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

Date of Decision: 22nd December, 2020

+ **RSA 72/2020 & CM APPLs.34101-03/2020**

MOHD NADEEM

..... Appellant

Through: Mr. Ashim Shridhar, Ms. Niyati
Patwardhan and Mr. Rajkamal,
Advocates.

versus

MOHD RAFI

..... Respondent

Through: Mr. S.D. Ansari, Advocate

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done by video conferencing.
2. This is a second appeal challenging the impugned judgment dated 10th October, 2019 in **RCA No. 41/2017**, passed by the Additional Senior Civil Judge, Central District, Tis Hazari Courts, by which the Appellate Court has upheld the decree dated 15th July, 2017 passed by Trial Court in **CS No. 568/16**. The dispute is between the Plaintiff/ Respondent who is the father (*hereinafter, "plaintiff"*) and the Defendant/ Appellant who is the son (*hereinafter, "defendant"*).
3. The Plaintiff filed a suit filed for permanent and mandatory injunction against the Defendant. The case of the Plaintiff is that he is in lawful possession of the property bearing No.1250, Gali Jaman Wali, Kalan Mehal, Darya Ganj, Delhi (*"hereinafter, "suit property"*). One room in the property is occupied by his son, i.e., the Defendant. Father of the Plaintiff was the tenant of one Mohd. Shami in the suit property and the Plaintiff

himself was born in the suit property. The Defendant, who is the son of the Plaintiff, was also born in the suit property. The father of the Plaintiff passed away in 1976 and since then, the tenancy of the suit property has vested exclusively with the Plaintiff. Disputes arose between the two parties consequent to which, the Plaintiff withdrew the permission given to the Defendant to live in the suit property. Since the defendant did not vacate the property, the suit for permanent and mandatory injunction came to be filed.

4. In the said suit, an application under Order XII Rule 6 of the CPC was filed, pursuant to which, the suit was decreed in favour of the Plaintiff. The appeal against the said decree has also been dismissed vide judgment dated 10th October, 2019, which is the order impugned in the present second appeal.

5. Mr. Shridhar, Id. counsel appearing for the Appellant, submits that the suit property originally belonged to one Mohd. Shami, who migrated to Pakistan, and after that, the property vested in the Government under the Enemy Property Act, 1968. Due to the same, he submits that the jurisdiction of civil courts is barred and the suit could not have been decreed by the court. He further submits that the Defendant has an interest in the suit property, and the Plaintiff, himself lacking any title in the said property, could not have filed a suit seeking injunction.

6. A perusal of the Trial Court judgment shows that the Trial Court has decreed the suit on the ground that title need not be proven in such a suit for injunction. The findings of the trial court are as under:

- In the facts of the suit, the grandfather of the Defendant had a tenancy right in the suit property, which was inherited by his father/Plaintiff, upon the death of the grandfather in 1976. No rights in this tenancy and

in the suit property exist with the Defendant as the concept of ancestral property is alien to Muslim law, and the Defendant was not even born in 1976, when the right was transferred in favour of the Plaintiff.

- The Defendant has admitted that he was permitted to reside in the suit property by the Plaintiff and therefore, the Defendant cannot deny that the Plaintiff is the licensor. The Plaintiff has specifically averred that he has withdrawn his licence. Therefore, the Plaintiff is entitled to a decree under Order 12 Rule 6 of the CPC, in respect of mandatory injunction
- This is not a case of recovery of possession on the basis of title, and therefore a determination of title is not necessary in this suit

7. The Trial Court thus holds that under Muslim Law, since there is no concept of ancestral property which passes on from generation to generation, the Plaintiff being the exclusive occupant of the suit property and having succeeded to the tenancy is entitled to seek eviction of his son, who is only a licensee. On this issue, the Id. Appellate Court has concurred with the Trial Court.

8. It is the settled position in Muslim personal law that there is no right, title or interest that exists in a property, as a birth-right such as a coparcenary right or a HUF right. A right, title or interest in a property is only acquired by a legal heir upon the death of the ancestor.

9. The relevant observations of Sir Dinshaw Fardunji Mulla on the '*Principles of Mahomedan Law*' (22nd Edition, 2017) on inheritance in Muslim Law are as under:

“ §52. Birth-right not recognised *The right of an heir-apparent or presumptive comes into existence for*

the first time on the death of the ancestor, and he is not entitled until then to any interest in the property to which he would succeed as an heir if he survived the ancestor

...

The Mahomedan law does not recognise any interest expectant on the death of another, and till that death occurs which by force of that law gives birth to the right as heir in the person entitled to it according to the rules of succession, he possesses no right at all."

In the case of **Md. Aliuddin Farooqui (Died) By LR's v. Mohd. Karamath Hussain and ors., 2003 (3) ALD 528**, the division bench of the Andhra Pradesh High Court held:

"8.....there is no joint family system under Muslim Law and as such no member of a family even if they reside jointly cannot claim a share in the property held by a Muslim as per Section 57 of the Principles of Mohammedan Law. To put it aptly, a member of a Muslim family cannot claim as a matter of right a share in the property held by a Muslim unless it is proved that the properties were acquired by pooling the energies of all the people concerned as per Section 57 of the Principles of Mohammedan Law.

xxx"

Further, in the case of **Mukhtar Ahmed & Ors. v. Mahmudi Khatoon and Ors., (2010) 2 JLJR 636**, the Jharkhand High Court has held that:

"xxx

3. In Muslim law, so long as a person is alive he or she is the absolute owner of his or her property; nobody else (including a son) has any right, whatsoever, in it. It is only when the owner dies- and never before-that the legal rights of the heirs accrue. There is, therefore, no question of a would be- heir dealing in any way with his future right to inherit.

*4. The Indian legal concepts of 'joint' or 'undivided' family, 'coparcenary', karta, 'survivorship', and 'partition', etc., have no place in the law of Islam. A father and his son living together do not constitute a 'joint family'; the father is the master of his property; the son (even if a minor) of his, if he has any. The same is the position of brothers or others living together.
xxx”*

10. From a perusal of the above authorities, it is clear that under Muslim Law, the son does not enjoy any right in a property of the father and a grandson does not enjoy any right in the grandfather's property. Similar would be the position in respect of a tenancy which the father may have inherited. Until death of the father the son has no rights. Accordingly, the Defendant in the suit has no right or interest in the tenanted property, and the Plaintiff is the sole right holder, until his death. Moreover, even if the Defendant's case is taken at the highest, that the property is either enemy property or evacuee property, it is for the Government to assert its rights against the father. The son cannot seek to legitimise his possession in the property on this ground.

11. After perusing the Trial Court and the Appellate Court judgments, this Court is of the opinion that no interference is warranted against the said two judgments. However, considering the fact that the Defendant is the son of the Plaintiff, and was born in the suit property, the Defendant is given time to vacate the suit property till 30th June, 2021, as requested, subject to an affidavit of undertaking being filed by him, to the following effect:

- (i) The Defendant would not create any third party interest or part with possession of the property during this period.
- (ii) The Defendant would not cause any kind of damage to the

property, in any manner.

- (iii) That the defendant would hand over vacant and peaceful physical possession of the portion of the property in his possession/occupation on or before 30th June, 2021.

An affidavit of undertaking to this effect of the Defendant shall be filed within two weeks on behalf of himself and his wife/children, if any.

12. The execution proceedings before the Executing Court in ***Execution Petition No. 88/2019***, listed tomorrow, shall accordingly, be adjourned till July, 2021.

13. This appeal, along with all pending applications, is disposed of, in the above terms. List for compliance on 18th January, 2021.

**PRATHIBA M. SINGH
JUDGE**

DECEMBER 22, 2020/dk/Ak

