasures, 10'x15' and on the other hand, it is claimed that the front portion of this shop was also let out to them. Defendants are not sure as to what portion was exactly let out to late Shri Ram Prakash Khurana. Defendants as such have failed to prove that the suit property was also let out to them.

18. Plaintiff on the other hand, has been able to show that the suit property was unauthorizedly occupied by the Defendants and was never let out to them. The following suggestions, given to the plaintiff in his cross-examination, demolishes the defence of the Defendants in respect of the suit property, "it is correct that the portion in tenancy of the husband of Defendant No.1 was of measurement of 10'x15' and its rental was Rs.80/- per month." By giving this suggestion, the Defendants admit that the suit property was never rented out to the husband of Defendant No.1 late Shri Ram Prakash Khurana.

19. The affidavit of evidence of DW1, on the other hand, is nothing but a copy and paste of the written statement and this witness admitted in the cross-examination that he has no document to show that this veranda was let out to his father. The witness admits that Smt. Parvati Devi was issuing rent receipts to them. That was the best piece of evidence available with the Defendants to show as to what exactly was let out to them. The Defendants did not produce the rent receipt and as such, it is held that the suit property was not let out to them and was trespassed by them subsequently. As such, plaintiff being the owner is entitled to recover the possession of the suit property which is the front portion measuring 10'x8' in front of shop No.X-21, West Patel Nagar, New Delhi. Plaintiff however

has failed to prove that access to the tenanted portion of 10'x15' is from rear side as there is no evidence led in this regard." (underlining added)

8. Learned counsel for the appellant/defendant no.2 sought to argue that the suit land belongs to the Government, and therefore, suit for possession had to be dismissed but when it was put to the counsel that admittedly since appellant/defendant no.2 does not claim ownership/title in the suit courtyard then the respondent no.1/plaintiff can take possession of the courtyard and in case the Government is still aggrieved then Government will take possession from the respondent no.1/plaintiff, and to this argument no satisfactory answer was given by the counsel for the appellant/defendant no.2. Also, in any case in view of the documents Ex.DW2/3 land in front of the shop, being the subject courtyard, became part of the ownership of the owner of the shop premises and therefore though there may not be any formal title deed yet the respondent no.1/plaintiff had an entitlement to possession because of Ex.DW2/3 and hence trial court has rightly decreed the suit for possession with respect to the subject courtyard.

9. There is no merit in the appeal. Dismissed.

FEBRUARY 15, 2018

VALMIKI J. MEHTA, J