



* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Reserved on: 01st June, 2023
Pronounced on: 01st August, 2023

+ RFA (OS) 7/2023 & CM APPLs. 20674/2023 and 20675/2023

HANNY KUMAR Appellant

Through: Mr. Raj Singh Rana and Mr. Aditya Hooda, Advocates.

versus

ANU GUPTA & ANR. Respondents

Through: Mr. Kshitij Sharda and Mr. Shashank Goel, Advocate for R-1.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J

CM. APPL.20677/2023 (Exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

CM. APPL.27301/2023 (Condonation of delay)

3. *Vide* the present application, the applicant/appellant seeks condonation of 23 days' delay in filing the present appeal.
4. For the reasons and ground stated in the present application, the application is allowed and the delay of 23 days in filing the present appeal is condoned.
5. Accordingly, the application is disposed of.

**RFA (OS) 7/2023**

6. The present Appeal has been preferred by the defendant No. 2/appellant against the Judgement and Decree dated 08.08.2022 *vide* which the suit of the plaintiff/respondent No. 1 for possession and for mandatory injunction has been decreed and the appellant was directed to hand over the possession, under Order XII Rule 6 Code of Civil Procedure, 1908 (*hereinafter referred to as "CPC, 1908"*). The appellant has also challenged the Order dated 03.02.2023 *vide* which the Review Petition against the judgement was dismissed.

7. The respondent No.1 (*plaintiff in the original suit*) herein had filed a suit for possession and mandatory injunction against the appellant, Hanny Kumar/defendant No. 2, Sh. Sardar Singh, defendant No. 3/respondent No. 3 and Sh. Vijay Gupta, defendant No. 1/respondent No.2 in regard to suit property bearing no WZ-36A/2, Krishna Park Extension, New Delhi-110018.

8. Admittedly, the suit property which comprised of ground, first and second floor, was owned by the husband of the plaintiff late Sh. Ashok Kumar, *vide* Sale Deed dated 18.01.1995. He expired on 27.02.2015 and the plaintiff along with her two children, Himanshu Gupta and Prachi Goel, became joint owners of the suit property. The children relinquished their respective share in the suit property *vide* Relinquishment Deed dated 25.05.2017 in favour of the plaintiff thereby, she became the sole and absolute owner of the suit property. It was got mutated in her favour by SDMC *vide* Mutation Letter dated 27.02.2020.

9. The respondent No.1/plaintiff had stated that in the year 2012, Sh. Vijay Gupta/defendant No.1 (respondent No.2 herein), who is the elder



brother of her husband late Sh. Ashok Kumar, was permitted to use the first and second floor and one room on the ground floor of suit property for storing goods and he was liable to vacate as and when the permission was withdrawn by Late Sh. Ashok Kumar. However, defendant No. 1/respondent No. 2 carried out illegal construction and demolition and opened a Gymnasium in 2014-15. Sh. Ashok Kumar was averse to the opening of the same as it altered the usage of the suit property. Hence, he requested respondent No. 2 to cease operating the Gymnasium from the first floor; however, the appellant pleaded that he would incur losses if the Gymnasium is closed and sought permission to continue for some time. Since the wedding of son of Sh. Ashok Kumar was scheduled for 09.02.2015, he did not want any acrimony between the brothers and decided to sort out this issue subsequently. However, soon before the wedding of the son, he got hospitalized on 04.02.2015 and died intestate later on 27.02.2015.

10. The respondent No.1/plaintiff explained that the ground floor of the suit property except one room was vacated by M/s. Saraswati Accountants Software Pvt. Ltd., but Sh. Vijay Gupta started utilizing the entire area of ground floor for the purpose of storing of the goods without the permission of the plaintiff. The plaintiff requested him to cease utilization of the ground floor and vacate first and second floor of the suit property, but he narrated his financial woes and pleaded that he may be allowed a year or two to make alternative arrangements. The plaintiff, because of the sudden loss of her husband, acceded to the request on the condition that he would not cause any change in the suit property and would continue to maintain the existing manner of use of the suit property and shall not



create any third party right.

11. The respondent asserted that despite the lapse of two years, the appellant failed to vacate the suit property and also raised illegal construction on the second floor without the knowledge or permission of the plaintiff and behind her back. Moreover, the appellant demolished one wall on the ground floor and installed a rolling shutter. One Take Away restaurant began to function during the evenings in a small area on the ground floor abutting the now demolished wall. The plaintiff/respondent No.1, on inquiry, came to know that this eatery was being run by one Sardar Singh, defendant No.3/respondent No. 3 who had been permitted by respondent No.2 to do business without any prior permission from the plaintiff. Because of these illegal acts, the plaintiff /respondent No. 1 filed the suit for possession of the suit property and for mandatory injunction to direct respondent No.2 to re-construct the perimeter of the boundary wall, separating the second floor of the suit property from the second floor of the adjoining property and reconstruct the wall demolished on the ground floor of the suit property.

12. The **defendant No. 1/respondent No. 2 in his written statement** claimed that the suit property as well as the adjoining property bearing No.WZ-36A/3, Krishna Park Extension, New Delhi, which is owned by him, are both one unit and land and therefore, the demarcation would be required between the two properties before a decree of possession can be passed.

13. It was stated that the suit property was purchased by Sh. Ashok Kumar *vide* Sale Deed dated 18.01.1995 and a perusal of the Sale Deed would show that the boundaries of the suit property have not been clearly



demarcated. It is claimed that the property adjoining the suit property was purchased by respondent No.1 prior to the purchase of the suit property by Sh. Ashok Kumar. Both the properties were merged together and the construction was raised as one unit.

14. It was explained that, initially, the ground floor of the property was constructed which consisted of three rooms, hall, pantry, bath etc, where the three shops were running. The first floor consisted of two rooms, three toilets and one hall respondent No.2 averred that the construction of the second floor was as two halls. However, he admits to have altered the construction on the second floor in 2018 by constructing bedrooms, drawing rooms, kitchen etc. It is further asserted that it was he who had provided funds for acquiring the property where the brothers were conducting business together until the dissolution of their partnership. After the dissolution, Sh. Ashok Kumar and respondent No.2 were conducting business under the name and style of M/s Indo Export and M/s. Indo Exim, respectively. During this period, respondent No.1 was having continuous and uninterrupted possession of the entire building which includes the suit property as no business was conducted by Sh. Ashok Kumar since 2003. Even otherwise, the suit property and its adjoining property were in an unconfirmed area and thus, he was enjoying the whole property. He has denied all the averments made in the plaint.

15. It was thus claimed that defendant No.1/respondent No.2, Sh. Vijay Gupta had been in possession of the suit property as an owner since 2007 or in the alternative he became the owner by way of adverse possession as his possession is open and hostile with notice to late Sh.. Ashok Kumar and the entire world. He also asserted that the suit was barred under



Section 27 of the Limitation Act, 1963, as it had been filed after 12 years from the date when the defendant No.1 took possession of the suit property. Moreover, Section 53A of the Transfer of Property Act, 1882 (*hereinafter referred to as "TP Act"*) is also applicable as defendant is in possession in terms of a Writing dated 28.09.2009 of Late Sh. Ashok Kumar.

16. Respondent No. 2 has also clarified that the Gymnasium has been in operation in the suit property since 19.06.2014 for which a written Agreement had been entered into between respondent No. 2, Sh. Vijay Gupta and defendant No. 2/appellant, Sh. Hanny Kumar in which respondent No. 2 has been duly reflected as the owner of the suit property. Respondent No. 2 got the police verification done of the appellant along with all his essential documents. The Gymnasium was run by the appellant and not respondent No. 2.

17. It was further claimed that the plaintiff has failed to present any document which shows that Sh. Ashok Kumar or the plaintiff was in possession of the suit property or had created any tenancy. Thus, the occupation of the defendants was not illegal.

18. **Defendant No. 2/appellant Hanny Kumar in his written statement** claimed that he is a tenant in a portion of the suit property *vide* Agreement dated 19.06.2014. The suit is not maintainable against defendant No. 2/appellant as it amounts to a misjoinder of causes of action. It is stated that the plaintiff/ respondent No.1 is claiming her right through late Sh. Ashok Kumar. A large amount had been invested in the Gymnasium for furniture and fittings and annual membership fees had been collected from clients. Albeit, defendant No. 2/the appellant had



been running a Gymnasium from 2015 which was during the lifetime of late Sh. Ashok Kumar, but no action had been taken against him by respondent No. 2 or respondent No.1.

19. It was explained that the suit property and its adjoining property were merged with each other and the entire first floor of the unit was rented to the appellant. Since, both the properties are inseparable from each other, the suit in itself is not maintainable. It was also clarified that the respondent No.2 had nothing to do with the Gymnasium apart from collecting its rent, as it was run and maintained by the appellant. The other contentions as raised by respondent No.2 had been reiterated to challenge the ownership of respondent No.1.

20. **The respondent No.1/plaintiff filed an application under Order XII Rule 6 CPC for a decree of possession on admissions** made by Sh. Vijay Gupta, respondent No.2. It was submitted that even if the suit property has not been demarcated, a partial decree can still be passed in terms of the site plan relied upon by respondent No. 2. The claim of Sh. Vijay Gupta, respondent No.2, of being an owner of the suit property, is barred under Section 4 of the Benami Transaction (Prohibition) Act, 1988. The limitation under Section 65 of the Limitation Act, 1963 commences only from the date when hostile possession is claimed by respondent No. 2. The hostile possession of the respondent No. 2 may be considered at best from 2014 when he leased the property for the opening of the Gymnasium in the suit property, which does not make him an owner by adverse possession. The Writing dated 28.09.2009 executed by late Sh. Ashok Kumar was not a registered document. The defence under Section 53A of TP Act is not available to respondent No. 2 as such a defence is



available only on the basis of a registered document. Plaintiff/ respondent No. 1, by way of her application under Order XII Rule 6 CPC sought possession on the basis of admissions.

21. The **learned Single Judge in his impugned judgement & Decree dated 08.08.2022** considered all the defences taken on behalf of the appellant as well as respondent No. 2, Sh. Vijay Gupta. The learned Single Judge referred to the Writing dated 28.09.2009 and held that till such time the registered document transferring the ownership is executed in favour of Sh. Vijay Gupta/respondent No.2, he cannot claim ownership in the suit property. A reference is also made to Section 4 of Benami Transaction (Prohibition) Act, 1988 which provides that no defence based on any right in respect of any property held benami whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property. Learned Single Judge also referred to Section 17 (1A) of the Registration Act, 1908 which provides that transfer of property can only happen through a registered document. Since admittedly the Writing dated 28.09.2009 was not a registered document, therefore, no benefit under Section 53A of TP Act could be given to Sh. Vijay Gupta/respondent No. 2.

22. The learned Single Judge also discarded the plea of adverse possession and concluded that the limitation period as provided under Article 65 of the Schedule to Limitation Act and Section 25 of the Limitation Act would commence only when the possession of Sh. Vijay Gupta/ respondent No. 2 became adverse to that of the plaintiff. Therefore, the suit of respondent No. 1 was not barred by limitation.



23. Accordingly, the application under Order XII Rule 6 CPC was allowed and a decree of possession in respect of the suit property was made and possession of suit property was directed to be handed over within three months to respondent No. 1.

24. A **Review Petition bearing No. 31/2023** was filed by the appellant, Hanny Kumar, asserting that the Writing dated 28.09.2009, by Mr. Ashok Kumar, did not require registration under Section 17 (2) (v) of the Registration Act, 1908. Further, possessory interest was created in favour of Sh. Vijay Gupta on account of the aforesaid Writing, and thus, the provisions of prohibition of Benami Property Transaction Act, 1988 were not applicable.

25. This application was contested by **respondent No. 1/plaintiff**, who claimed that there were no grounds for review as Mr. Hanny Kumar had failed to file any formal reply to the application under Order XII Rule 6 CPC, 1908. Moreover, Mr. Hanny Kumar is in occupation of only a portion of the suit property on the basis of a lease deed entered with Sh. Vijay Gupta/ respondent No. 2. It was also stated that by virtue of the judgment and Decree dated 08.08.2022, the matter has been amicably settled between respondent No.1 and respondent No.2.

26. The review application was dismissed *vide* Order dated 03.02.2023 by learned Single Judge by observing that in the impugned judgment all the aspects raised on behalf of Mr. Hanny Kumar, had been dealt with and did not require any further deliberation. It was also noted that no suit has been filed on behalf of respondent No. 2, seeking specific performance of the Writing dated 20.09.2009. Furthermore, it was also observed that respondent No. 2 has already settled his disputes with respondent No. 1.



27. The review application was accordingly dismissed.

28. **The appellant, Hanny Kumar, has assailed both the Orders and argued** that the judgment and decree is based on alleged admissions when in fact no admissions qua the ownership of the suit property have been made in favour of respondent No.1 in the Written Statement. Moreover, respondent No.1 had filed a suit for possession. Once the title of the suit property was challenged a suit for possession was not maintainable without a declaration of title. Reliance has been placed on the decision of Supreme Court in Anathula Sudhakar vs. P. Buchi Reddy (Dead By Lrs & Ors. Appeal (Civil) 6191 of 2001.

29. **It is further contended that** evidence was essential to prove the frivolous claims made by the respondent No.1. Furthermore, the appellant is in possession of the first floor of the suit property (along with the first floor of the adjoining property of which Sh. Vijay Gupta/respondent No.2 was the owner) *vide* Lease Deed dated 19.06.2014 executed in his favour by respondent No.2 who represented himself as the owner of both the portions. Thus, respondent No.1 could not have sought the possession without first impugning the Lease Deed.

30. It was further contended that the suit was being jointly contested by Sh. Vijay Gupta and the appellant, but apparently, there has now been a settlement between respondent nos.1 and 2 which has put the rights of the appellant in jeopardy.

31. It is further submitted that the appellant was having a commercial venture in the property which is covered under the Commercial Courts Act, 2015. Delhi High Court in appeal FAO (OS) bearing No.166/2016 titled Jagmohan Behl vs. State Bank of Indore had held that where the



property has been leased for commercial purposes and is used exclusively for trade and commerce it would come within the definition of sub-clause (vii) to clause (c) to Section 2 of the Commercial Courts Act. The Commercial Courts Act was thus applicable and the Civil Suit per se was not maintainable. The decree of possession could have been granted only by the competent Commercial Court and not by the Civil Court. Hence, the decree dated 08.08.2022 and the Order dated 03.02.2023 dismissing the review application are liable to be set aside.

32. **Learned counsel on behalf of the respondent/plaintiff has argued** that the pleas taken in the present appeal are frivolous. Admittedly, there is no registered document of ownership in favour of the respondent No. 2 in respect of the suit property and he had merely been permitted by Late Sh. Ashok Kumar to use the property, considering his financial difficulties. The learned Single Judge has rightly passed the decree of possession after considering all the defences of respondent No. 2.

33. The defence of adverse possession can only be claimed if the same is not contradictory to the main defence taken by the defendant, in view of the settled proposition of law as explained in Mohan Lal vs. Mirza Abdul Gaffar and Anr., (1996) 1 SCC 639 and in Rama Kanta Jain vs. M.S. Jain and Others, 1999 (50) DRJ 232.

34. It is further argued that the property is residential in nature, inherently intended to be used for the purpose of residence. The appellant may have chosen to use the property for commercial purposes but that could not make it a commercial property covered by Commercial Courts Act, 2015. The impugned order, therefore, does not suffer from any



ambiguity and the appeal is liable to be dismissed.

35. Learned counsel for the respondent has placed reliance on the judgement of Ambalal Sarabhai Enterprises Limited vs. K.S. Infraspace LLP and Anr. (2020) 15 SCC 585 and Karan Kapoor vs. Madhuri Kumar (2022) 10 SCC 496 to define the scope of a decree under Order XII Rule 6 CPC on the basis of the admissions made by the parties.

36. Learned counsel for **respondent No.1 has further argued** that the appellant had filed an earlier Appeal *vide* RFA (OS) 28/2022 which he had withdrawn with permission to file a Review Petition before the learned Single Judge. The Appeal was accordingly, dismissed as withdrawn *vide* order dated 05.12.2022. It is argued that where first appeal had been withdrawn to avail the remedy of review before the High Court without any liberty, then on not getting any relief on his review application, the appellant is precluded from challenging the order of Review by way of an Appeal. The support for this argument has been drawn from Vinod Kapoor vs. State of Goa (2012) 12 SCC 378. Learned counsel for the respondent has thus argued that the appeal against both the Orders is without merit and is liable to be dismissed.

37. **Submissions heard.**

38. It is an admitted case that the original Sale Deed dated 18.01.1995 in respect of suit property was in the name of Sh. Ashok Kumar, and after his demise, his wife Anu Gupta/Respondent No.1 became the owner of the suit property. It is also not disputed that prior to purchase of suit property by Sh. Ashok Kumar, respondent No.2 had purchased the adjoining property and the wall between the two properties was removed and the first floor was merged into big halls and were generally used



together for the business of two brothers or let out by them to the same tenant *vide* separate Lease Deeds executed by them. It is abundantly clear from the admissions that suit property was owned by Sh. Ashok Kumar exclusively, though it was combined with adjoining property of respondent No.2 and was being used jointly by them. However, joint use or possession of the suit property does not confer any ownership rights on respondent No.2.

39. Respondent No.2 had resisted the suit for possession by claiming to be the owner of the suit property on the premise that he had paid the entire sale consideration through his son and wife which was duly acknowledged in the Writing dated 28.09.2009 by Sh. Ashok Kumar.

40. Learned Single Judge, as already discussed above considered all the defences taken by Sh. Vijay Gupta and found them without merit and passed a decree for possession in respect of the suit property, as already mentioned.

41. Appellant, who was defendant No.2 in the main suit, has filed the present appeal. His claim to first floor of suit property is that he had entered into a Lease Deed dated 19.06.2014 with respondent No. 2 for running the Gymnasium and cannot be asked to vacate the same, being in lawful possession.

I. Title of Respondent No. 1.

42. The first main ground of challenge raised in the present appeal is that the present suit for possession is not maintainable without seeking a declaration; however, the question of declaration could have arisen only when the title of Late Sh. Ashok Kumar, and thereafter, of his wife,



respondent No. 1, was under challenge. The ownership of Late Sh. Ashok Kumar, *vide* a registered Sale Deed dated 18.01.1995 is an admitted fact by respondent No.2. Once the title was of respondent No. 1 in the suit property had not been denied or challenged, there was no question of seeking a declaration of title in respect of the suit premise.

43. Rather, it is Sh. Vijay Gupta, who was claiming to have acquired ownership right from Sh. Ashok Kumar, by virtue of a Writing dated 28.09.2009. However, it has been held in the impugned judgment that the Writing itself does not confer any ownership rights in favour of respondent No.2. He may have had the remedy of seeking specific performance which he has not chosen to pursue. It is also submitted by the appellant that apparently, respondent No.1 and respondent No. 2 have settled their differences, for which reason no appeal has been preferred by respondent No.2. The title of respondent No. 1 in the suit property was never under challenge, and therefore, no declaration of title was required for the maintainability of the suit. The ground as taken by the appellant is without any merit.

II. Lawful Possession of the Appellant.

44. The second ground which has been taken by the appellant is that he had taken possession of the first floor of the suit property along with the first floor of the adjoining property which had been combined into a big hall for running a Gymnasium, from respondent No. 2 *vide* Lease Deed dated 19.06.2014. It is the case of the appellant himself that he was put into possession by respondent No. 2 by claiming himself to be the owner of the suit property when in fact the documents as well as the findings in



the impugned judgment clearly show that respondent No. 2 himself was a permissive user of the suit property.

45. The possessory claim of the appellant in respect of the First Floor of the suit property for running the Gymnasium is derived from the Lease deed with respondent No.2. It has already been held that respondent No. 2 was only enjoying the possessory rights in the suit property and was not the owner thereof. It is a settled principle of law that no person can transfer a title better than what he himself possesses as is expressed in the maxim *nemo dat quod non habet*. Once it has been held that respondent No. 2 is liable to vacate the premises on withdrawal of permission by respondent No.1, the appellant also becomes bound by the judgment and cannot claim a title better than that of respondent No.2. His remedy, if any, lies against respondent No.2, which he is at liberty to pursue.

46. In the present case the appellant has not claimed any title independent or superior to that of respondent No.2. Once respondent No. 2 has not challenged the judgment granting possession of the suit property to respondent No.1, the appellant has no ground to seek protection of his right to possession of the First Floor of the suit property.

III. Non-maintainability of present Appeal in view of unconditional Withdrawal of earlier Appeal bearing No. RFA(OS) 28/2022.

47. In the end, a legal objection has also been taken by respondent No.1 that an Appeal bearing No.RFA(OS) 28/2022 had been filed earlier on behalf of the appellant against the impugned Judgment dated 08.08.2022. On the request of the appellant who sought to file a Review petition



before the learned Single Judge, the appeal was dismissed as withdrawn *vide* Order dated 05.12.2022. Once the appeal had been unconditionally withdrawn with the sole objective of filing a review, the second appeal is clearly not maintainable.

48. The Apex Court in the case of Vinod Kapoor (supra) while dealing with similar facts had concluded that once the appellant had taken the permission to pursue his remedy of review instead of appeal and had withdrawn the appeal, then on not being successful in the review petition, he cannot file another appeal as the same is barred under the law.

IV. Applicability of Commercial Courts Act, 2015.

49. An ancillary objection has been taken on behalf of the appellant that the present subject matter being commercial in nature, only a Commercial Court as defined under Section 2(c) of the Commercial Courts Act, 2015 was competent to adjudicate in the present matter. The impugned judgement has been made by the learned Single Judge in a Civil Suit, which is liable to be set aside.

50. In the present case as well, the appellant had already exercised his remedy of filing an appeal which he withdrew on 05.12.2022 solely with the permission to file a Review, which he has availed without any success.

51. It is a legal argument that has been set up, which could have been tenable had the appeal been maintainable. The appellant is therefore at liberty to raise this objection at the appropriate forum while perusing his remedy against respondent No. 2 from whom he is claiming his right or any other proceedings which may arise in respect of the suit property. Thus, the ground now being raised by the appellant cannot be considered.

52. The present appeal is, therefore, not maintainable on this ground as



well.

V. Order dated 03.02.2023 vide which the review petition has been dismissed.

53. The appellant has also challenged the order dated 03.02.2023 vide which the Review petition has been dismissed, by way of present Appeal. However, the appellant has not been able to show any ground whatsoever for interference in the aforesaid order dismissing the review petition.

54. We therefore, find no merit in the appeal which is hereby dismissed.

55. The pending applications, if any, also stand disposed of.

**(NEENA BANSAL KRISHNA)
JUDGE**

**(SURESH KUMAR KAIT)
JUDGE**

AUGUST 01, 2023
Va/S.Sharma