

Vimla Mitra and Anr Vs. Kishan Chand Mitra

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Court : Delhi

Decided On : Dec-22-2014

Judge : A. K. Pathak

Appellant : Vimla Mitra and Anr

Respondent : Kishan Chand Mitra

Advocate for Pet/Ap. : Mr. Vineet Bhagat

Judgement :

\$~19 * IN THE HIGH COURT OF DELHI AT NEW DELHI + RFA6752014 Decided on 22nd December, 2014 VIMLA MITRA & ANR Through: versus KISHAN CHAND MITRA Through: Appellants Mr. Vineet Bhagat, Adv. Respondent None. CORAM: HON'BLE MR. JUSTICE A.K. PATHAK A.K.PATHAK, J.(ORAL) 1. Appellant no.1 is sister-in-law (brothers wife); whereas appellant no.2 is nephew of respondent. Respondent filed a suit for recovery of possession of suit property, that is, property No.1-A, New Loyal Pur Colony, Krishna Nagar, Delhi - 110051 comprising of two rooms, kitchen, bathroom, staircase and courtyard against the appellants as also for recovery of mesne profits and damages.

2. Trial court has passed a decree of possession and mesne profits in favour of the respondent and against the appellants. Mesne profits @ `2,000/- per month with effect from 1st April, 2008 till 31st March, 2012 and @ `3,000/- per month with effect from 1st April, 2012 onwards till delivery of possession have been awarded.

3. Aggrieved by the judgment and decree, appellants have preferred this appeal.

4. Respondent alleged in the plaint that his brother Late Shri Nathu Ram Mitra was facing financial crunch in the year 1984. He was in need of house for his residence. At the request of Late Shri Nathu Ram Mitra respondent permitted him to live in the suit property. All along, Late Shri Nathu Ram Mitra had been assuring the respondent that he would vacate the suit property after he becomes financially stable. Late Shri Nathu Ram Mitra died in the year 2000. However, appellants continued to occupy the suit property. They assured the respondent that they were in the process of making alternate arrangements for their residence and will shift whenever they are able to find a house. However, they did not shift from the suit premises. Accordingly, respondent terminated the license vide legal notice dated 11th March, 2008 and called upon the appellants to vacate the suit property. He also claimed damages @ `5,000/- per month from them. Despite this, appellants did not vacate the suit premises. Instead they sent a frivolous reply dated 28th April, 2008. Hence, the suit.

5. Appellants alleged in the written statement that suit was bad for non- joinder of necessary parties as eldest son of Late Shri Nathu Ram Mitra was not impleaded. Appellant no.1 was not capable of protecting her interest, therefore, guardian ad-litem ought to have been appointed. Suit was not valued properly for the purpose of court fee and jurisdiction. It was not denied that Late Shri Nathu Ram Mitra was brother of respondent. However, it was denied that Late Shri Nathu Ram Mitra was put in the possession of suit property by the respondent in the year 1984 on compassionate ground. It was denied that appellants assured the respondent, after the death of Shri Nathu Ram Mitra that they would shift from the suit property. Appellants claimed that Late Shri Nathu Ram Mitra raised construction of permanent nature in the suit property in the year 1984-85 from his own resources and funds, thus, respondent could not have terminated the license granted to Late Shri Nathu Ram Mitra. Receipt of legal notice was not denied.

6. Following issues were framed by the trial court:

1. Whether suit has been properly valued for the purposes of court fee and jurisdiction?. OPP.

2. Whether suit suffers from non-joinder of elder son of Late Sh. Nathu Ram Mitra?. If so, to what effect?. OPD.

3. Whether Late Sh. N.R. Mitra had carried out works of permanent character in the suit premises by incurring huge expenses or the license has become irrevocable?. OPD. 7.

4. Whether plaintiff is entitled to decree of possession of the suit property?. OPP.

5. Whether plaintiff is entitled to recover mesne profits for use and occupation of suit property from the defendants?. If so, at what rate and for which period?. OPP6

Relief. Respondent examined himself as PW1. He proved legal notice along with postal receipts as Ex. PW1/1 to PW1/4. Reply sent by the appellants was proved as Ex. PW1/5. Site plan of the suit property was proved as Ex. PW1/7. Respondent was cross-examined by the appellants counsel. However, despite opportunities granted to the appellants, they did not lead any evidence, accordingly, their evidence was closed vide order dated 7th March, 2012. Thereafter, a review petition was filed which was also dismissed on 20th March, 2013. Appellants did not challenge the aforesaid order passed by the trial court in the superior courts, thus, same has attained finality. Appellants have now filed an application being CM No.21078/2012 seeking permission to lead evidence at the appellate state. I do not find any justification to reopen the case and afford opportunity to the appellants to lead additional evidence. It is not the case that appellants have led evidence during the trial and seek opportunity to lead additional evidence, which was not within their knowledge during the trial. Order 41 Rule 27 (1) of the Code of Civil Procedure, 1908 (CPC, for short) provides that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, however, certain situations are envisaged in Order 41 Rule 27(1) (a), (aa) and (b) of CPC, when Appellate Court may allow such evidence or document to be produced or witness to be examined. Order 41 Rule 27 CPC is not meant for permitting the parties to lead evidence which they have failed to lead during the trial despite opportunities granted to them by the trial court. It is not the case that any additional evidence, which was not within the knowledge of appellant despite exercise of due diligence,

has come to his knowledge subsequently so as to allow him to lead additional evidence. Accordingly, CM No.21078/2014 under Order 41 Rule 27 CPC is dismissed.

8. Upon scrutiny of evidence adduced by the parties, trial court has concluded that appellants were occupying the suit property as a licensee, inasmuch as, it was not in dispute that respondent had permitted late Shri Nathu Ram Mitra to live in the suit property. Appellants did not challenge the title of respondent in the suit property. Trial court has further held that appellants being licensee were precluded from challenging the title of the owner under Section 116 of the Indian Evidence Act, 1872 (for short, the Act) more so when they had admitted that Late Shri Nathu Ram Mitra was put in possession of the suit property by the respondent. As regards plea of appellants that Late Shri Nathu Ram Mitra had raised construction of permanent nature in the licensed premises, thus, license was irrevocable, trial court has held that appellants did not lead any evidence to prove the said fact. It has been further held that irrevocability of license on the plea of raising of permanent structure could have arisen only in respect of immovable property of more than `100/- and that too by registered document. Reliance was placed on *Tukaram Sawant vs. Manglalaxmi Chinubhai Sah* 1989 Maharashtra L.J.

97, wherein it was held that a licensee is not entitled to plead irrevocability because he has carried out a work of permanent nature by incurring expenditure. He has to show that what he has done viz. executing a work of permanent nature, is pursuant to a right granted to do upon the land of the grantors something which would be unlawful in the absence of such a right.

9. I have heard learned counsel for the appellants and perused the material placed on record and do not find any illegality or perversity in the view taken by the trial court. I do not find any force in the contention of learned counsel for the appellants that since no title documents were placed and proved on record by the respondent, suit is liable to be dismissed. Respondent has categorically alleged in the plaint that he had permitted his brother Late Shri Nathu Ram Mitra to live in the suit property as a licensee in the year 1984; meaning thereby Late Shri Nathu Ram Mitra was occupying the suit premises as a gratuitous licensee. It has not

been disputed that Late Shri Nathu Ram Mitra was put in possession of the suit property by the respondent. Appellants were living with the licensee as his family members. After the death of Late Shri Nathu Ram Mitra, appellants were permitted to continue to occupy the suit property without payment of any charges, thus, their status was also rendered as a gratuitous licensee. Accordingly, appellants being licensee are precluded from challenging the title of the licensor under section 116 of the Act which provides that no tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such licence was given. It has been duly proved that license was terminated vide notice Ex.PW1/1. Receipt of the notice is not in dispute since appellant sent a reply Ex.PW1/5. Upon termination of licence, appellants were divested of any right to retain possession of the suit premises.

10. For the foregoing reasons, appeal is dismissed. A.K. PATHAK, J.

DECEMBER22 2014 ga

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