

(1974) 05 DEL CK 0037
In the Delhi High Court
Case No : First Appeal No. 61 of 1973

Krishna Parkash and Others

APPELLANT

Vs

Shanta Sinha Chenoy and Another

RESPONDENT

Date of Decision : 01-05-1974

Acts Referred:

Citation : (1974) ILR Delhi 385(2) : (1974) RLR 470

Hon'ble Judges : V.S. Deshpande, J;T.V.R. Tatachari, J

Bench : Division Bench

Advocate : C.M. Kohli, S. Pappu and C.N. Murthy, for the Appellant;

Judgement

V.S. Deshpande, J.

(1) What are the rights and remedies of an owner of immovable property against an unauthorised occupant and his licensee in respect of the property ? This question arises for consideration in this appeal on the following facts.

(2) Mrs. Chenoy, Respondent No. 1 is the owner of the premises at 20, Sunder Nagar, the ground floor of which was let out to Dr. Suraj Prakash at Rs. 1000 per month who was alleged to have had consulting medical practice on the premises.

(3) While a suit by the landlady against Dr. Suraj Prakash for eviction was pending before the Rent Controller, Dr. Suraj Prakash died. The Appellants were brought on record as his legal representatives, but the Rent Controller held that the proceedings for eviction before him abated on the death of the tenant inasmuch as the tenancy had been terminated by a notice to quit before the eviction proceedings were filed. Dr. Suraj Prakash had become only a statutory tenant. Therefore, the protection of the Delhi Rent Control Act to him came to an end with his death. As his legal representatives did not inherit either the tenancy or the statutory protection from Dr. Suraj Prakash and as the Rent Controller had no power to order their eviction from the premises, the proceedings before him had abated. Mrs. Chenoy, the owner of the premises, Therefore, filed suit No. 456 of 1972 on the original side of this Court against two sets of defendants

namely (1) defendants I to 4 who are appellants herein, being the legal representatives of Dr. Suraj Prakash, who are in possession of the premises and (2) Dr. P. K. Kapur defendant No. 5, respondent No. 2 herein, who comes to the premises allegedly to continue the medical practice of Dr. Suraj Prakash after the latter's death. Against the defendants 1 to 4 the suit is for possession. Against defendant No. 5 the suit is for permanent injunction. During the pendency of the suit the landlady made an application for the issue of a temporary injunction against the defendants in the following terms namely:

(A) defendant No. 5 be restrained from carrying on his medical practice in the premises, and

(B) defendants I to 4 be restrained from allowing defendant No. 5 or any other person to carry on medical practice or to use any portion of the premises as a consulting room. Others Vs. Mrs. Shanta SINHA

THE application was allowed by Avadh Behari, J., on the following grounds, namely:-

(1) The lease to Dr. Suraj Prakash was for a residential purpose. The right to carry on medical practice (consultation) was personal to Dr. Suraj Prakash and it could not be exercised by his legal representatives muchless by Dr. Kapur even if he was an assistant to Dr. Suraj Prakash from before the latter's death. Using the premises for medical practice amounts to a misuser.

(2) Such use also amounts to nuisance to the landlady. She has an ailing father who stays on the first floor of the premises with her. The landlady says that there is enough suffering in her house and she wants no more of the suffering humanity.

(3) The third ground on which the temporary injunctions were granted is trespass inasmuch as none of the defendants has any right to stay on the premises and Dr. Kapur has no right to enter the premises.

(4) The grant of the above temporary injunctions by the learned Single Judge has been challenged in this appeal mainly on the ground that carrying on medical practice by Dr. Kapur was a part of status quo continuing from before the death of Dr. Suraj Prakash. This should not have been disturbed inasmuch as the medical practice did not amount either to trespass or to a nuisance or to misuse as against the landlady.

(5) The application for temporary injunction was made under order 39 rules 1 and 2 Civil Procedure Code. Even the inherent powers of the Court to grant a temporary injunction u/s 151 CPC and the analogous considerations governing* the grant of perpetual injunctions under Chapter VIII of the Specific Relief Act 1963 may also be considered in dealing with such an application. An injunction is an equitable relief and the principles of the English law applicable to the grant of such relief may also be some time helpful to determine whether a temporary injunction should be granted in particular circumstances. In the light of these

considerations we have to determine if the grant of the temporary injunction in favor of the plaintiff respondent No. 1 against the appellants and the respondent No. 2 was justified.

(6) A temporary injunction may be granted either to protect the property or to protect the right of a person in the property. Order 39 rule 1 (a) CPC allows temporary injunction to be granted to restrain acts which would amount to wasting, damaging, alienation, sale, removal or disposition of the property. This provision has no application to the present case inasmuch as there is no allegation that the premises are in danger of being wasted, damaged or alienated . by any party to the suit. The real question in issue is whether any right of the owner of these premises is being injured by the use of the premises by the appellants and respondent No. 2 for medical practice. It is necessary, Therefore, for the plaintiff respondent No.1 to show within the meaning of order 39 rule 2(1) that the appellants and/or respondent No. 2 are "committing a breach of contract or other injury of any kind". The question of the breach of any contract cannot arise inasmuch as the suit of the plaintiff against the defendants is not based on any contract or the termination of any lease. For, the relationship of landlord and tenant, according to the plaintiff, came to an end when the lease of Dr. Suraj Prakash was terminated and the statutory protection available to Dr. Surj Prakash also came to an end with his death. The only question for consideration is whether the right of the plaintiff in the property was threatened with any "injury" by the defendants or whether any such injury was caused by the defendants to any right of the plaintiff. What is the right of the plaintiff to the property ? The plaintiff has the right of ownership of the property minus possession of the property. The plaintiff, has, however, the right to the immediate possession of the property because the relationship of landolrd and tenants has come to an end and she has also the right to recover the possession of the property because the statutory protection available to Dr. Suraj Prakash has also come to an end. As the right of the plaintiff to possession is not admitted by the defendants, however, the plaintiff has to recover it by way of a suit as was held by the Supreme Court in Mohan Lal v. State of Punjab, 1970 ARCJ 95(1). The relationship between the plaintiff and the defendants was not such that the plaintiff could have recovered the possession without going to a court of law e.g. the eviction of a bare licensee who did not claim any right to be in legal possession by the true owner of the property (Raj Singh v. Union of India, 1972 Rent Control Reporter 718) (2). Under order 20, rule 12 Civil Procedure Code, in such a suit for possession of immovable property the plaintiff may also be entitled to recover from the defendants mesne profits or damages for wrongful occupation. It is because the plaintiff has to wait till the possession is delivered to her in execution of the decree for possession to be obtained by way of a suit that the mesne profits are payable to the plaintiff by the defendants for the user of the premises till the delivery of possession. This implies that the normal and legitimate user of the premises by the defendants is contemplated by law. If the premises were not to be used by the defendants in the normal course, the

defendants could not be made liable to pay mesne profits for the user. It would appear, Therefore, that the normal user of the premises by the defendants cannot be prohibited by the issue of a temporary injunction when the suit for possession is pending. The right of the plaintiff is not to exclude the defendants from the present possession and user of the premises but only to get a decree for possession against them. The plaintiff must, Therefore, prove some injury to his legal right other than the mere wrongful possession and user of the property by the defendants.

(7) Even if the defendants I to 4 are assumed to be in wrongful possession of the property, that by itself does not disentitle them from the possession or the user of the property till they are dispossessed according to the law. The remedy of the plaintiff to get possession of the property is the suit which is already pending. The plaintiff seeks to distinguish between possession and residence of the defendants 1 to 4 on the one hand and the user of the property by defendants 1 to 4 and 5 for medical practice on the other hand. She seeks the remedy of injunction only in respect of the user for medical practice. The question is whether such a distinction is tenable in law. It is in this context that we have to examine the three grounds, namely, (1) misuser, (2) nuisance, and (3) trespass, on which the temporary injunctions were granted by the learned Single Judge against the appellants and Respondent No. 2.

MISUSER:-

(8) The ground of misuse implies that such user is contrary to either a contract or what is allowed by law. It appears from the argument of Shri C. N. Murty for Respondent No. 1 and from the order under appeal that the Respondent No. 1 is prepared to allow the defendants I to 4 to use the property for residence only. For, medical practice was allowed under the rent note to Dr. Suraj Prakash only and to no one else. Therefore, medical practice permitted by defendants I to 4 to Dr. Kapur becomes a misuse of the property, according to the plaintiff. In our view, it is not permissible to introduce the concept of the user allowed by the terms of the lease as distinguished from the user after the expiry of the lease in the suit which is based purely on the title of the plaintiff as against the wrongful possession of the defendants. The defendants 1 to 4 are, Therefore, entitled to use the property according to the ordinary law. They are neither restricted in their use by the terms of the lease between the plaintiff and Dr. Suraj Prakash nor is the scope of their ordinary user of the property expanded because at one time Dr. Sura) Prakash was allowed medical practice by the plaintiff. Whether the user by way of medical practice should be restrained by way of an injunction has to be considered irrespective of the terms of any lease between the plaintiff and Dr. Suraj Prakash. For, the plaintiff is dealing here not with Dr. Suraj Prakash but with the defendants who, according to the plaintiff, cannot derive any rights from the lease in favor of Dr. Suraj Prakash. What injury can be caused to the right of the owner who is out of possession, by the use of the premises by the defendants for medical practice ? Since it cannot be said that residence in its

strict sense alone is the proper user of the premises, medical practice cannot be described as a misuse of the premises. The right of ownership is not affected either by the residence or by the medical practice. Both of them depend on the existing possession of the defendants which will disappear when the plaintiff gets a decree for possession. There is no inherent limitation on the user of the house by unauthorised occupants excluding the use for medical practice. misuse in the sense of a breach of contract does not arise as there is no contract between the parties. We have, Therefore, to see whether misuse in the sense of user contrary to law is committed by the defendants and this brings us to the next ground for the grant of temporary injunction, namely, nuisance. Before passing from misuse to nuisance, we may observe that neither in the order appealed against nor in the arguments addressed before us were there any mention of any law such as the Delhi Development Act and the Master Plan issued there under which prohibited the use of the premises for medical practice. The existence of any such prohibition and any allegation made by the plaintiff that such a prohibition is violated by such user would have required the Court to consider whether such user should be restrained to prevent the breach of law. But no such consideration arose before us in this case.

NUISANCE:-

(9) It is the basic principle underlying the law of torts or civil wrongs committed against the property or the right of an owner of property that a person in possession of property must not so use it as to cause any nuisance to his neighbours. Such a nuisance may cause discomfort or annoyance to neighbours by sound, smell, etc. There is absolutely no pleading that the medical practice results in such offensive sound, smell, etc., which would amount to nuisance under the law of torts. It is the standard of reasonable man which would apply to the determination of the question whether the user of the premises by the defendants amounts to a nuisance. All that we find in the order appealed against about nuisance is that the ailing father of the plaintiff stays with her, that the plaintiff had enough suffering in her house and that she does not want any more of the suffering humanity. On the most favorable interpretation this may mean that the plaintiff does not wish to see patients coming to the ground floor of the house for being examined by or for consulting Dr. Kapur. The question is whether this amounts to nuisance in law. From the standard of a reasonable man it would be impossible to conclude that the mere sight of patients coming to a doctor can be a nuisance. It may be that a large number of patients crowding to see a doctor, for instance, in a hospital, may amount to a nuisance. But there is no material on record to show that either the patients coming to Dr. Kapur in the premises were numerous or that they were affected by such sufferings that a sight of them would amount to a nuisance. Not a single decision could be cited by the Respondent No. 1 to show that the mere carrying on of medical practice unaccompanied by any crowd, noise, etc., can by itself be regarded as a nuisance in law. Shri Murty, learned counsel for Respondent No. 1, then argued that nuisance may have a special meaning in a special context. For instance, where

there is a clause in a contract prohibiting an act which would be a nuisance to the other contracting party then such an act would be a nuisance to the contracting party even though it would not be a nuisance under the ordinary law. The decisions cited in paragraph 36, pages 179-180 of Ramaswamy Iyer's "Law of torts", 6th Edition, were relied upon for this argument. It is, however, unnecessary for us to consider whether nuisance in the context of a contract can have a wider meaning than its meaning under the ordinary law. For, in our view, the contract between the plaintiff and Dr. Suraj Prakash has already ended. It cannot become the test of judging the conduct of the defendants as against the plaintiff which would be governed only by ordinary law and not by a contract. Shri Murty made no attempt to argue that medical practice in itself could amount to nuisance under the ordinary law nor are we aware of any decision which has so held. Section 41(F) of the Specific Relief Act, 1963 prohibits grant of injunction to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance. The same principle applies to grant of a temporary injunction. Nor does any equity require injunction to be granted in the absence of pleading and proof of facts which would show that medical practice in this case was a nuisance. There is no presumption that it was so. We find, Therefore, that the plaintiff made no prima facie case of nuisance to support the grant of temporary injunction.

TRESPASS:-

(10) The distinction between possession and ownership is important. Trespass is a wrong against possession. It is the defendants 1 to 4 who are in possession. They alone could seek injunctions to prevent a trespass on their possession. Trespass is not a wrong against ownership. The owner who is out of possession cannot, Therefore, ordinarily seek injunction against a simple trespass inasmuch as it is the person in possession and not a person who is out of possession who can complain of a simple trespass. On the other hand, the right of the owner would be infringed by a person who denies the title of the owner to the property or who commits trespass on the property asserting a title in himself to the property. The owner out of possession could seek an injunction against such action of a stranger. But in the present case, Defendant No. 5 who is Respondent No. 2 herein does not deny the title of the plaintiff and does not assert any hostile title to the property in himself. He is a mere licensee of defendants 1 to 4. His visits to the premises would continue only so long as the defendants 1 to 4 are in possession thereof. They would cease with the loss of possession by defendants 1 to 4. In a general sense, the plaintiff may regard the occupation of the property by defendants 1 to 4 as a trespass. But it is only a threatened occupation which can be restrained by an injunction. A settled occupation can be terminated only by a suit for possession. It is true that the occupation of Dr. Kapur is repeated every day and ends every day. Had the plaintiff been in possession of the property, she could have claimed injunction against such threatened trespass. But she is not in possession and, Therefore, it is immaterial for her whether the defendants 1 to 4 allow the Defendant No. 5 into the

premises or not. The visits of Dr. Kapur to the premises is only a part of the user of the premises by the defendants 1 to 4. Defendant No. 5 does not claim any independent title to such user. The only remedy of the plaintiff against the defendants 1 to 4 is a suit turn possession and not injunction. For the same reason the only remedy of the plaintiff against Defendant No. 5 is also the suit for possession which is already filed against defendants 1 to 4. Since the Defendant No. 5 claims through defendants 1 to 4, he will go out of possession along with defendants 1 to 4. The plaintiff does not need to claim either possession or injunction against the Defendant No. 5.

ACCORDING to Winfield, "the better view is that one who has merely the right to possess, without actually having possession, cannot sue for trespass and that the alleged exceptions to this rule are unreal." (Law of tort, 8th Edition, page 332). According to Salmond, "trespass and nuisance are essentially injuries to the possession of land and not to the ownership of it... ...a reversioner-using that term in a wide sense to include any person having a lawful interest in land but not the present possession of it..... may sue for any trespass or nuisance if, and only if, it actually affects his reversionary interest; and in general this is so only if the effects of the injuries so committed are permanent." (Law of torts, 12th Edition, page 290). These observations support the view expressed above that the plaintiff is not entitled to injunction against the defendants on the ground of trespass.

--- *** ---BEFORE closing we may mention that the injunctions granted against the defendants 1 to 4 and Defendant No. 5 were based on common grounds, namely, trespass, nuisance and misuser, by all the defendants together. Defendant No. 5 has no independent possession at all. He claims only through defendants 1 to 4. The appeal filed by defendants 1 to 4 was against the temporary injunctions granted against both the sets of defendants. The whole of the order and not only a part of it is challenged in the appeal. According to the principle of Order Xli rule 4 CPC which is applied to orders by Order Xliii rule 2, any one of the defendants could appeal against the whole of the order inasmuch as it proceeded on grounds common to all the defendants. In such an appeal the Court may reverse or vary the order in favor of all the defendants. In the appeal by defendants 1 to 4, defendant No. 5 has been added as Respondent No. 2. Under Order Xli rule 4, Therefore, the order as a whole can be reversed by us. Even if the defendants 1 to 4 had appealed against only that part of the injunction which was directed against them, the said part was inseparable from the part which operated against Defendant No. 5. Under Order Xli rule 33, Therefore, we would have been required to reverse the whole of the order even if the appeal had been only against a part of it. *Mahabir Prasad Vs. Jage Ram and Others*, , distinguishing *Rameshwar Prasad and Others Vs. Shyam Beharilal Jagannath and Others*, , and *Ramana Prasad Gupta v. Shri Murli Prasad*, (1973) Scc 9, paragraph 36(5), so hold. FOR the above reasons, the appeal is allowed and the order appealed against is set aside. In the circumstances we make no order as to costs in this appeal.

C.M. 610 of 1974 is dismissed as not pressed.