

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

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Reserved on: 27th September, 2019

Decided on: 15th October, 2019

+ **CS(OS) 72/2017 & I.A. 2098/2017 (u/O.XXXIX R. 1&2 CPC)**

RIPU DAMAN

..... Plaintiff

Represented by: Mr.Nikhilesh R, Mr.Navdeep Jain and
Mr.Aakash Choudary, Advocates.

versus

SHRI DALIP KUMAR

..... Defendant

Represented by: Mr.Atul Varma, Advocate.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. By the present suit, the plaintiff claims a decree for recovery of possession in favour of the plaintiff and against the defendant directing the defendant to hand-over the vacant peaceful possession of the property bearing Plot No.32 located in Block K-5, P.O & PS Model Town, Delhi-110009 (in short the suit property) in favour of the plaintiff, damages, mesne profit, cost and permanent injunction against the defendant from parting with the possession of the suit property or creating any third party rights.

2. Summons in the suit were issued on 17th February, 2017 whereafter the defendant entered appearance and sought time to file written statement. After the pleadings and admission/ denials were over, the following issues were settled:

“1. Whether the plaintiff is entitled to a decree of possession of suit property bearing Plot No.32 located in Block K-5, P.O & PS Model Town, Delhi – 110009? (OPP)

2. Whether the plaintiff is entitled to a decree of damages and mense profits for continuing to use the said property till date of handing over the possession of the said property to the plaintiff at the prevailing market rates along with 12% interest per annum? (OPP)

3. Whether plaintiff is entitled to a decree of permanent injunction against the defendant with regard to the suit property bearing Plot No.32 located in Block K-5, P.O. & PS Model Town, Delhi – 110009? (OPP)

4. Whether mother of the parties was not the owner of the suit property and consequently was not competent to execute the Will in question? (OPD)

5. Relief.”

3. Plaintiff examined himself as PW-1. However, the defendant despite opportunities did not lead any evidence even after cost was imposed and thus the right of the defendant to lead evidence was closed.

4. Case of the plaintiff in the suit is that the suit property was acquired and built by late Smt. Jio Rani from her own funds and the plaintiff contributed to the construction of the suit property as he had started working and supporting the family in the year 1972. Thereafter, the plaintiff moved to Germany for work in the month of April, 1981 and used to send money from Germany on regular basis to support his parents. The plaintiff also supported the defendant who is his younger brother till the time the defendant got employed and became independent. The plaintiff also contributed to the marriage expenses of the defendant. After the defendant got married, he was asked by the mother to move out of the suit property due to serious differences created by him and his wife with the mother and

other family members, and thus there was no interaction between the mother and defendant after April, 1987. In the month of November, 2010 plaintiff's mother Smt. Jio Rani was unwell and defendant on his own accord came and started residing in the suit property which was neither approved by the mother nor the plaintiff. Defendant owns a house in Faridabad built up on 500 sq.meters land which he purchased from his own fund and is occupied by him which is his permanent residence.

5. The plaintiff continued sending money for supporting the mother initially through the elder sister Smt. Surinder Gulalia from January 2007 till December 2012 and thereafter through the defendant. Smt. Jio Rani passed away on 19th November, 2013 whereafter the plaintiff transferred money to the defendant for maintenance of the suit property. The plaintiff has placed on record documents to show transfer of money. On the death of Smt. Jio Rani, plaintiff filed a Probate case before the learned Additional District Judge which was allowed and the Will dated 7th September 2011 of Smt. Jio Rani was probated in favour of the plaintiff and a letter of administration in respect of the suit property was granted to the plaintiff on 30th July, 2016. Despite the plaintiff requesting the defendant to vacate the suit property as he needed it for his personal use and that the defendant owned his own property, the defendant failed to vacate the same nor gave reply to the letter and legal notice of the plaintiff dated 12th August, 2016 and 9th September, 2016 respectively. Hence the present suit.

6. In support of his claim besides tendering his affidavit by way of evidence deposing the facts as noted above, the plaintiff has proved the certified copy of the Will dated 7th September, 2011 of late Smt. Jio Rani vide Ex.PW-1/2, registered deed of general power of attorney in favour of

the plaintiff executed by the mother vide Ex.PW-1/3, certified copies of the order of the learned Additional District Judge granting probate and letter of administration as Ex.PW-1/7 and PW-1/8 and his letter dated 12th August, 2016, receipt thereof and the legal notice dated 9th September, 2016 as Ex.PW-1/9, PW-1/10 and PW-1/11 respectively. The plaintiff also exhibited copies of the money gram through which he sent money from Germany for maintenance of the property in the name of defendant, their father and their elder sister Smt. Surinder Gulalia vide Ex.PW-1/4, PW-1/5 and PW-1/6 respectively.

7. As noted above, probate and letter of administration of registered Will dated 7th September, 2011 has already been granted in Probate Case No. 50/15. The registered Will dated 7th September, 2011 of late Smt. Jio Rani is accepted by everybody in the probate proceedings and the defendant himself is a signatory to the said registered Will as a witness.

8. From the evidence as led by the plaintiff and the documents as exhibited which have not been rebutted by leading any contrary evidence, it is evident that by virtue of the registered Will dated 7th September, 2011 the suit property was bequeathed to the plaintiff on the death of Smt. Jio Rani on 19th November, 2013 and thereafter the possession of the defendant particularly from the date when the letter dated 12th August, 2016 was received by the defendant is illegal and the defendant has no right of possession of the suit property, as plaintiff is the lawful owner and holds the lawful title to the suit property.

9. Supreme Court in the decision reported as (2012) 5 SCC 370 Maria Margarida Sequeira Fernandes & Ors. Vs. Erasmo Jack De Sequeira (dead)

through Lrs. dealing with the case of unauthorized occupant and in possession of the suit property held:

“67. In an action for recovery of possession of immovable property, or for protecting possession thereof, upon the legal title to the property being established, the possession or occupation of the property by a person other than the holder of the legal title will be presumed to have been under and in subordination to the legal title, and it will be for the person resisting a claim for recovery of possession or claiming a right to continue in possession, to establish that he has such a right. To put it differently, wherever pleadings and documents establish title to a particular property and possession is in question, it will be for the person in possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue in possession.

67. xxxxx ... xxxxx ... xxxxx

68. In order to do justice, it is necessary to direct the parties to give all details of pleadings with particulars. Once the title is prima facie established, it is for the person who is resisting the title-holder's claim to possession to plead with sufficient particularity on the basis of his claim to remain in possession and place before the court all such documents as in the ordinary course of human affairs are expected to be there. Only if the pleadings are sufficient, would an issue be struck and the matter sent to trial, where the onus will be on him to prove the averred facts and documents.”

10. In view of the evidence led by the plaintiff and the discussion aforesaid, suit is disposed of granting a decree in favour of the plaintiff and against the defendant in terms of prayer (a) and (c) of the suit.

11. As regards damages and mense profit the plaintiff has led no evidence to prove the same. There is no evidence on record to show the rent on which other similar properties have been let out in the area. Hence no decree in favour of the plaintiff in terms of prayer (b) can be passed.

12. As regards cost in favour of the plaintiff, the only material before this Court is in the form of Court fees paid by the plaintiff. Thus cost of ₹2,93,000/- is granted in favour of the plaintiff and against the defendant.
13. Decree sheet be prepared accordingly.
14. I.A. 2098/2017 is dismissed as infructuous.

(MUKTA GUPTA)
JUDGE

OCTOBER 15, 2019
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