

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

+ **RFA No.916/2018**

% **14th November, 2018**

SUNIL KUMAR & ANR.

..... Appellants

Through: Mr. Sunil K. Kalra, Advocate
with Mr. Vikram Gola,
Advocate (M. No.9810396959
& 9811244209).

versus

USHA SHARMA

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.46611/2018(exemption)

Exemption allowed subject to just exceptions.

C.M. stands disposed of.

RFA No.916/2018 & C.M. Nos. 46612/2018 (for condonation of delay of 382 days in filing), 46613/2018 (for condonation of delay of 277 days in re-filing) & 46610/2018 (stay)

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 08.08.2016 by which the trial court has decreed the suit filed by the respondent/plaintiff against the appellants/defendants for recovery of possession/mandatory injunction and has also passed a decree of Rs. 3 lakhs in favour of plaintiff towards arrears of license fee and Rs.25,000/- per month along-with interest at 6% per annum for *mesne* profits.

2. The present appeal is accompanied by two applications for condonation of delay. One application for condonation of delay is **CM No. 46612/2018** praying for condonation of delay of 382 days in filing of the appeal. The only ground given in this application for condonation of delay is that the appellants/defendants were advised by their advocate to not file this appeal because some other case was filed by the appellants/defendants, and which in my opinion is quite clearly an unacceptable reason for not having filed the appeal within limitation and the resultant delay is not of a few days or weeks or

months but of 382 days. Therefore, there is no ground for condonation of delay.

3. There is another application being ***C.M. No. 46613/2018*** for condonation of delay in re-filing of 277 days. In this application, though the condonation of delay is sought by pleading that the advocates for the appellants/defendants were negligent in not removing the objections raised by the Registry and that the appellants/defendants have made a complaint against the advocates, however in my opinion, the grounds given in this application for condonation of delay in re-filing are also false and frivolous and are rejected because nothing is shown or pleaded by the appellants/defendants as to how they remained in touch with their counsels for getting the objections removed, and therefore in my opinion, the complaint made to Bar Council is a self-serving complaint only to seek condonation of delay. Therefore, both the applications for condonation of delay in filing and re-filing being ***C.M. Nos. 46612/2018*** and ***46613/2018*** have no merit and are liable to be dismissed. However, I have also heard the counsel for the

appellants/defendants on merits and therefore the appeal is also being disposed off on merits.

4. The subject suit was filed by the respondent/plaintiff and who is the *bhabhi* (sister-in-law) of the appellants/defendants i.e. the respondent/plaintiff is the wife of the brother of the appellants/defendants. The respondent/plaintiff pleaded that she was the owner of the suit property having purchased the same by means of Documentation dated 23.03.2005 being the Agreement to Sell, Power of Attorney, Will, Receipt, Affidavit and Possession Letter. The Will and the Power of Attorney were duly registered before the Sub-Registrar. The respondent/plaintiff also got the property mutated in her name in the record of the Municipal Corporation of Delhi and paid the house tax with respect to the suit property. The appellants/defendants being the real brothers of the husband of the respondent/plaintiff sought permission to take the premises on license and in view of the family relationship, the appellants/defendants were allowed as licensees on monthly payment of Rs. 15,000/-. The license commenced in April 2005 and the appellants/defendants are said to have paid license fee of Rs. 15,000/- per month till 30.04.2008 and

thereafter citing their financial difficulties the appellants/defendants stopped paying the license fee. After making repeated requests to pay the license fee and to vacate the suit premises, since the appellants/defendants failed to comply with the genuine requests of the respondent/plaintiff, a Legal Notice dated 18.08.2009 was issued to the appellants/defendants terminating their license, and thereafter the subject suit for possession, mandatory injunction and *mesne* profits was filed.

5. Before turning to the averments made by the appellants/defendants in their written statements, it must be noted that the written statements of the appellants/defendants were struck off vide Order dated 12.08.2015 as they had failed to pay the interim license fee charges as directed by an earlier order. This order has become final and therefore there are no written statements of the appellants/defendants on record and the appellants/defendants have thus not led any evidence whereas the respondent/plaintiff has led evidence and proved her case thereby entitling her to the decree for possession and *mesne* profits.

6. The appellant no. 1/defendant no.1 pleaded that it was not the respondent/plaintiff who was the owner but that the appellant no. 1/defendant no. 1 was the owner of the suit property because he had paid a sum of Rs. 14,50,000/- to the erstwhile owner Smt. Raj Rani. It was pleaded that the appellant no.1/defendant no.1 had made payment to Smt. Raj Rani by banking instruments and also in cash. A sum of Rs. 14,50,000/- thus stood paid to the erstwhile owner Smt. Raj Rani and only a sum of Rs. 50,000/- remained, and which was to be paid at the time of execution of the transfer documents in favour of the appellant no.1/defendant no.1. The payments were said to be paid to Smt. Raj Rani by banking instruments of March, 2005 and cash payment are said to have been made in November, 2007 and December 2008. The appellant no.1/defendant no.1 claimed that since transfer documents were not executed in his favour by Smt. Raj Rani, he issued a Legal Notice dated 21.05.2010 to Smt. Raj Rani which did not elicit the desired result from Smt. Raj Rani. The appellant no.1/defendant no.1 therefore denied that he was the licensee in the suit property.

7. The appellant no.2/defendant no.2 filed his written statement and denied that the respondent/plaintiff is the owner of the suit property. The appellant no.2/defendant no.2 also denied that there was any license created in his favour at Rs. 15,000/- per month. It was pleaded that a civil suit was filed by the appellant no.2/defendant no.2 against the respondent/plaintiff and Smt. Raj Rani and this suit is pending disposal.

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

- “1. Whether the plaintiff is owner of property bearing No. RZ-603/21, Tughlakabad Extension, New Delhi? OPP
2. Whether the defendants were permitted by the plaintiff to occupy the property bearing No. RZ-603/21, Tughlakabad Extension, New Delhi as a 'licensee' on agreed licence fee of Rs. 15000/- per month? OPP
3. Whether the defendant no. 1 was put in possession of property bearing No. RZ-603/21, Tughlakabad Extension, New Delhi by Smt. Raj Rani in part performance of the agreement to sell? OPD-1
4. Whether the defendant no. 2 is in occupation of property bearing no. RZ-603/21, Tughlakabad Extension, New Delhi, in his own right? OPD-2
5. Whether the plaintiff is entitled to the reliefs as prayed for? OPP
6. Relief.”

9. The respondent/plaintiff proved her case by leading evidence and these aspects are recorded in paras 7 to 10 of the impugned judgment, and these paras read as under:-

“7. In order to prove her case, plaintiff examined four witnesses including herself as PW1; plaintiff's husband Sh. Narender Dutt Sharma as PW2; one witness Sh. Rajender Singh, LDC from SDMC as PW3; Sh. Jyotish Topno, Ahlmad from the court of Ms. Jyoti Kler, Ld. ASCJ/JSCC, South District as PW4 and Sh. Sanjay Goswami, Record attendant from the office of Sub Registrar-V, Mehrauli as PW5. PW1 and PW2 filed their evidentiary affidavit in examination in chief wherein they deposed more or less in terms of averments contained in plaint. PW1 also relied upon following documents such as:

- (i) Site plan as Ex. PW1/1
- (ii) General Power of Attorney dated 23.03.2005 as Ex. PW1/2
- (iii) Agreement to sell and purchase dated 23.03.2005 as Ex. PW1/3
- (iv) Affidavit of Smt. Raj Rani Bajaj dated 23.03.2005 as Ex. PW1/4
- (v) Photocopy of Receipt as Ex. PW1/5
- (vi) Photocopy of Possession letter as Ex. PW1/6
- (vii) Photocopy of Will as Ex. PW1/7
- (viii) Copy of Mutation letter dated 01.10.2008 as Ex. PW1/8
- (ix) House tax receipts as Ex. PW1/9 & 10
- (x) Copy of legal notice dated 18.08.2009, its postal receipts and UPC receipts as Ex. PW1/11 to Ex. PW1/13 respectively.
- (xi) Bank statement as Ex. PW1/14

8. PW3 has been examined in order to prove the mutation of the suit property in the name of plaintiff vide document Ex. PW1/8 which is the letter dated 01.10.2008 issued by SDMC in favour of plaintiff. However, in the letter itself it is mentioned that mutation in the name of plaintiff has been effected only for the purposes of property taxes and does not

devolve upon her any legal title in respect of the suit property. PW3 has also brought the original record relating to the house tax receipts Ex. PW1/9 & Ex. PW1/10 for establishing the fact that it was the plaintiff who had been depositing house tax in respect of suit property.

9. PW4 was summoned for bringing the case file of suit bearing no. 73/13 titled as "Sunil Kumar vs. Raj Rani & Ors." and after seeing the record the certified copy of plaint of said suit was exhibited as Ex. PW4/A. PW5 had brought the record regarding the registration of the GPA and Will dated 23.03.2005 registered vide registration no. 4013, Book No.4, Volume no. 2450 and registration no. 3787, Book No.3, Volume no. 1350 respectively, at the office of Sub Registrar-V, Mehrauli. The said two documents were exhibited as Ex. PW1/2 & 7 respectively.

10. PW1 & PW2 were duly cross examined by the opposite counsel Sh. D.C. Vohra, Advocate and relevant part of their examination shall be discussed at the appropriate place while giving issue wise findings. Defendant however, did not cross examine remaining plaintiff's witnesses despite opportunity."

10. In my opinion, once the respondent/plaintiff has proved her case; proved and exhibited the documents showing entitlement to better possession of the suit property than the possession claim of the appellants/defendants, because documents dated 23.03.2005 were executed by Smt. Raj Rani in favour of the respondent/plaintiff and which were proved as Ex.PW1/2 to Ex.PW1/7, therefore, the trial court has committed no error in decreeing the suit for mandatory injunction/possession. It is also required to be noted that respondent/plaintiff has acted as an owner and has got the property mutated in her name, and which is proved by the Mutation Letter dated

01.10.2008/Ex.PW1/8. The House Tax Receipts showing payment of house tax by the respondent/plaintiff were proved as Ex.PW1/9 and Ex.PW1/10. The Legal Notice dated 18.08.2009 terminating the tenancy and postal receipts have also been proved as Ex.PW1/11 to Ex.PW1/13.

11. As already stated above, the written statements of appellants/defendants were struck off from the record and the appellants/defendants have led no evidence and hence there is no reason to disbelieve the case of the respondent/plaintiff, which has otherwise been proved by the respondent/plaintiff by leading evidence.

12. The trial court is also justified in the facts of this case in decreeing the suit for *mesne* profits because the appellants/defendants failed to cross-examine PW-1 on the point of prevalent rate of rent/damages, and accordingly, the trial court has granted *mesne* profits at Rs. 25,000/- per month.

13. I may note that no doubt the documents of the respondent/plaintiff dated 23.03.2005 along with the agreement to sell in favour of the respondent/plaintiff is not registered, however, the

power of attorney of the respondent/plaintiff is registered and therefore the respondent/plaintiff can be said to be acting as the attorney of the original owner for taking possession, and therefore, had better entitlement to possession of suit property than the appellants/defendants, and the trial court was therefore clearly justified in decreeing the suit for mandatory injunction/possession of the suit property in favour of the respondent/plaintiff.

14. In view of the aforesaid discussion, no grounds have been made out for condonation of delay, and even on merits the appellants/defendants have no case. Dismissed.

NOVEMBER 14, 2018
ib

VALMIKI J. MEHTA, J