

(2018) 05 DEL CK 0508

In the Delhi High Court

Case No : Civil Suits (OS) No. 133 Of 2016, Miscellaneous Application No. 3553 Of 2016

Pankaj Shah & Anr

APPELLANT

Vs

Rafat

RESPONDENT

Date of Decision : 10-05-2018

Acts Referred:

Citation : (2018) 05 DEL CK 0508

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Neelima Tripathi, Vidhi Gupta, Titasha Banerjee

Judgement

Rajiv Sahai Endlaw, J

1. The two plaintiffs viz. Pankaj Shah and Rajeev Shah have instituted this suit for, (i) recovery of possession of property No.241, Sukhdev Vihar, New Delhi; (ii) recovery of mesne profits; and, (iii) for permanent injunction restraining the defendant from interfering with the peaceful possession of the plaintiffs.

2. The counsel for the plaintiffs however states that the defendant is in exclusive possession of the property and the plaintiffs are not in possession of the property; the relief of permanent injunction thus can be only for the period after the plaintiffs have recovered possession from the defendant.

3. It is the case of the plaintiffs, that i) the father of the plaintiffs became a member of Sarai Julaina Cooperative House Building Society Ltd., the developer of the colony of Sukhdev Vihar and the plot of land underneath the property aforesaid was sub-leased to the father of the plaintiffs who had raised construction thereon; ii) the father of the plaintiffs died on 22nd May, 2001 leaving a Will dated 7th October, 1999 bequeathing the entire property in favour of the plaintiffs who are the only children of their parents and the mother of the plaintiffs had pre-deceased their father;

iii) the defendant, who was known to the plaintiffs through the mother-in-law of the plaintiff no.1, was appointed as the caretaker of the property as the plaintiff no.1 is a resident of USA and the plaintiff no.2 is a resident of Ahmedabad in Gujarat; iv) the defendant was also allowed to occupy one of the rooms in the property; v) that the plaintiffs, prior to the institution of the suit, asked the defendant to vacate the property but the defendant refused to do so and hence the present suit.

4. The suit came up first before this Court on 17th March, 2016 when while issuing summons thereof, vide ex parte ad interim order the defendant was restrained from selling or disposing of or transferring or dealing in any manner or creating third party rights in the property.

5. The defendant contested the suit by filing a written statement pleading that, (i) the plaintiffs have never resided in the property and the defendant is living adversely in the property for more than 15 years and has got title to the property by way of adverse possession and is in possession of the property in her own right and not as caretaker; (ii) as per the own admissions of the plaintiffs also, the plaintiffs are not the owners of the land underneath the property which is leasehold; the plaintiffs thus have no title to the property or right to file the present suit; (iii) the Will set up by the plaintiffs of their father is ineffective because the same has not been probated and no letters of administration with respect thereto has been granted; the Will is forged; (iv) since the plaintiffs are not in possession, the suit for permanent injunction is not maintainable; (v) the valuation of the property is not more than Rs.75 lacs and the plaintiffs have wrongly valued the property at Rs.6 crores and the suit, as per correct valuation of the property, is below the minimum pecuniary jurisdiction of this Court; (vi) the defendant and her husband and their children entered the said property in 1997 and since then are residing in the property; the husband of the defendant has expired 7-8 years back and now the defendant and her children are residing in the property, without any claim or interference from anyone; (vii) the plaintiff no.1 having settled in USA, even otherwise has ceased to be the sub-lessee of the land underneath the property; (viii) the Aadhaar Card, Election Card and Passbook of the defendant and her children show the address as of the property and the defendant and her children have also been receiving correspondence at the said address; (ix) the defendant was not known to the mother-in-law of the plaintiff no.1 and was never appointed as the caretaker and had entered the property along with her husband and children, finding it to be lying vacant; (x) the defendant and her children have been residing in the property for 15 years prior to the institution of the suit; and, (xi) the plaintiffs had never approached the defendant to vacate the property and in fact have no right to do so.

6. Though the plaintiffs are found to have filed replication to the written statement aforesaid but the need to detail herein contents thereof is not felt.

7. Vide order dated 18th January, 2017, the following issues were framed in the suit:-

"1. Whether the plaintiffs are entitled to the relief of vacant physical possession of the suit property? OPP

2. Whether the plaintiffs are entitled to a decree of permanent injunction, thereby restraining the defendant and her agents etc. from interfering in the peaceful possession of the suit property by the plaintiff? OPP

3. Whether the plaintiff are entitled to a decree of damages against the defendant @ Rs.30,000/- per month or at any other rate as determined by this Hon'ble Court. If so, from what date and at what rate? OPP

4. Whether the defendant has adverse possession over the suit property? OPD

5. Whether the plaintiffs do not have legal right of ownership of the suit property? OPD

6. Whether the suit has been properly valued? OPD

7. Whether the plaintiffs are entitled to payment of cost? OPD

8. Relief, if any."

and the ex parte ad interim order dated 17th March, 2016 made absolute till the disposal of the suit.

8. The suit came up before this Court on 23rd November, 2017 when the Advocate earlier appearing for the defendant sought discharge and was discharged and the defendant appeared in person. It was also found that IA No.3354/2016 of the plaintiffs for direction to the defendant to deposit the interim mesne profits in the Court was pending consideration. The consideration of the said application was however deferred to 14th December, 2017. Observing, that since the defendant in the written statement was claiming adversely to the plaintiffs, it amounted to the defendant admitting the title in favour of the plaintiffs and there was no need for framing an issue qua title, the parties were nevertheless relegated to the Joint Registrar for completion of recording of evidence.

9. The plaintiffs in their evidence examined the plaintiff no.1 and his wife, mother-in-law of the plaintiff no.1 and three relatives, one close friend of the plaintiffs and the resident of house no.237, Sukhdev Vihar, New Delhi and closed their evidence on 4th December, 2017. The suit was adjourned to 24th January, 2018 for evidence of the defendant.

10. Vide order dated 20th December, 2017, the defendant was directed to, on or before 30th January, 2018, deposit in this Court, for the period with effect from the month of March, 2016 when the suit was instituted and till the month of January, 2018, a sum calculated at the rate of Rs.50,000/- per month and to, with effect from the month of February, 2018, continue to deposit a sum of Rs.50,000/- per month in this Court, in advance for each month by the 10th day of each English Calendar month, till the disposal of this suit. The defendant was

also cautioned that non-compliance of the order would result in not only a decree being passed in favour of the plaintiffs for recovery of the amount but defence of the defendant also being struck off.

11. The defendant did not lead any evidence inspite of opportunities granted by the Joint Registrar and the Joint Registrar has accordingly placed the matter before this Court for today.

12. Ms. Titasha Banerjee, Advocate appears on behalf of the defendants and states that she has received the brief today morning only and seeks time to prepare.

13. The counsel for the plaintiffs states that the defendant has not complied with the order dated 20th December, 2017 and has not deposited the amounts as directed.

14. Ms. Titasha Banerjee, Advocate is not aware whether the defendant has complied with the order dated 20th December, 2017.

15. Conveniently, the defendant, though has given the brief to Ms. Titasha Banerjee, Advocate today morning, but has chosen not to appear probably to avoid such questions.

16. The defendant having not bothered to appear today and having not briefed the Advocate appearing for the defendant also, the evidence of the defendant is closed.

17. The counsel for the plaintiffs has been heard.

18. The plaintiffs in their evidence have proved (i) as Ex.PW1/1, the perpetual sub-Lease in the name of their father of the land underneath the property; (ii) as Ex.PW1/3, the Death Certificate of their mother; (iii) as Ex.PW1/4, the Will of their father; (iv) as Ex.PW1/5, the Death Certificate of their father; (v) as Ex.PW1/7, the mutation of the property in the names of the plaintiffs, in the records of South Delhi Municipal Corporation; and, (vi) as Ex.PW1/11 collectively, the photographs showing the defendant and her daughter taking care of the children and guests of the plaintiff no.1 at the house of the mother-in-law of the plaintiff no.1.

19. The defendant also as aforesaid, by claiming adversely to the plaintiffs, has admitted the plaintiffs as owners.

20. As far as the defence of the defendant of adverse possession is concerned, not only has the defendant failed to lead any evidence but even in the written statement, the plea of adverse possession is merely for name sake and without any particulars whatsoever. The defendant has not pleaded as to where she has denied the title of the plaintiffs or claimed adversely to plaintiffs or where she has claimed or declared herself to be the owner of the property or exercised any rights as owner. Mere long occupation does not amount to adverse possession as held by the Supreme Court in *Roop Singh Vs. Ram Singh* (2000) 3 SCC 708 and

followed by this Court in Jagdish Chander Talwar Vs. Uday Sarin (2013) 134 DRJ 677 and Om Parkash Vs. South Delhi Municipal Corporation 2016 SCC OnLine Del 2445.

21. The pleas in the written statement of the defendant, of the Will propounded of the father of the plaintiffs being forged, of the plaintiffs being not entitled to possession without obtaining probate / letters of administration of the Will propounded by them, of the plaintiff no.1 owing to residence outside India ceasing to have ownership rights in the property, are misconceived in law. Even if there were to be no Will of father of plaintiffs, it is not in dispute that the plaintiffs are the sons of Shri Jagu Bhai Shah who was the owner of the property. The plaintiffs thus, even in absence of any Will, would inherit the property from their father. Moreover, the defendant, having no chance of succession to the estate of Shri Jagu Bhai Shah, has no caveatable interest or right to challenge the Will of Shri Jagu Bhai Shah. Further, as far as city of Delhi is concerned, for claiming right under a Will it is not necessary to seek probate or letters of administration with respect to the Will. There is also no law which forfeits immovable property of a Non-Resident Indian or of foreign citizen of Indian origin.

22. Issue no.5 is thus answered in favour of the plaintiffs and against the defendant by holding the plaintiffs to have proved their ownership of the property and Issue no.4 is decided against the defendant and in favour of the plaintiffs by holding that the defendant has utterly failed to prove any possession of the property adversely to the plaintiffs for a period of continuous 12 years immediately preceding the institution of the suit.

23. Once the plaintiffs are found to be the owners and the defence of the defendant of adverse possession fails, Issue no.1 is also decided in favour of the plaintiffs and it has but to be held that the plaintiffs are entitled to recover possession.

24. No merit is found in the defence of the defendant of the suit being not properly valued for the purposes of the court fees and jurisdiction. The counsel for the plaintiffs states that the valuation of the property for the purposes of jurisdiction and court fees is at the Circle Rate as prescribed by the Delhi Government. The defendant has been unable to prove that the valuation is less than that under the Circle Rate. Thus Issue no.6 is also decided against the defendant and in favour of the plaintiffs.

25. As far as the claim of the plaintiffs for mesne profits is concerned, it is deemed appropriate to fix the mesne profits as already fixed under the order dated 20th December, 2017 and which has attained finality. Accordingly, the plaintiffs are held entitled to recover mesne profits @ Rs.50,000/- per month with effect from the date of institution of the suit i.e. with effect from the month of March, 2016 and till the date of delivery of possession.

26. I may in this respect notice that though the plaintiffs in the plaint have claimed mesne profits @ Rs.50,000/- per month but in the order dated 18th

January, 2017 framing issues, the claim of the plaintiffs has been erroneously referred to as at the rate of Rs.30,000/- per month.

27. Accordingly, a decree is passed in favour of the plaintiffs and against the defendant (i) of recovery of possession of property no.241, Sukhdev Vihar, New Delhi; (ii) of recovery of mesne profits/damages for use and occupation @ Rs.50,000/- per month with effect from the date of institution of the suit i.e. from the month of March, 2016 till the date of recovery of possession and/or delivery of possession; and, (iii) of costs.

28. Decree sheet be drawn up.

29. Decree, insofar as for mesne profits shall be executable only after the court fees has been paid thereon.

30. Considering the facts of the case, on oral request of the counsel for the plaintiffs, warrants of possession are ordered to be issued in terms of the decree aforesaid with respect to property no.241, Sukhdev Vihar, New Delhi and be forwarded dasti to Administrative Civil Judge before 16th 31. The plaintiffs to appear before the Administrative Civil Judge on 16th 32. Since the defendant is represented, it is also directed that the Station House Officer (SHO), Chowki, Sukhdev Vihar, falling in the jurisdiction of Police Station, New Friends Colony, New Delhi to, if sought, render all necessary assistance for execution of the warrants of possession.

33. Warrants of possession are made returnable on 23rd May, 2018.

34. A copy of this order be given dasti under signatures of the Court Master.