



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

% **Judgment reserved on : 22 December 2023**
Judgment pronounced on : 08 January 2024

+ **FAO 300/2023 & CM APPL. 59331/2023**

GOLDEN ASSETS HOLDINGS PVT LTD & ORS.

..... Appellants

Through: **Mr. Rajshekhar Rao, Sr.**
Advocate with Mr. S.P. Mehta,
Advocate.

versus

SANJAY GUPTA & ANR.

..... Respondents

Through: **Mr. Rajat Aneja, Ms. Sonali**
Chopra, Mr. Sahil Gupta & Ms.
Alka Dwivedi, Advocates.

+ **FAO 301/2023 & CM APPL. 59333/2023**

GOLDEN ASSETS HOLDINGS PVT. LTD. Appellant

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CORAM:

HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

FACTUAL BACKGROUND

1. This common judgment shall decided the above-noted two appeals filed by the appellants under Order XLIII Rule 1 of the Code



of Civil Procedure, 1908¹ assailing the common order dated 10.11.2023 passed by Mr. Satyabrata Panda, learned Additional District Judge-03, Patiala House Courts, New Delhi², whereby the applications moved by the appellants i.e. the defendants before the learned ADJ (*hereinafter referred as the appellants/defendants*) under Order VII Rule 11 of the CPC as also application under Order XXXIX Rules 1 and 2 of the CPC were dismissed, while at the same time the applications moved by the respondents i.e., the plaintiffs before the learned ADJ (*hereinafter referred as the respondents/plaintiffs*) were allowed in Civil Suit bearing No.409/2023 titled as ‘Sanjay Gupta v. Golden Assets Holding (P) Ltd. It is clarified that in FAO 301/2023 the appellants/defendants have challenged the dismissal of their application under Order XXXIX Rule 1 & 2 C.P.C while in FAO 300/2023, the appellants/defendants have challenged the grant of interim injunction on the application under Order XXXIX Rule 1 & 2 C.P.C in favour of the respondents/ plaintiffs as against them.

FACTUAL BACKGROUND:

2. Briefly stated, the respondents/plaintiffs filed a suit for “Mandatory Injunction & Damages” against the appellants/defendants claiming themselves to be the owners of property on the first floor bearing No. E-40 & E-41, Connaught Place, New Delhi (*hereinafter referred as the ‘suit property’*) and claiming possession of the roof/open terrace vertically over the suit property and sought the following reliefs:

¹ CPC

² ADJ



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“a) Pass a Decree of Permanent Injunction restraining the Defendants their agents, employees, representatives, assigns, executives, legal heirs, nominees etc. from in any manner obstructing, preventing or interfering with the Plaintiffs' peaceful use and possession of the open roof/terrace over and above the properties bearing No. E-40 & E-41, Connaught Place, New Delhi - 110001;

b) Pass an order/ decree of damages in favour of the Plaintiffs and against that Defendants, thereby granting a sum of Rs.10,00,000/- [Indian Rupees Ten Lakhs] for causing criminal intimidation, mental stress, trauma, anguish and frustration to the Plaintiffs;”

3. Shorn of unnecessary details, suffice to state that the respondents/plaintiffs also filed an application under Order XXXIX Rules 1 and 2 of the CPC claiming interim relief against the appellants/defendants from obstructing their ingress and egress to the roof/open terrace of the suit property and *inter alia* from preventing, obstructing and/or interfering with the repair and renovation work sought to be carried out by the respondents/plaintiffs in the suit property. The suit was filed on 19.10.2023, which was listed before the learned ADJ on 20.10.2023 and on issuance of summons/notice, the appellants/defendants put their appearance on 21.10.2023 and thereafter moved an application under Order VII Rule 11 of the CPC pleading that the respondents/plaintiffs have not been in possession of the roof/open terrace portion of the suit property even much prior to the month of September, 2001 which was in occupation of certain outsiders/tenants/trespassers and since 20.09.2001 the appellants/defendants have been in exclusive use, occupation and possession of the same. It is pertinent to mention here that the appellants/defendants are admittedly owners of the adjoining premises bearing No. E-42 and



E-43, Connaught Place, New Delhi and it was claimed that they have had uninterrupted access to the roof/open terrace of the suit property through the adjoining property since September, 2001 to the total exclusion of the respondents/plaintiffs, although the latter are the owner and occupier of the suit property No. E-40 & E-41.

ANALYSIS AND DECISION:

4. I have given my anxious consideration to the submissions advanced by Mr. Rajshekhar Rao, learned Senior Advocate appearing for the appellants/defendants and Mr Raj Aneja, learned counsel appearing for the respondents/plaintiffs. I have meticulously gone through the record.

5. At the outset, the appellants/defendants' case appears to be most bizarre and ridiculous, and even unconscionable. Learned Senior Counsel for the appellants/defendants has vociferously urged that the respondents/plaintiffs have made wrong averments in the plaint that they have been in exclusive possession of the roof/open terrace over the suit property since the access to aforesaid roof/open terrace has always been through the adjoining property belonging to the appellants/defendants and in this regard he relies upon the report dated 21.10.2023 of the Local Commissioner, who was appointed on the direction of the learned ADJ, after a visit at the spot, the Local Commissioner *inter alia* made the following observations in paragraph (7) of the report dated 25.10.2023:

“That after concluding the above said visit/execution of commission, the undersigned found out that there is no access, ingress and/or egress to the roof over the property bearing no. E-40 and E-41 through the property bearing no. E-40 and E-41,





Connaught Place. The report Prepared by the undersigned while inspection is annexed herewith as Annexure-E”

6. It was urged that the learned ADJ has completely overlooked the aforesaid aspect and has passed the impugned order in a mechanical manner without considering their counter claim. **First things first**, it would be relevant to reproduce the operative portion of the impugned order dated 10.11.2023 passed by the learned ADJ, which reads as under:-

“18. The entire case of the defendants is essentially that the defendant no.1 was in possession of the open roof/terrace since 20/09/2001 and that the defendant no.1 had become owner by way of adverse possession as the defendant no.1 was in uninterrupted physical possession of the roof since 20/09/2001 which was hostile to the owner.

19. The defendants have taken this defence in their written statement and have on this basis sought dismissal of the suit as well as the application of the plaintiffs for interim relief. It is also on the very same basis that the defendant no.1 is seeking a counter-claim for declaration of its ownership by way of adverse possession and interim relief in its application.

20. However, this defence of the defendant no.1 of having become owner byway of adverse possession as sought to be raised by the defendants is *prima facie* not tenable in the face of the very opening paragraph of the counter-claim. In this regard, the paragraph 2 of the counter-claim of the defendant no.1 is set out as under:

"2. The present counter claim is being filed in respect of roof portion of property bearing No. E-40 and E-41, Connaught Place, New Delhi which is in possession of the answering defendant and its associates since 20.09.2001. The possession of the roof portion was taken by the answering defendant No.1 and one of its associates namely Jainsons Export Corporation from the unauthorized occupants of the same with the consent and knowledge of the then owner of the same namely Mr. Y.N.Gupta." (Emphasis supplied)

21. From the aforesaid paragraph 2 of the counterclaim, it is very dear that the defendant no.1 has pleaded that the defendant



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no.1 was in possession of the roof of the properties bearing no. E-40 and E-41 since 20/09/2001 and that the possession of the roof was taken by the defendant no.1 and one of its associates from the unauthorised occupants of the same "*with the consent*" of the owner Mr. Y. N. Gupta (who is the predecessor in interest of the plaintiffs).

22. Hence, dearly it is the own case of the defendant no.1 that it had come into and was in possession of the roof "*with the consent*" of the owner Mr. Y. N. Gupta. Once, this is the own admitted case of the defendant no.1, then *prima facie* I fail to see how the defendant no.1 is claiming to be in adverse possession which was hostile to the owner since 20/09/2001. When the defendant no.1 has itself averred that it was in possession of the roof since 20/09/2001 "*with the consent*" of the owner Mr. Y.N. Gupta, then, even as per its own case, at best, the defendant no.1 could be said to be in use of the roof only on a permissive basis. *Prima facie*, this would not create any title in favour of the defendant no.1 by way of adverse possession.

23. That apart, I have also perused the documents filed by the defendants and I find that the defendant no.1 has not filed any document which would go to even *prima facie* show that the defendant no.1 had ever claimed title hostile to that of the owner Mr. Y.N. Gupta or even to show that the defendant no.1 had ever claimed title to the roof over the properties bearing no. E-40 and E-41. A bald plea of ownership through adverse possession without anything more in support would not create a *prima facie* case in favour of the defendants, especially in light of the own admission of the defendant no. 1 of taking the possession with the consent of the owner Mr. Y.N. Gupta who is predecessor in interest of the plaintiffs.

24. The plaintiffs have been able to show that they have a *prima facie* strong case. The plaintiffs have already received approval from the NDMC for repairs and renovation of the properties bearing no. E-40 and E-41. The defence taken by the defendants *prima facie* appears untenable in the face of the own admission of the defendant no.1 that it had come into possession of the roof with the consent of the owner who is the predecessor in interest of the plaintiffs. *Prima facie* as per the admission made by the defendant no. 1 in paragraph 2 of the counter claim, the possession of the defendant no. 1 could at best be only permissive. The balance of convenience is in favour of the plaintiffs. Irreparable damage would also be caused to the plaintiffs since it has been shown that the properties bearing no. E-40 and E-41 including the roof/terrace are in urgent need of repairs and the



plaintiffs have also received approval for repairs and renovation from the NDMC.

25. In the result, the application of the plaintiffs under Order XXXIX Rules 1 and 2 is allowed in terms of the prayers sought in the said application.”

7. Challenging the aforesaid reasons, Mr. Rajshekhar Rao, learned Senior Advocate for the appellants/defendants alluded to the averments made by the appellants/defendants in their counter-claim (Annexure A-10) and it was vehemently urged that the respondents/plaintiffs have not been enjoying access to the roof/open terrace of the suit property and although the appellants/defendants had purchased the adjoining property i.e. E-42 and E-43 by virtue of a registered Agreement to Sell dated 16.04.2001 from Mr. Y.N. Gupta i.e., the predecessor-in-interest of the respondents/plaintiffs, it was evident that the predecessor-in-interest had no access, ingress or egress to the to the roof/open terrace through the suit property, which was lying closed. Mr. Rao also invited the attention of the Court to the **suit bearing No. 1204/2001** filed on the original side of the High Court of Delhi titled as ‘Golden Assets Holdings (P) Ltd. v. Smt. Chandra Devi and Ors.’ viz., against the occupants/tenants/trespassers on the roof/open terrace of the suit property, in which suit Mr. Y.N. Gupta, predecessor-in-interest of the respondents/plaintiffs, was arrayed as defendant No.9 and it was canvassed that Mr. Y.N. Gupta admitted the claim of the appellants/defendants that the access to the roof/open terrace of the suit property i.e., has always been from the adjoining property belonging to them (appellants/defendants).

8. Reiterating that the learned ADJ, in passing the impugned order, did not give any findings with regard to the observations made by the Local Commissioner in his report dated 25.10.2023, it was urged that the



learned ADJ erroneously assumed that the appellants/defendants are admitting that there has been express consent by Mr. Y.N. Gupta, to allow them access to the roof/open terrace; and that the learned ADJ overlooked the fact that the appellants/defendants have been consistently making the case that they have been in exclusive use and occupation of the roof/open terrace since September, 2011 so much so that they had filed a suit against the earlier occupants on the roof/open terrace and eventually got the matter settled with them by virtue of which the exclusive possession of the roof/open terraced was surrendered in their favour to the knowledge of late Mr. Y.N. Gupta, and in that way the appellants/defendants have been claiming adverse possession as well in respect of the roof/open terrace.

9. Learned Senior Counsel for the appellants/defendants placed heavy reliance on decision in **Kishore Kumar Khaitan & Anr. v. Praveen Kumar Singh**³ canvassing that the Court while granting or refusing interim mandatory injunction has to firstly consider whether the plaintiff has proved that *“he was in possession on the date of suit and on the date of order and that he had been dispossessed the next day. Unless a clear prima facie finding that the plaintiff was in possession on those dates is entered, an order of interim mandatory injunction could not have been passed and such order passed would be one without jurisdiction”*.

10. Learned Senior Counsel for the appellants/defendants also relied on a decision of the Madras High Court in **Chellathurai & Five Ors. v. Perumal Nadar**⁴ wherein it was observed that *“a suit for declaration of*

³ (2006) 3 SC 312

⁴ 1998 (3) Mad LJ 567





*title and consequential relief is not maintainable where the plaintiff is not found to be in exclusive possession of the premises and that in the suit for injunction it is the duty of the plaintiff to prove that he continued to be in possession on the date of the suit". He also placed reliance on the decision in **Nazir Mohamed v. J. Kamala & Ors**⁵ to buttress the point that "where the plaintiff wants to establish that the defendant's original possession was permissive, it is for the plaintiff to prove this allegation and if he fails to do so, it may be presumed that possession was adverse, unless there is evidence to the contrary".*

11. ***Per contra***, Mr. Rajat Aneja, learned counsel appearing for the respondents/plaintiffs was mercifully brief and urged that the entire claim of the appellants/ defendants is bizarre as it is difficult to understand as to how could they claim exclusive possession and use of the roof/open terrace, which is open to the skies and upon which no structure is existing in the nature of a room or bathroom. It was urged that the counter claim of the appellants/defendants is clearly an attempt to usurp on the property of another. Learned counsel for the respondents/plaintiffs vehemently urged that the **suit bearing No. 1204/2001** filed by the appellants/defendants against Smt. Chandra Devi and others, the latter being unauthorized occupants/licensees/tenants, was only to restrain them from having access, ingress or egress from their property/adjoining property No. E-42 and E-43 as *inter alia* an apprehension was expressed therein that the said unauthorized occupants/licensees/tenants might eventually lay claim to the roof/ open terrace over the property i.e. E-42 and E-43. It was pointed out that there is a proper demarcation between the suit property and the adjoining

⁵ (2020) 19 SCC 57



property except that there is a small opening so as to have access to the roof/open terrace of the suit property from the adjoining property, which opening has merely been for facilitating washing utensils etc. by the appellants/defendants who are running a Restro-Bar.

12. It was vehemently canvassed that the use of the roof/open terrace was merely causal, fleeting and in the nature of intermittent possession, and there is no way in law that the appellants/defendants can lay claim by way of adverse possession as there has never been any hostile and open declaration nor continuous possession for more than 12 years. Mr. Aneja also pointed out that the appellants/defendants have very conveniently relied on one receipt showing payment of some money to the previous occupants on the roof/open terrace for settlement of the issues arising in suit No. 1204/2001 and pointed out that the respondents/plaintiffs too have filed two receipts on the record with their short reply that would go to show that the occupants/licensees/tenants had also been paid a lump sum amount by late Mr. Y.N. Gupta. Lastly, learned counsel for the respondents/defendants pointed out that they have faced great difficulties and have had to run from pillar to post seeking permission from the concerned authorities to carry out repair and renovate their property, and ultimately the respondents/plaintiffs instituted Writ Petition (C) 14240/2022 titled '**Sanjay Gupta & Anr. v. NDMC**' before the High Court of Delhi. On passing of directions on the judicial side, eventually the NDMC granted permission to make repairs and renovation in the suit premises vide their letter dated 11.09.2023, which is valid for six months and thus the appellants/ defendant cannot prevent them from conducting such repairs/renovations in the suit property. Learned counsel for the respondents/plaintiffs in his





submissions relied on decisions in **Murti Devi & Anr. v. NCT of Delhi & Ors.**⁶; **Navalram Laxmidas Devmurari v. Vijayaben Jayvantbhai Chavda**⁷; **Chepudira Madaliah v. Mallengada Chengappa & Ors.**⁸; and **Thimappa v. The Tahasildar & Ors.**⁹

13. At the outset, the pleas canvassed by the learned Senior Counsel for the appellants/defendants are manifestly unfathomable, misconceived and unsustainable in law. It is well ordained in law that for seeking interim injunction under Order XXXIX Rules 1 and 2 of the CPC, the well-known trinity tests are mandated to be satisfied and a plaintiff has to show the existence of a *prima facie* case in his favour, at the core of which lies existence of a legal enforceable right and its *prima facie* infringement by the opposite party. Admittedly, the respondents/plaintiffs are the owners and in possession of the suit property bearing No. E-40 & 41 and even the appellants/defendants had purchased the adjoining property bearing No. E-42 & 43 from the predecessor-in-interest of respondents/plaintiffs by virtue of a registered “Agreement to Sell” dated 16.04.2001.

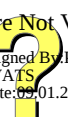
14. A bare perusal of the recitals in the registered “Agreement to Sell” dated 16.04.2001 in favour of the appellants/defendants would show that it does not create any right or interest in their favour in respect of the roof/open terrace existing over the suit property belonging to the respondents/plaintiffs. There is no acknowledgement or concession that the buyers i.e., the appellants/ defendants are entitled to have access and use the roof/open terrace over the suit property. Interestingly, a bare

⁶ RSA 115/2018 decided on 21.08.2018 [2018:DHC:5290]

⁷ AIR 1998 Guj 17

⁸ RFA No. 1840 of 2005 decided on 17.11.2021 [Karnataka High Court]

⁹ RSA No. 371 of 2021 decided on 04.10.2023 (NC:2023:KHC:35950)





perusal of the pleadings in the earlier suit filed by the appellants/defendants **bearing No. 1204/2001** on the Original Side of the High Court of Delhi and the order dated **06.09.2001 by the learned Single Judge of the this High Court** (as his lordship of the Supreme Court was then) shows that they had claimed reliefs in the nature of restraint/injunction against the occupants/tenants/tress-passers on the roof/open terrace of the suit property since they had been evidently using their staircase to have access to the roof/open terrace of the adjoining property No. E-42 & 43. It is pertinent to indicate that there was no claim lodged against defendant No.9 Mr. Y.M. Gupta, urging that the appellants/defendants had any legal right or interest to have exclusive access to the roof/open terrace of the suit property, and on the contrary it was pleaded that the suit property was a separate property *inter alia* acknowledging defendant No. 9 as its owner.

15. Further, it is more than manifest that the real apprehension of the appellants/ defendant in the said suit was that the use of the stairs from their property i.e. E-42 & 43 by the occupants/tenants/tress-passers might result in such unauthorized persons claiming possession or occupation of the roof/open terrace of their property. **Assuming for the sake of convenience** that the appellants/ defendants indeed entered into some settlement with the occupants/ tenants/tress-passers occupying the roof/open terrace over the suit property since, say 1947, that alone would not create any legal right or interest in favour of the appellants/defendants so as to claim unhindered access to the roof/open terrace of the suit property belonging to the respondents/plaintiffs. It needs no divine wisdom to perceive and raise an inference that perhaps both parties i.e., the appellants/defendants and defendant No. 9 brought



about a situation that left no option with the occupants/ tenants /trespassers but to vacate the premises. Be that as it may, as per the documents placed on record it is also brought out that a substantial amount was paid by late Mr. Y.N. Gupta to the said occupants/ tenants/tress-passers so as to enable him to reclaim the possession and occupation of the roof/open terrace over the suit property, and it *prima facie* appears the vacant possession of the roof/open terrace was surrendered in favour of late Shri Y.N.Gupta.

16. The aforesaid view is fortified on a bare perusal of the operative portion of the order dated 06.09.2001 passed by Hon'ble Mr. Justice A.K. Sikri, Judge, High Court of Delhi (as his Lordship of the Supreme Court was then) and it would be relevant to extract the operative portion of the said order, which reads as under:

“As already mentioned above, it is not in dispute that the plaintiffs are the owners of suit premises No.E-42 and E-43, Connaught Place, New Delhi. It is also not in dispute that the defendants 1-8 are in occupation of portion of the terrace of E-40 and E-41, Connaught Place, New Delhi and not of the property No.E-42 and E-43. In fact the defendants 1-8 claim themselves to be the tenants of defendant No.9 who is the landlord of E-40 and E-41, Connaught Place, New Delhi which fact is disputed by defendant No.9. It may be pointed out here that the defendants 1-8 had filed Suit No.57/2001 for injunction in the court of Mr. Pravin Kumar, Civil Judge, Delhi and **had also moved an application under Order XXXIX Rules 1 and 2 CPC for ad-interim injunction. It was pleaded by defendants 1-8 that they were the tenants of defendant No.9 (defendant No.1 in the said suit) and the relief prayed for was that the defendants be restrained from dispossessing the plaintiffs (defendants 1-8 herein) from the portion in their possession.** The application under Order XXXIX Rules 1 and 2 CPC was dismissed by the Civil Judge by order dated 23rd March, 2001 and the Civil Judge, *prima facie*, came to the conclusion that the defendants 1-8 could not establish their tenancy in respect of the portion of the premises in their possession in E-40 and E-41, Connaught Place, New Delhi. I am informed that





the defendants 1-8 have not filed appeal against that order and the defendants 1-8 have also withdrawn that suit.

Be as it may, **admittedly the defendants 1-8 have no right or interest, of in any nature whatsoever, in suit premises, namely, E-42 and E-43, Connaught Place, New Delhi. They are in occupation of a portion of terrace of E-40 and E-41. They are supposed to use the staircase of E-40 and E-41 to reach terrace and not that of the plaintiffs in E-42 and E-43.** If they are not allowed to use the staircase of premises No.E-40 and E-41 which leads to the terrace, the grievance of the defendants 1-8 could be only against the defendant No. 9 and it would not give them any right to use the stairs of adjoining suit premises No. E-42 and E-43 belonging to the plaintiffs. **The plaintiffs have, therefore, every right to stop the defendants 1-8 from using the staircase which leads to the terrace of premises No. E-42 and E-43 and from there jumping to the terrace of premises E-40 and E-41, Connaught Place, New Delhi allegedly in the occupation of the defendants 1-8.**

The plaintiffs have, therefore, made out a prima facie case for grant of ad-interim injunction. Order dated 4th June, 2001 is accordingly made absolute till the disposal of the suit. Consequently IA No. 8193/2001 filed by the defendants 1-2 and 5-8 is dismissed. At this stage, learned counsel for defendants 1-2 and 5-8 prays for two weeks' time to be given to defendants 1-8 to file appropriate proceedings against the defendant No. 9 and seek appropriate orders from the court to enable them to use the staircase of E-40 and E-41, Connaught Place, New Delhi. This time is granted upto 20th September, 2001 to defendants 1-8 subject to furnishing an undertaking to this court that these defendants shall stop using the staircase of suit premises No. E-42 and E-43, Connaught Place, New Delhi irrespective of the fact as to whether they take any action against the defendant No. 9 or not or whether they succeed in obtaining any order from the court. The undertaking should be filed within two days. The defendant No. 8 is present in person in court who gives an undertaking to this effect which is hereby accepted. However, proper undertaking in the form of affidavits would be filed by all the defendants.

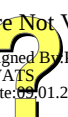
The prayer contained in IA No. 7199/2001 is also allowed. However, the plaintiffs shall not construct the wall and door as stated in this application upto 20th September, 2001 and thereafter they would be free to make the construction and in case the defendants create any obstruction, the plaintiffs shall be entitled to approach police for providing necessary assistance and on their



approaching the concerned police station, it is directed the SHO shall give necessary police assistance.
These IAs stand disposed of. **{Bold portions emphasized}**

17. The crux of the matter at this stage is that there is not an *iota* of material on the record to even remotely suggest that there has been any open and hostile declaration or assertion on the part of the appellants/defendants claiming adverse possession over the roof/open terrace. In other words, no material worth its salt has been presented to suggest use and occupation of the roof/open terrace to the total exclusion of the respondents/plaintiffs. Such claim belies common sense and logic, particularly when the roof/open terraces of the two properties are vertically placed and properly demarcated except for their being an opening in the intervening wall so as to allow access to the roof/open terrace of the suit property belonging to the respondents/plaintiff, which access by all mean *prima facie* appears to be casual, fleeting and in the nature of intermittent possession as rightly canvassed by the learned counsel for the respondents/plaintiff.

18. Indeed, the Local Commissioner in the report dated 25.10.2023 *inter alia* has also brought out that access, ingress or egress to the roof/open terrace was found to be through the adjoining property bearing No. E-42 & 43 belonging to the appellants/defendants and the learned ADJ has not dealt with such aspect. All said and done, the said aspect *does not cut much ice* either so as to confer any legal benefit upon the appellants/defendants. It is also evident from the report of the Local Commissioner that there was access and/or opening from the stairs of the suit property No. E-40 & 41 except that it was blocked using iron wires and by placing some junk material. The appellants/defendants while





laying their claim for adverse possession have never ever raised any claim so as to warrant full closure of such opening so as to prevent or refrain the respondents/plaintiffs from gaining access to the roof/open terrace. The fact that there has always been an opening, has evidently been in their knowledge throughout this relevant time. Learned counsel for the respondents/plaintiffs rightly urged that it is a bizarre claim by the appellants/defendants where they claim exclusive right to use and occupy the roof/open terrace over the adjoining property, which is admittedly an open terrace in the sense open to the sky and there exists no room, bathroom or any other structure upon it.

19. The last twist in the tale was sought to be hammered by Mr. Rao, learned Senior Counsel who argued that the respondents/plaintiffs in the garb of seeking repairs and renovation are attempting to usurp upon the roof/open terrace of the suit property to their detriment. In this regard, it is pertinent to mention that the respondents/plaintiffs have received approval from the NDMC as well as an 'NOC' from the Heritage Conservation Committee on 11.09.2023 to carry out following works in the suit property bearing No. E-40 & 41

- a) Plastering, POP punning;
- b) Painting/whitewashing;
- c) Flooring/re-flooring;
- d) False ceiling;
- e) Temp wall panelling;
- f) Electrical wiring;
- g) Waterproofing and plumbing works with new fixtures;
- h) Re-roofing and and filing of cut out at ground floor roof level and first floor level in open to sky area;
- I) Proposed internal doors and windows;
- j) Repainting of external windows from inside; and
- k) Repairing of staircase."



20. It was sought to be canvassed that the aforesaid permission does not include any permission to carry out repairs or renovation of the roof/open terrace. The plea is laughable if not unpalatable since it is apparent that the work in the nature of water proofing would involve repairs of the floor of the roof/open terrace as also inner walls of the ceiling. There is also permission to repair the staircase leading to the roof/open terrace. How or why the appellants/defendants would object to the adjoining owner of the property seeking to carry out repairs and renovation for better and comfortable enjoyment of their own premises, is itself not understandable.

21. The long and short of the aforesaid discussion is that the respondents/plaintiffs are owners and in possession of the suit property No. E-40 & 41 and as a necessary corollary where the two properties are have separate structures and are properly demarcated vertically, and there are openings to have access to the roof/open terrace, the claim of the respondents/plaintiffs that they are owners and in possession of the roof/open terrace cannot be discarded at this stage.

22. Before finally drawing the curtains on the instant appeals, in so far as reliance on the decision in the case of **Kishore Kumar Khaitan** (*supra*) is concerned, it was a case where an *interlocutory mandatory injunction* was sought and it was in the said context that it was held that “*such remedy cannot be easily granted and it could only be passed in the circumstances which are clear and where there are prima facie materials clearly justifying the findings that the status quo has been altered by one of the parties to the litigation and the balance of interest demand that status quo ante be restored*”.





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23. The decision in the case of *Chellathurai (supra)* is clearly distinguishable since it was a case where the plaintiffs were not found to be in exclusive possession of the property in question, and therefore, a mere suit for declaration without seeking consequential relief of possession was held to be not maintainable. The decision in the case of *Nazir Mohamed (supra)* was one where the appellants claimed ownership of the property in their own rights, disputing the claim of the opposite party that they had been inducted as tenants. It was a decision which was given after a full-fledged trial on appreciation of evidence led by the parties. Rather, an interesting observation in law was made, which goes as under:-

“48. The maxim “possession follows title” is limited on its application to property, which having regard to its nature does not admit to actual and exclusive occupation, as in the case of open spaces accessible to all. The presumption that possession must be deemed to follow title, arises only where there is no defining proof of possession by anyone else. In this case, it is admitted that the applicant-defendant is in possession and not the respondent-plaintiff.”

24. Likewise, in the cited case of *Murti Devi (supra)* by the learned counsel for the respondents/plaintiffs, there was a situation where the appellants/plaintiffs claimed that they had entered into an agreement to purchase an open space of land in the year 2001 but their attempts to raise construction thereupon had been foiled by the respondents/defendants by repeatedly demolishing unauthorized construction raised upon the land. Observing that the plaint disclosed that possession of the appellants/plaintiffs was never settled or peaceful, and the respondents/defendants had been zealously guarding the land, it was held that “*the position with respect to open land is, that the possession there*



of is presumed to be in the person having title thereto. Mere use of open land of another, also does not amount to dispossession of another.” This Court relying on decision in **Rame Gowda v. M. Varadapa Naidu**¹⁰ held as under:-

“22. **Rame Gowda** supra, instead of supporting the appellants/ plaintiffs, is against the appellants/ plaintiffs. Though it also holds that a person is settled peaceful possession cannot be dispossessed by the owner of the property except by due recourse to law, but clarifies, (i) that mere stray and intermittent acts of trespass do not give such a right against the owner; (ii) the possession which a trespasser is entitled to defend against owner must have extended for a sufficiently long period of time; (iii) a casual act of possession would not have the effect of interrupting possession of owner; (iv) the owner may re-enter and reinstate himself without using more force than is necessary; (v) for possession to be settled, it must be effective, undisturbed and to the knowledge of the owner.”

25. Further in the cited case of **Navalram Laxmidas Devmurari (supra)** there was a claim over an open piece of land in front of the tenancy shops over which the tenants claimed continuous user and adverse possession and in the said context it was held as under:-

“11. The concept of possession is an abstract one. The ordinary presumption is that possession follows title. Presumption of possession over an open land always is deemed to be that of the owner and not of a trespasser. An open place of land shall be presumed to be in possession of the owner unless it is proved by the trespasser that he had done some substantial acts of possession over the land which may excite the attention of the owner that he has been dispossessed. As indicated above, an owner of an open land is ordinarily presumed to be in possession of it and this presumption becomes strong in his favour when the defendant fails to establish the ground on which he claims to have come in possession.

The presumption that possession goes with the title is not limited to particular kind of cases where proof of actual possession is impossible on account of nature of the land, such as boundary land, forest land or submerged land. The presumption applies to all kinds of lands. Where plaintiff proves his title, but not any act of

¹⁰ (2004) 1 SCC 769



possession and the defendant does not prove possession except unnoticed user of small part of land, the presumption that possession follows title will come into play.

26. To sum up the aforesaid discussion, it *prima facie* appears that the respondents/plaintiffs are the owners and in occupation of the suit property No. E-40 & 41 and their claim that they have been in possession of the roof/open terrace cannot be said to be wrong on facts and in law. Learned ADJ has rightly found that the appellants/defendants by their own admission at one place have asserted that the user of the roof/open terrace has been permissive with the consent of its owner Mr. Y.N. Gupta, and at this stage of the matter, there is not an *iota* of material to show that there has been any open and hostile declaration by the appellants/defendants to claim ownership of the roof/open terrace over the suit property by way of adverse possession and to the total exclusion of the respondents/plaintiffs. Undoubtedly, the balance of convenience lies in favour of the respondents/plaintiffs and they have now received approval from the NDMC for carrying out repairs and renovation vide letter dated 11.09.2023, which deadline is expiring by 11.03.2024. No irreparable loss or damage shall be caused to the appellants/defendants in case the respondents/ plaintiffs are allowed to have access, ingress and egress to their own property i.e. roof/open terrace so as to carry out repairs and renovations as per the law. The appellants/respondents can very well make suitable alternate arrangements to wash their utensils etc. in connection with their business.





27. This Court, therefore, finds that the impugned order dated 10.11.2023 does not suffer from any illegality, perversity or incorrect approach in law. Accordingly, the present appeals are dismissed upholding the impugned common order dated 10.11.2023 passed by the learned ADJ. However, nothing contained in this judgment shall tantamount to an expression of opinion on the merits of the case. Needless to state that the issues raised by the appellants/defendants in the counter claim are matter of trial and could only be appreciated after evidence is led by the parties.

28. The pending applications also stand disposed of.

DHARMESH SHARMA, J.

JANUARY 08, 2024

Sadique