

**(2018) 08 DEL CK 0286**

**In the Delhi High Court**

**Case No :** Regular Second Appeal No. 75 OF 2018

Sheikh Aftab Ahmed Jamlana & Ors

APPELLANT

Vs

Akhtari Begum & Anr

RESPONDENT

**Date of Decision :** 03-08-2018

**Acts Referred:**

Code Of Civil Procedure, 1908 — Section 96, 100, Order 39 Rule 2A, Order 41 Rule 27

**Citation :** (2018) 08 DEL CK 0286

**Hon'ble Judges :** RAJIV SAHAI ENDLAW, J

**Bench :** Single Bench

**Final Decision :** Dismissed

## Judgement

RAJIV SAHAI ENDLAW, J

CM No.18747/2018 (for exemption)

1. Allowed, subject to just exceptions.

2. The application is disposed of.

RSA 75/2018, CM No.18746/2018 (for stay), CM No.18748/2018 (for condonation of delay in re-filing the appeal) & CM No.18749/2018 (u/S 151

CPC)

3. This Second Appeal under Section 100 of the Code of Civil Procedure Code, 1908 (CPC) impugns the judgment and decree [dated 29th November,

2017 in RCA No.1211/16/12 of the Court of Senior Civil Judge, Central District] of dismissal of the First Appeal under Section 96 of the CPC

preferred by the appellants / plaintiffs against the judgment and decree [dated February, 2012 in Suit No.145/10/85 (Unique Case ID

No.02401C0005401998) of the Court of Civil Judge-6, Central District] of dismissal of the suit filed by the appellants / plaintiffs.

4. The counsel for the appellants / plaintiffs has been heard.

5. The appellants / plaintiffs instituted the suit, from which this Second Appeal arises, pleading (i) that their predecessor was a tenant of Shop No.804,

Bartan Market, Sadar Bazar, Delhi along with common passage abutting the said shop and the roof over the said shop including roof over the common

passage; (ii) that the respondents / defendants had encroached upon the roof over the common passage and which roof was in the tenancy of the

appellants / plaintiffs; and, (iii) and the respondents / defendants had constructed a room over the roof of the common passage. Hence, the suit for

possession of the roof above the common passage and of permanent injunction restraining the respondents / defendants from interfering with the

possession of the appellants / plaintiffs of the said roof over the shop and the common passage.

6. The respondents / defendants contested the suit by filing a written statement inter alia pleading, (i) that the property, in shops wherein the appellants

/ plaintiffs and the respondents / defendants were tenants, was an evacuee property and which then vested in the Delhi Development Authority

(DDA); (ii) denying that the predecessor of the appellants / plaintiffs was a tenant in Shop No.804 or a tenant of the roof above the shop and the

common passage; (iii) denying that the respondents / defendants had encroached on the roof over the common passage; (iv) that the roof above the

common passage as well as the roof over the shop had always been in possession of the respondents / defendants and the appellants / plaintiffs were

never in possession of the roof above the shop or the common passage;

(v) that the room on the roof above the common passage in possession of the respondents / defendants had also been in existence for long; (vi)

denying that the room on the roof above the common passage had windows and doors which open towards the roof over the shop of the appellants /

plaintiffs; and,

(vii) denying that the respondents/defendants had no right to make construction over the roof above the shop in their possession.

7. On the pleadings of the parties, the following issues were framed in the suit on 22nd May, 1986:

1. Whether the suit has not been properly valued? OPD.

2. Whether the suit is bad for non joinder of necessary parties? OPD

3. Whether the Plaintiff is entitled to a decree of permanent injunction as prayed for? OPP.

4. Whether the Plaintiff is entitled to a decree of possession as prayed for? OPP

5. Relief.â??

8. During the pendency of the suit, there was an order directing both the parties to maintain status quo. The appellants / plaintiffs alleged violation of

the said order by the respondents / defendants and on which application under Order XXXIX Rule 2A of the CPC, the following issues were framed

on 23rd July, 1987:

â??1. Whether the Respondent has committed contempt of Court? OPA

2. Relief.â??

9. The Suit Court, on the basis of evidence led by the parties, dismissed the suit, observing / reasoning / holding that (i) the appellants / plaintiffs, in

proof of their tenancy of Shop No.804 with roof above the shop and roof above the common passage had produced rent receipts but which only

showed the shop No.804 to be in the tenancy of the appellants / plaintiffs and there was no mention in the rent receipts of the roof above the said shop

or the roof above the common passage; (ii) there was no other document also, to prove the title as tenant or possession of the appellants / plaintiffs of

the roof above the common passage or possession of the said roof above the common passage; (iii) thus the pleas had to be decided on the basis of

oral evidence; (iv) as per the site plan exhibited by the appellants / plaintiffs, there was no other way to reach the roof above the common passage

save through the roof over the shop of the appellants / plaintiffs; (v) the appellants / plaintiffs had failed to examine any witness from the DDA to

prove that the roof above the common passage was in the tenancy of the appellants / plaintiffs; (vi) the appellants / plaintiffs, in cross-examination of

one of the defendants appearing as DW5, put questions about the site plan in the office of the DDA showing the premises in the tenancy of the

appellants/plaintiffs and the respondents/defendants and wherefrom it appeared that the said site plan was the best evidence to prove the tenancy of

the appellants / plaintiffs of the roof above the common passage; (vii) the appellants / plaintiffs however failed to prove the said site plan of the DDA

or as aforesaid, examine any witness from the DDA; (viii) one of the appellants / plaintiffs, appearing as PW2, in cross-examination also admitted that

there was a tea shop being run in the common passage and the door of Shop No.804 in the tenancy of the appellants / plaintiffs opening in the common passage was lying closed for a number of years for the reason of the tea shop in the common passage in front of the said door; (ix) the appellants / plaintiffs had thus been unable to prove any right over the common passage or the tenancy of the roof above the common passage; and, (x) the appellants / plaintiffs having failed to prove title to or possession of the common passage, of roof above which possession was claimed, were not entitled to a decree for possession thereof or any other relief claimed with respect thereto.

10. The First Appellate Court, upon appeal being preferred by the appellants / plaintiffs, merely affirmed the findings of the Suit Court and, by dealing with the grounds taken in the memorandum of First Appeal and not finding any merit therein, dismissed the same.

11. The counsel for the appellants / plaintiffs, before this Court argues that though the appellants / plaintiffs in their evidence proved the site plan got prepared by them and copy of which is placed at page no.120 of the paper book and exhibit PW1/2 was put thereon subject to objection of the counsel for the respondents / defendants but the Suit Court, though the site plan had been proved, has not considered the same and the First Appellate Court has though considered that the admission into evidence of the site plan as Ex.PW1/2 was subject to objection, but decided the said objection against the appellants / plaintiffs, by holding that since the draftsman of the site plan has not been examined by the appellants/plaintiffs, the site plan did not stand proved. It is argued that the substantial question of law which arises for consideration is â??Whether the site plan can be proved by the litigant who has got prepared the same or has to be proved by the draftsman thereofâ??

12. No other argument has been urged.

13. Not only is the aforesaid question not res integra but even otherwise the substantial question of law in vacuum cannot be proposed unless determination thereof has a bearing on the outcome of the appeal. Reference if any required in this regard may be made to State Bank of India Vs.

S.N. Goyal (2008) 8 SCC 92 and Union of India Vs. Ibrahim Uddin (2012) 8 SCC 148. In the present case, the proof of the site plan got prepared by

the appellants / plaintiffs, has no bearing on the outcome of this appeal and the

substantial question of law urged does not arise for consideration.

14. A perusal of the site plan exhibit PW1/2 shows, (i) the shop of the respondents / defendants, bearing No.802, to be behind the shop No.804 of the appellants / plaintiffs; (ii) the shop of the respondents / defendants having access from the common passage abutting the shop of the appellants / plaintiffs; and, (iii) the access to the roof above the shop of the appellants/ plaintiffs and of the roof above the common passage to be through a staircase also shown in exhibit PW1/2, between the shops of the appellants / plaintiffs and the respondents / defendants.

15. The counsel for the appellants / plaintiffs states that the said staircase is common for the appellants / plaintiffs and the respondents / defendants.

16. What prevailed with the Suit court and has been affirmed by the First Appellate Court, is the failure on the part of the appellants / plaintiffs to show any title as tenant to the roof above the common passage, for recovery of possession of which the suit was filed. The appellants / plaintiffs, on a reading of the plaint, are found to have instituted the suit for recovery of possession on the basis of title, as distinct from on the basis of prior possession and once the appellants / plaintiffs failed to prove title as tenant to the roof above the common passage, the question of the appellants / plaintiffs being entitled to a decree for possession of the said roof above the common passage did not arise. The counsel for the appellants / plaintiffs has also not found any fault with the reasoning given in this respect by the Suit Court and has not drawn attention to any evidence which may have been led by the appellants / plaintiffs showing tenancy rights in the roof above the common passage and on the basis of which it can be said that the finding of the Suit Court, of the appellants / plaintiffs having not proved any title, is perverse.

17. Though there is nothing to show the title if any of the respondents / defendants to the roof above the common passage but it cannot be lost sight of that it was the appellants / plaintiffs who were suing for recovery of possession thereof and it was for the appellants / plaintiffs to prove that they had title as tenants to the roof above the common passage and which the appellants / plaintiffs had failed to do. Even though the suit as aforesaid is on the basis of title, but even if it were to be considered as a suit for recovery of possession on the basis of prior possession, no evidence has come on record

to show prior possession of the appellants / plaintiffs of the roof above the common passage. I may in this regard also observe that though there is

nothing to show that the roof above the shop in the tenancy of the appellants / plaintiffs is also in the tenancy of the appellants / plaintiffs but the law

raises a presumption in this regard. Reference in this regard can be made to (i) Bhal Singh Malik Vs. Dr. Nazar Singh 1975 SCC OnLine P&H 2010;

(ii) Ramji Lal Mahindar Kumar Vs. Naresh Kumari 24 (1983) DLT 100; (iii) Rawal Singh Vs. Kwaliti Stores AIR 1986 Del 236; (iv) Mohammed

Jahan Begum Vs. Abdul Hakim 45 (1991) DLT 3; and, (v) Sushila Ahluwalia Vs. Arvind Mehta 93 (2001) DLT 706. However, the said presumption

does not extend to a roof over common areas.

18. For the sake of clarification, I may also state that just like the Suit Court, in the impugned judgment has observed that the appellants / plaintiffs

have no other access to the roof above the common passage save through the roof above their shop, similarly, the access of the respondents /

defendants also to the roof above the common passage is from the roof above the shop No.802 in the tenancy of the respondents / defendants. Faced

therewith, the counsel for the appellants / plaintiffs states that the appellants / plaintiffs had filed an application under Order XLI Rule 27 of the CPC

before the First Appellate Court and which has been wrongly dismissed. It is stated that this Court, in this Second Appeal, may interfere with the said

finding of the First Appellate Court.

19. The First Appellate Court, in the impugned judgment has held that the appellants / plaintiffs wanted to lead additional evidence to summon

witnesses from the DDA and to produce documents of the police report which had been made by the appellants / plaintiffs. The only reason given for

not producing the said documents before the Suit Court at the appropriate time was, the blame put on the earlier counsel for the appellants / plaintiffs.

20. The counsel for the appellants / plaintiffs also has similarly placed the blame on the counsel for the appellants / plaintiffs conducting the suit.

21. On enquiry, the name of the counsel for the appellants / plaintiffs has been disclosed and all that can be observed is that the said counsel is a

seasoned counsel.

22. I have enquired from the counsel for the appellants / plaintiffs, whether the appellants / plaintiffs, invoking the Right to Information Act, 2005 have

obtained from the DDA the copies of the records which are now sought to be produced.

23. The counsel for the appellants / plaintiffs states that no steps in that regard have been taken.

24. In today's day and time of transparency, when all the records of public authorities are available on the asking, the act of the appellants / plaintiffs of, instead of making enquiry with the DDA and producing before this Court any clinching evidence from the records of the DDA, merely

wanting to keep the lis alive, speaks volumes of the conduct of the appellants / plaintiffs.

25. Such conduct of the appellants / plaintiffs does not entitle the appellants / plaintiffs to any interference in Second Appeal with the rejection of the

application under Order XLI Rule 27 of the CPC. It cannot be lost sight of that the suit remained pending before the Suit Court from 18th May, 1985

till 18th February, 2012 and the appellants / plaintiffs had plenty of time to prove their case and having not done that, without any real intention to prove

and substantiate their case, cannot be permitted to keep this lis alive.

26. No substantial question of law arises. Dismissed.

No costs.