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

Date of Decision: 13.08.2019

+ **RFA No.729/2019**

SUNAINA DEVI & ANR Appellants
Through Mr.Bipin Jha, Adv.

versus

RAKESH VATSA & ANR Respondents
Through Nemo.

CORAM:
HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J (ORAL)

CM No.36083/2019 (for exemption)

1. Exemption allowed, subject to all just exceptions.
2. The application is disposed of.

CM No.36085/2019 (for condonation of delay in filing)

3. This application has been filed by the appellant seeking condonation of 60 days' delay in filling the appeal.
4. For the reasons stated in the application, the same is allowed. The delay of 60 days in filing the appeal is condoned.
5. The application is disposed of.

CM No.36086/2019 (for condonation of delay in re-filing)

6. This application has been filed by the appellant seeking condonation of 66 days' delay in re-filing the appeal.
7. For the reasons stated in the application, the same is allowed. The delay of 66 days in re-filing the appeal is condoned.
8. The application is disposed of.

RFA No.729/2019

9. The present appeal impugns the judgment and decree dated 27.11.2018 passed by the learned Additional District Judge, Central District, Tis Hazari Courts, Delhi in CS No.610691/16, whereunder the suit for possession and injunction instituted by the respondents/plaintiffs has been decreed in their favour. Under the impugned judgment, a decree for possession and mandatory injunction has been passed against the appellants restraining them, their relatives, agents and employers from creating third party rights in or from transferring the possession of the suit property situated at no.10/19A, First Floor (Part of one building), Ward No. 1, Yog Maya Mandir, Mehrauli, New Delhi-30('suit property' for short).

10. The brief facts emerging from the record are that the respondent no.1/plaintiff, claiming to be the grandson of Shri Suraj Narayan Vatsa, instituted the aforesaid suit against the appellants claiming therein that the suit property which was owned by his grandfather, had been bequeathed in his favour by way of a registered Will dated 31.07.1996. The suit property had been given on lease to Shri Lakheshwar Jha, the father-in-law of appellant no.1 and father of appellant no.2, at a monthly rent of Rs.100/- in the year 1981. It was claimed that Shri Lakheshwar Jha was provided with electricity and water by way of connections which were sanctioned in the name of respondent no.1's grandfather. It was further claimed that even though the suit property had been given on rent to Shri Lakheshwar Jha, he colluded with both the appellants to file a suit bearing no.631/1993 for grant of relief of permanent

injunction against the respondents' grandfather claiming that the suit property had been given to Shri Lakheshwar Jha by a trust, viz., Yog Maya Mandir Samsthan. The said suit came to be dismissed by the trial Court which dismissal has now attained finality. Thereafter, the appellant no.1 filed yet another suit being Suit No.548/04 this time against one Shri Mool Chand Patwari seeking permanent injunction and other consequential reliefs, which suit also came to be dismissed. It was further claimed in the subject suit that since both the appellants were mere trespassers who were unauthorisedly staying in the suit property by claiming an independent right to continue residing in the suit property and, therefore, were liable to hand over vacant possession of the said property to the respondents.

11. Before the trial Court, the appellants/ defendant nos. 1 and 2 filed a common written statement refuting the respondents' claim and reiterating that the suit property was owned by Shri Mool Chand Patwari and that the possession thereof had been handed over to Shri Lakheshwar Jha by Yog Maya Mandir Samsthan and not by the respondents' grandfather. They further claimed that the respondents' father-in-law had forcibly obtained signatures of the appellant no. 2 in a blank paper and that the appellants were in possession of the suit property in their own right and not by way of any lease. Based on the pleadings of the parties, the following issues were framed by the trial Court on 22.09.2005:-

- “1. Whether the suit is not maintainable for non-joinder and misjoinder of parties? OPD*
- 2. Whether the suit has not been valued properly for the purposes of court fees? OPD*

3. *Whether the signatures of defendant No. 2 were obtained by the grandfather of the plaintiff on some blank papers and rent receipts at gun point or whether the same were also got written under force and pressure from defendant No. 2? OPP*
4. *Whether the plaintiff is entitled to a decree of possession as prayed for? OPP*
5. *Whether the plaintiff is entitled to a decree of mandatory injunction as prayed for? OPP*
6. *Whether the plaintiff is entitled to a decree of permanent injunction as prayed for? OPP*
7. *Whether the correct number of the suit property is 10/18A or 10/19A? Onus on parties”*

12. After the issues were framed, the appellants stopped appearing before the trial Court and were, therefore, proceeded against ex parte vide order dated 22.11.2010. As the suit was proceeded ex parte, the appellants filed an application under Order IX Rule 7 of the CPC before the trial Court on 24.01.2011 for setting aside the ex parte order dated 22.11.2010, which came to be dismissed in default for their non-appearance on 07.05.2013. Aggrieved thereby, the appellants moved a second application seeking restoration of their earlier application for Recall dated 24.01.2011 which came to be dismissed as well by the trial Court vide its order dated 03.08.2015. In these circumstances, the evidence tendered by the respondents/plaintiffs remained unrebutted and a decree for possession in their favour was passed by the trial Court by relying on the evidence brought on record. The findings of the trial Court read as under:-

“ISSUE No. 1:- Whether the suit is not maintainable for non-joinder and mis-joinder

of parties? OPD

21. Onus to prove this issue is upon the defendants. Apart from bald allegation nothing has been pointed out by the defendants as to who were the necessary parties who were not impleaded and who are the parties who have been un-necessarily impleaded. Hence, issue No. 1 is decided against the defendants and in favour of the plaintiff.

ISSUE No. 2:- Whether the suit has not been valued properly for the purposes of court fees? OPD

22. Onus to prove this issue is upon the defendants. Defendants have not led any evidence. Defendants have also not cross-examined the plaintiff witnesses. For the relief of possession, the plaintiff has valued the suit at Rs.6,00,000/- and for the relief of permanent and mandatory injunction at Rs.130/-each. There is nothing on record to disbelieve the valuation given by the plaintiff particularly for the relief of possession. Therefore, issue No. 2 is decided against the defendants and in favour of the plaintiff.

ISSUE No. 3:- Whether the signatures of defendant No. 2 were obtained by the grandfather of the plaintiff on some blank papers and rent receipts at gun point or whether the same were also got written under force and pressure from defendant No. 2? OPD

23.- Onus to prove this issue is upon the defendants. Defendants have not led any evidence and therefore, the assertion made by them have not been proved by them. Therefore, issue No. 3 is decided against the defendants and in favour of the plaintiff.

ISSUE No. 4:- Whether the plaintiff is entitled to a decree of possession as prayed for? OPP

ISSUE No. 7:- Whether the correct number of

the suit property is 10/18A or 10/19A? Onus on parties

24. Plaintiff in the plaint has categorically averred that late Sh.Narayan Vatsa bequeathed H.No. 10/18 which is on ground floor and H.No.10/19A which is on first floor i.e. above house No. 10/18. However, the defendants have claimed that the father-in-law of defendant No. 1 was given the first floor accommodation bearing No. 10/18A and in front of the same there was a open space on which father-in-law of the defendant No.1 constructed a tin shade on open space now bearing No. 10/19A. The defendants claimed that they are in possession of both the properties bearing No. 10/18A and 10/19A independently. Plaintiff has claimed possession only of H.No. 10/19A because as per plaintiff floor above the House No. 10/18 bears municipal number 10/19A comprising of one room with kothri inside as duly shown in red color in the site plan Ex PWI/B.

25. It is not in dispute that defendants No.1 and 2 are in possession of House No. 10/19A. Plaintiff also proved the letters of request Ex PWI/C and ExPW/D and rent receipts Ex PW/E and Ex PWI/F which documents were allegedly got written from contesting defendants on the gun point but defendants have chosen not to cross examine the plaintiff's witnesses nor did they choose to lead their own evidence to prove their own averments/stands nor did they come forward to prove that the portion under their occupation have different municipal number. Defendants did not come forward to dispute the site plan Ex PWI/B relied upon and proved by plaintiff nor did they come forward to show that site plan is not in accordance with actual site. Hence, in this circumstance plaintiff has been successful in proving that they are the owner of the suit property as duly shown in the red color in the site plan Ex PWI/B and defendants No. 1 and 2 were tenant in the suit property and that it

bears municipal No. 10/19A. Defendants neither proved their case nor did they succeed in demolishing the plaintiff's case.

26. Defendants have not come forward to object to the suit on the ground that their tenancy is protected under Delhi Rent Control Act. It is worthwhile to note that there is no presumption of law that tenancy with rent below Rs 3,500/- p.m. shall be governed by Delhi Rent Control Act. It is only in those area where Delhi Rent Control Act, 1958 is specifically made applicable by notification that tenancy with rent below Rs 3,500/- p.m. shall be governed by the said Act. Defendants in their plea also has not taken this specific defense that suit of the plaintiff is barred by Section 50 of Delhi Rent Control Act, 1958 which also goes to show that tenancy of defendants No. 1 and 2 is not protected under the said Act. Hence, both issues No. 4 and 7 are decided in favour of the plaintiff and against the defendant Nos. 1 and 2.

ISSUE No. 5:- Whether the plaintiff is entitled to a decree of mandatory injunction as prayed for? OPP

ISSUE No, 6:- Whether the plaintiff is entitled to a decree of permanent injunction as prayed for? OPP

27. Both issues are taken up together. Onus to prove these issues are upon the plaintiff. However, in view of the findings recorded on issues No.4 and 7, the issues under consideration are hereby decided in favour of the plaintiff and against the defendants No. 1 and 2.”

13. Before this Court learned counsel for the appellants, while conceding that the appellants' challenge to the ex parte order dated 22.11.2010 stands rejected vide order dated 03.08.2015 which order has now attained finality, submits that notwithstanding the fact that the trial was proceeding ex parte

against the appellants, it was still incumbent upon the trial Court to appreciate and examine the defence of the appellants as set out in their written statement. He, thus, submits that the trial Court has erred in failing to appreciate that in view of the respondents' own assertion regarding the alleged monthly rent of the suit property being Rs.100/-, the suit for possession was not maintainable as it was barred under Section 50 of the Delhi Rent Control Act, 1958. He further submits that the trial Court has failed to appreciate that the possession of the suit property had been handed over to Shri Lakheshwar Jha not by the respondents but by the Yog Maya Mandir Samsthan and, therefore, the respondents had no right whatsoever to claim possession of the suit property from the appellants or to institute the subject suit against them. He further submits that it was necessary for the respondent no.1/plaintiff to implead Shri Mool Chand Patwari, who was also a claimant of the suit property, in the subject suit, which aspect has also not been appreciated by the trial Court.

14. Finally, Mr.Jha submits that the suit was even otherwise not maintainable as, admittedly, the respondents had never served the appellants with any notice under Section 106 of the Transfer of Property Act, 1882 terminating their tenancy and, therefore, contends that the impugned judgment is liable to be set aside on this ground alone. He, thus, prays that the present appeal be dismissed.

15. I have considered the submissions of learned counsel for the appellants and with his assistance, perused the record.

16. As noted hereinabove, the subject suit was proceeded ex parte against the appellants on 22.11.2010 whereafter their

application seeking to set aside the same stood finally dismissed by the trial Court vide its order dated 03.08.2015, which order has already attained finality. Resultantly, neither did they lead any evidence nor did they cross-examine the plaintiffs/respondents before the trial Court and, consequently, the evidence led by the respondents remained unrebutted. Thus, there was absolutely no evidence before the trial Court in support of the pleas raised by the appellants in their written statement and, therefore, the trial Court cannot be faulted for relying on the unrebutted evidence led by the respondents while arriving upon its findings.

17. It is, thus, evident that nothing was placed by the appellants before the trial Court in support of their claim that the suit property had been handed over to Shri Lakheshwar Jha by Yog Maya Mandir Samsthan. Even otherwise, keeping in view the admitted position that the suit for injunction preferred by the appellants against Yog Maya Mandir Samsthan was dismissed prior to the passing of the impugned decree, which order of dismissal had attained finality, it does not lie in the mouth of the appellants to now contend that the suit property was not owned by the respondents' grandfather or that it was owned by Yog Maya Mandir Samsthan.

18. Insofar as Mr.Jha's submission that the non-joinder of Shri Mool Chand Patwari is fatal to the suit, the same is noted only to be rejected. In the light of the appellants' own plea before this Court that their suit for injunction against Shri Mool Chand Patwari stood dismissed, the appellants are estopped from now contending that Shri Patwari was a necessary party to the suit instituted by the respondent or that the suit was liable to

be rejected on the ground of non-joinder of parties. It is not the case of the appellants that Shri Mool Chand Patwari had ever sought impleadment in the suit instituted by the respondents or that he had ever sought a declaration that he was the owner of the suit property. It appears that the appellants, in order to somehow deprive the respondents of their rightful property had filed frivolous suits first against Yog Maya Mandir Samsthan and then against Shri Mool Chand Patwari, both of which came to be dismissed. It also appears from the record that the appellants did not even specify before the trial Court as to which necessary party had not been impleaded and, therefore, the appellant's objection regarding non-joinder of necessary parties has been rightly rejected by the trial Court.

19. I also do not find any merit in the submission of the learned counsel for the appellants that the suit was barred by Section 50 of the Delhi Rent Control Act, 1958 as the alleged monthly rent was Rs.100/-, i.e., less than Rs.3,500/- per month or that the suit was not maintainable on the ground of non-compliance with Section 106 of the Transfer of Property Act, 1882. A perusal of the written statement filed by the appellants before the trial Court as also the issues framed by the Court shows that no such pleas were adopted previously by the appellants. These pleas, as are sought to be taken before this Court today, are primarily factual in nature and cannot be decided unless evidence in support thereof was led before the trial Court. In these circumstances, the appellants have themselves to blame for the non-consideration of these pleas by the trial Court. In any event, once the appellants' own plea before the trial Court was that they were in occupation of the

suit property in their own right and not in the capacity of tenants, it was incumbent upon them to prove their title thereon or right to continue in possession of the suit property which they failed to do. In my view, the trial Court was completely justified in decreeing the respondents' suit for possession. Evidently, the appellants have been attempting to hold on to the suit property without any title or right and, in furtherance of their said attempt, have also filed frivolous suits which already stand dismissed.

20. For the aforesaid reasons, I find absolutely no reason to interfere with the impugned judgment and decree. The appeal, being meritless, is dismissed.

CM No.36084/2019 (for stay)

21. In view of the appeal having been dismissed, this application does not survive for adjudication and is dismissed.

**(REKHA PALLI)
JUDGE**

AUGUST 13, 2019
aa.