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

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Delivered on : 21st August, 2019

+ **RSA 93/2019, CM APPL.No.20493/2019**

FAKRUDDIN & OTHERS

..... Appellants

Through : Mr.R.K.Sharma, Advocate.

versus

MOHD NABI & ANR

..... Respondents

Through : Mr.Sonal Sinha, Advocate for R1.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The respondent No.1/plaintiff filed a civil suit bearing No.134/2010 on 03.06.1988 for recovery of possession of terrace on the second floor of property bearing No.747, Phatak Dhobian, Farsh Khana, Delhi-110006 and also for mesne profits against the petitioners. The respondent No.1 claim to be an owner of said portion.

2. It was alleged petitioner No.4 - Mohammad Deen was a tenant in respect of two rooms, one kothari, courtyard, kitchen, bathroom, latrine at the first floor and *barsati* on the second floor. The terrace is separate to *barsati* on the second floor. The respondent No.1/ plaintiff alleges to be in occupation of terrace viz a portion admeasuring 17.8 x 11 feet on second floor. It was alleged appellants No.1 & 2 and sons of Kabiruddin/deceased appellant No.3 in collusion with and/or at the instance of their father illegally and unauthorizedly occupied the terrace

on the second floor since January 1986. The respondent No.1 further alleged the appellants had no right, title or interest over the terrace portion on the second floor and they need to dismantle the tin shed built over it and surrender the possession of such terrace portion and also liable to pay damages @Rs.20/- per month.

3. The appellants herein filed their written statement before the learned Trial Court wherein various objections were taken viz suit barred by *res-judicata*; no cause of action and valuation etc, but ultimately, the learned Trial Court vide the impugned judgment dated 21.11.2012 had passed a decree for possession holding the appellants had no authority to retain the disputed terrace portion since they were sub-tenants under appellant No.4/Mohammad Deen qua the other portion. Reference was also made to various other litigations between the parties which settled the facts, the appellants being sub-tenants of appellant No.4/Mohammad Deen for a portion other than terrace on second floor.

4. The learned Trial Court decided the issue of *res-judicata* in favour of the respondents and against the appellants and even held there was no suppression of facts. The learned Trial Court even agreed to the valuation of the suit and thus decreed the suit in favour of the respondent and against the appellants on the basis of evidence of both the parties.

5. A bare perusal of the learned Trial Court shows it has considered the evidence, including the cross examination of the respective parties. The judgment dated 21.11.2012 was unsuccessfully challenged by the appellants before the learned First Appellate Court vide RCA No.60806/2016 which also noted the facts and evidence on record and

held since defendant No.4 was in possession of the first floor of premises and of the portion other than terrace on second floor and that the appellants herein could not have forcibly occupied the terrace on the second floor; the defendant No.4 has simply sublet the first floor and *barsati* floor to the father of the appellants herein. The learned first appellate Court agreed to the findings given by the learned Trial Court and accordingly dismissed the first appeal.

6. Heard.

7. In this second appeal, same two objections have again been raised *a)* qua the ownership of the respondents; and *b)* qua the suit being barred by *resjudicata*. Both these issues have been aptly looked into by both the Courts below.

8. This suit (CS No.1340/2010) is not barred by the *resjudicata* as the subject premises in this suit is different than the subject premises in the earlier suit; secondly, the respondent was never a party in such earlier suit. Moreso, the issue of ownership was never seriously challenged by the appellants before the Courts below and their defence was mostly concentrated on the factum of they being legal sub-tenants in the tenancy premises.

9. Both the learned Courts below thus gave a concurrent findings which I would not like to interfere. The substantial questions of law intended to be raised are qua ownership as also *locus standi* of plaintiff which per se the questions relating to facts and duly considered by Courts below. Infact no such substantial questions of law have been alleged and

are neither made out.

10. Thus there is no merit in this second appeal. It is dismissed. No order as to costs. The pending application, if any, also stands dismissed.

YOGESH KHANNA, J.

AUGUST 21, 2019

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