

ishwar Devi and anr. Vs. Elite Electrical Industries

ishwar Devi and anr. Vs. Elite Electrical Industries

SooperKanoon Citation : sooperkanoon.com/690202

Court : Delhi

Decided On : Apr-12-1983

Reported in : 26(1984)DLT242

Judge : S.S. Chadha, J.

Acts : [Limitation Act, 1963](#) - Sections 28

Appeal No. : Suit No. 398 of 1980

Appellant : ishwar Devi and anr.

Respondent : Elite Electrical Industries

Advocate for Pet/Ap. : K.K. Mehrotra,; L.R. Gupta and; I.D. Gupta, Advs

Judgement :

S.S. Chadha, J.

(1) The plaintiffs' claim in this suit a declaration that the defendants are illegally and unauthorisedly occupying the area on the terrace floor/first floor of property No 5332, Chandrawal, Road Subzi Mandi, Delhi, as shown yellow in the plan attached with the plaint including room 'H' as shown in the site plan and that the construction on the terrace floor/first floor as raised by the defendants or any of them is illegal. The plaintiffs' claim in addition a decree for mandatory injunction directing the defendants to demolish the unauthorised construction on the first

floor/terrace floor of the said property. The plaintiffs also claim a decree for delivery of possession of the portion on the first floor/terrace floor of the suit property. The relief further claimed is for the recovery of Rs. 10,300.00 being the mesne profits and a decree for pendente lite and future interest @10% per annum.

(2) The plaint says this. The plaintiffs are the owners and landlords of entire property comprising ground floor, terrace floor and the constructions as raised by them bearing Municipal No. 5332, Chandrawal Road, Subzi Mandi, Delhi. The plaintiffs had purchased the vacant land beneath the above said building vide an agreement dated March 5, 1954 and the sale-deed subsequently registered in the office of the Sub-Registrar, Delhi on February 11, 1969 making the plaintiffs owners since the date of agreement to sell. The plaintiffs applied to the Municipal Corporation of Delhi for permission to construct the building on the said plot and the requisite permission was granted. The plaintiffs constructed the entire ground floor of the building and on the first floor construction up to door level in the front area was raised by the plaintiffs. A completion certificate was obtained from the Corporation by the plaintiffs.

(3) The averments further are that defendant No. 2 vide rent deed dated July, 10, 1961 became tenant of the plaintiffs in his individual capacity in respect of one big hall, two small rooms, 3 mazanines, one bathroom and one W.C. on the ground floor at a rent of Rs. 400.00 per month. Two rooms on the ground floor in addition were let out to defendant No. 2 in his individual capacity in August, 1963 at Rs. 90.00 per month. Defendant No. 3 became tenant in his individual capacity of the plaintiffs in respect of a portion on the ground floor with effect from October 1, 1961 at a rent of Rs. 50.00 per month and thereafter another portion was let out to defendant No. 3 in his individual capacity at a rent of Rs. 35.00 per month on the ground floor. The other portions of the ground floor have been let out to other tenants. The case of the plaintiffs is that with regard to the first floor of the suit property, the parda walls in the back portion were constructed by the plaintiffs. The plaintiffs also constructed in addition to other portions a Chhabra (projection) on the first floor on the front portion of the property. The plaintiffs also constructed two rooms as shown as 'G' and 'H' in the plan on the first floor and room 'G' was given by the plaintiffs to their own relative and room 'H' was let out to one tenant who

remained in occupation of that room till 1966. After room 'R' became vacant in 1966, defendant No. 2 approached the plaintiffs and sought their permission to occupy this room as a licensee to be vacated as and when desired by the plaintiffs. With regard to the remaining portion on the first floor, this area remained unconstructed and uncovered till 1965 when defendant No. 1 through defendants 2 and 3 started storing their scrap material on the terrace which was objected to by the plaintiffs. The plaintiffs' claim that they had free access to the terrace floor till 1973 as the above-said portion never had any door and was never capable of being in exclusive possession of the defendants.

(4) After 1965, defendant No. 1 through its partners raised some illegal and unauthorised construction on the terrace floor without any lock or door and without obstructing free access and approach of the plaintiffs to this area for which a notice was served by the Municipal Corporation on defendants for demolishing the above-said unauthorised construction. The plaintiffs removed the scrap material stored by the defendants from the portion in or about 1969 and remained owner and became occupier of this portion of the property. The defendants without any right again started storing scrap material on the first floor area of the property and made attempts to occupy the same which was objected to by the plaintiffs. In October, 1974, defendants 2 and 3 made illegal efforts to put their signboard and neon-sine on the first floor of the suit property and hence the plaintiffs had to file a suit for declaration and injunction and had obtained an ex-parte interim injunction against the defendants restraining them from illegally occupying the first floor or putting neon-sine or signboard thereon alleging that defendants 2 and 3 were tenants only in respect of portions on the ground floor and had no right with regard to any portion of the first floor. Defendants 2 and 3 in their written statement filed on October 21, 1974, took the plea that defendant No. 1 through its partners was the tenant and their possession on the ground floor as well as of the first floor was in the capacity of tenants. The plaintiffs in the reply averred that the defendants were tenants in respect of only those accommodations on the ground floor as detailed in the plaint and they were not tenants either themselves or through defendant No. 1 of any area on the first floor of the suit property. Defendants 2 and 3 moved for amendment of the written statement and for the first time on July 12, 1976 came forward with the plea that they had acquired title by adverse

possession to the first floor area of the suit property. The stand of the plaintiffs in this suit is that the possession of the defendants of the first floor area was permissive only and has to be handed over to the plaintiffs on their demand and the defendants have no legal right, title or interest to continue to hold the same against the wishes and desires of the plaintiffs. Hence this suit claiming the aforesaid reliefs.

(5) The main defense of the defendants in the written statement is that the defendants are in adverse possession of the suit premises for more than 12 years and have acquired title by adverse possession and thus the suit does not lie. The plea is that this suit is barred by time. There is a denial in the written statement of the title of the plaintiffs as owners of property bearing No. 5332, Chandrawal Road, Subzi Mandi, Delhi. The tenancies created in favor of defendants 2 and 3 as alleged by the plaintiffs are, however, admitted. The specific plea in the written statement is that the defendants raised the construction on the first floor and raised constructions thereon in the year 1962 to the knowledge of the plaintiffs who did not raise any objection thereto and nor they brought any action against the defendants for the same. It is denied that the possession of the first floor was taken or the constructions were raised with the permission of the plaintiffs. As the plaintiffs stood by with the said constructions and the use and possession of the defendants since 1962 and did not bring any action against the defendants in this behalf, the plaintiffs are estopped and barred from making any grievance against the same on account of waiver, acquiescence, laches, acts of commission and omission. The defendants have thus acquired title by adverse possession of the entire first floor except room marked 'G'. The defendants are alleged to be in adverse possession of the first floor of the premises in dispute except room 'G' openly and to the knowledge of the plaintiffs. It is further pleaded that after making the constructions by the defendants, the Municipal Corporation of Delhi served notice for demolition. The defendants got the said construction regularised from the Municipal Corporation of Delhi by paying the damages amounting to Rs. 288.00 on September 27, 1965 and the defendants have been in exclusive possession of the first floor except room marked 'G' since 1962. The plaintiffs had no access to the terrace/first floor of the premises in dispute and the defendants did not allow them to enter into the said premises at any time since the same was

constructed in the year 1962. There is denial of the alleged writing in or about the year 1973. The institution of the suit by the plaintiffs in October, 1974 and the filing of the written statements as well as application for amendment of the written statement in that suit is admitted.

(6) On the pleadings of the parties, the following issues were framed :

WHETHER defendants are in adverse possession of the suit property (first floor) since 1962 Whether suit is not maintainable and is barred under Order 9 Rule 8 of the Code of Civil Procedure as pleaded in para 2 of the preliminary objections Whether plaintiff is entitled to the mesne profits If so to what amount 4. Relief.'

The parties went to trial. During the trial, the plaintiffs produced two witnesses, namely, Shri Gangoo Ram as Public Witness . 1 and Shri Brij Mohan, Special Power of Attorney Holder of the plaintiffs, besides producing several documents. In rebuttal, defendant No. 2 Shri Harish Chand Gupta and seven other witnesses were examined. Mr. L.R. Gupta, the learned counsel for the defendants does not press issue No. 2.

(7) Issue No. 1 At the outset, the objection of the counsel for the defendants is that the burden of this issue has wrongly been placed. The contention is that a suit for recovery of possession of immovable property based on title as well as on the assertion .of the prior possession and subsequent dispossession or disturbance of possession falls within Articles 64 of the Schedule to the [Limitation Act, 1963](#) (hereinafter referred to as Act of 1963) and the plaintiffs must prove that they were dispossessed within the statutory period. Reference was made to Sections 3 and 27 of Act of 1963 in support of the contention that it is the duty of the Court to dismiss the suit although limitation has not been set up as a defense. At the determination of the period limited by the Act of 1963 to any person for instituting a suit for possession of any property, his right to such property stands extinguished. He urges that the plaintiffs must establish their possession within 12 years and the plaintiffs are not entitled to succeed unless they prove this. Reliance is placed on 'Official Receiver v. Chava Govindaraja and another' A.I.R. 1940 Mad 798, 'Lingamma v. Putte Gowda and another' A.I.R. 1963 Mys 1, 'Lila Ram v. Mohar Chand and others' , 'Munshi Manzoor Ah Khan and others v. Sukhbasi Lal and

others', : AIR 1974 SC706 , 'Smt. Raj Rani v. Kailash Chand and another' : [1977]3SCR18 , 'Nathu Lal (since deceased) through L. Rs. and another v. Ambaram and another, : AIR 1982 MP114 and 'Surajmal and another v. Mangilal and another', .

(8) The principle of law initiated under the provisions of Article 142 of the Limitation Act 9 of 1908 (hereinafter referred to as Act of 1908) is that Article applies if the plaintiff has discontinued possession of the property within 12 years. None of these authorities deal with the cases which are governed by the provisions of Act of 1963.

(9) Article 64 of Act of 1963 relates to suit for possession of immovable properties based on previous possession, and not on title, whereas Article 65 applies to the categories of suit where the action is founded on title, whereas Article 65 applies to the categories of suit where the action is founded on title. The reasons for the changes brought about by Articles 64 and 65 are to be found in the third report of the Law Commission. The recommendation of the Law Commission was, inter alia, to this effect :

'IF the defendant wants to defeat the right of the plaintiff, he must establish his adverse possession for over twelve years which has the effect of extinguishing the title of the owner by the operation of section 28 of the Limitation Act read with Article 144. If he fails to do so, there is no reason for non-suing the plaintiff merely because he was not able to prove possession within twelve years. In our opinion Article 142 must be restricted in its application only to suits based on possessory title. We, therefore, suggest that in order to avoid injustice and inequality to the true owner and to simplify the law, Article 142 should be restricted to suits based on possessory title and owner of the property should not lose his right to it unless the defendant in possession is able to establish adverse possession.'

It was pursuant to this opinion thus expressed that the two Articles 64 and 65 came to be enacted in the Act of 1963. There is a clear cut distinction between suits based on prior possession and suits based on title. The decisions of Courts on the interpretation of Articles 142 and 144 of the Act of 1908 laid down a rule of law that loaded the dice heavily against the owner who was dispossessed. The

burden cast on the dispossessed owner made it incumbent on him not only to establish his title but made it requisite that in an ejectment action, he should also make out that he was in possession at some point of time within 12 years before the date of the suit. This was considered as a harsh and oppressive provision and was replaced by the Legislature while amending Articles 64 and 65 of Act of 1963. There are observations of the Supreme Court in 'Nair Service Society Ltd. v. K.C. Alexander and others' : [1968]3SCR163 relied upon by the counsel for the defendants in para 14:-

'...In other words, the right is only restricted to possession only in a suit under Section 9 of the Specific Relief Act but that does not bar a suit on prior possession within 12 years and title need not be proved unless the defendant can prove one. The present amended articles 64 and 65 bring out this difference. Article 64 enables a suit within 12 years from dispossession, for possession of immovable property based on possession and not on title, when the plaintiff, while in possession of the property has been dispossessed. Article 65 is for possession of immovable property or any interest therein based on title. The amendment is not remedial but declaratory of the law. In our judgment the suit was competent.'

In *Raj Rani (supra)*, another case relied upon by counsel for the defendants, their Lordships of the Supreme Court observed that in cases governed by Act of 1908, at any rate, a plaintiff admitting dispossession, in suits based on title, had to prove that he was in actual or constructive possession within twelve years and hence, the change in law. The difficulty in deciding the question whether Article 142 or 144 applies to a case, which really depends upon an interpretation of the pleadings, was sought to be removed in the Act of 1963 by a more clarified position in Articles 64 and 65 of Act of 1963. The reasons for changes were also noticed by their Lordships that Articles 142 and 144 had given rise to a good deal of confusion with respect to suits for possession by owners of property. Even in *Surajmal (supra)* relied upon by the counsel for the defendants, the objects and reasons of Act of 1963 are again noticed. It is then observed that Article 64 is restricted to suits based on possessory title so that the owner of property does not lose his right to property unless the defendant in possession is able to prove the adverse possession. Article 65 is new and deals with suits based on title and this

is so stated in that case. In my opinion, there is a vital difference in the language employed in Article 142 of Act of 1908 and Article 65 of Act of 1963. Under Article 142, a defendant/plaintiff is required to prove title and possession within twelve years. Under Article 65 of Act of 1963, in a suit for possession of immovable property or any interest thereof based on title, the period of limitation is twelve years and the time from which period begins to run is when the possession of the defendant becomes adverse to the plaintiff. Under the Act of 1963 in a suit based on title even if dispossession is also alleged, the defendant can succeed only if he proves that his possession had become adverse to the plaintiff beyond twelve years of the suit. The plaintiff need to prove only his title, which he has established on the record of this case.

(10) The oral testimony of Public Witness . 1 Shri Gangoo Ram who brought the original sale-deed of the property in favor of the plaintiffs, says that the sale- deed was duly registered and the mutation was effected in the Municipal Corporation of Delhi. Ex. Public Witness . 1/1 is the photo stat copy of the original sale- deed. An earlier agreement made by Nihal Chand and Hardayal for sale of the property in favor of the plaintiffs was also brought in Court and Ex. P.W. 1/2 is the photostat copy of the original agreement. Oral evidence is given of the building plans being sanctioned by the Municipal Corporation of Delhi and the completion certificate obtained in the year 1960. Ex. Public Witness . 2/3 is the copy of the completion certificate. Though some cross-examination was directed but at the hearing, the counsel for the defendants did not address any arguments for want of knowledge of the witness.

(11) In view of this legal position, the onus has rightly been placed on the defendants. The plaintiffs have only to prove title. The period of twelve years would start when the possession of the defendants becomes adverse to the plaintiffs.

(12) A party who sets up a title by adverse possession has to affirmatively prove his possession far over the statutory period and presumptions and probabilities cannot be substituted for evidence. Adverse possession has to satisfy necessarily the tests of adequacy, continuity, exclusiveness and publicity. In other words, such

possession to be adverse must be adequate in continuity, in publicity and in extent to show that the possession was adverse to the plaintiffs. Possession to be adverse should be burst without any attempt at concealment so that the persons against whom time is running, ought, if they exercise due diligence, to be aware of what is happening. The adverse possessor must assert a title openly and in derogation of the title of true owner for a continuous period of twelve years. The plaintiffs in this case allege tenancy and such tenancy is proved by Exs. P-8 and P-9, the two rent deeds. Even the allegations of the plaintiffs to the creation of the tenancy in respect of the premises on the ground floor of the property in dispute are admitted in the written statement. The plaintiffs have proved their antecedent possession of the whole of the property. The defendants admit the tenancy of the ground floor premises. The possession of the defendants would be on and after the creation of the tenancy as the plaintiffs/landlords put the defendants into possession on the creation of the tenancy. The admission of the defendants that they are tenants on the ground floor amounts to an admission that when the tenancy was created, the plaintiffs-landlords were in possession and so they put the tenants into the possession of the tenancy premises on the ground the floor. A part of the tenancy was created on July 10, 1961, a part on October 1, 1961 and another part in August, 1963. It is not the case of the defendants that they came into possession of the first floor prior to the creation of the tenancy.

(13) The question of fact to be determined in this suit is when the possession of the defendants became adverse to the plaintiffs. I will first deal with the documentary evidence placed on the record by the parties. The first document in the point of time is the notice dated July 12, 1965 issued by the Municipal Corporation of Delhi under Sections 343(1) and 344(1) of the Delhi Municipal Corporation Act, 1957. It mentions the erection of a building in the form of cement shed in size 36' X 22' and consisting of bricks Kala Masala and cement sheets. Shri A.K. Ahluwalia, D.W. 3, an official in the Municipal Corporation of Delhi brought the register maintained by the Corporation containing entries of the constructions made without the sanction of the Corporation. It contained an entry of the year 1965 relating to premises No. 5332, Chandrawal Road, Subzi Mandi Delhi and the unauthorised construction made on Rcc shed-38' X 22' and pakka pillars up to 8' feet. The first notice was given on July 6, 1965 under Section 344(1)

of the Delhi Municipal Corporation Act, 1957 and the second notice was given on July 15, 1965 under Section 343 of the said Act. The inference from this oral evidence and Ex. P-7, in my opinion, can be this. Section 344(1) of the said Act says that where the erection of any building or execution of any work has been commenced or is being carried on, but has not been completed without or contrary to the sanction etc., the Commissioner may, in addition to any other action that may be taken under that Act, by order require a person at whose insurance the building or the work has been commenced or is being carried on, to stop the same forthwith. When the notice under section 344(1) was issued, the erection had either been commenced or was being carried on but was not completed, The oral evidence led by the defendants in the statements of D.Ws. 6, 7 and 1 that the constructions were made in 1961 or 1962 or that it had been in existence since then, cannot be believed. Their testimony is not trust-worthy in that regard. The oral evidence of the parties as to what happened after the notice, Ex. P-7 is conflicting. The statements of Public Witness . 1 and Public Witness . 2 is that the construction was got demolished in the year 1965. The statement of D, 1 and D.W. 8, the Accountant of the defendants is that the construction was not demolished. It is not necessary to resolve that conflict for the disposal of the suit.

(14) The next document in point of time is a writing. The date of this writing is given by Public Witness . 1 as 1973 and by Public Witness . 2 in cross-examination as January, 1973. It is Ex. Public Witness . 1/3. This document purports to be signed and in the hand-writing of Shri Harish Chand Gupta defendant No. 2. It says that whatever goods have been placed by the defendants on the roof, namely, property No. 5332 would be removed when it is required by the plaintiffs. The execution of this document is denied by Shri Harish Chand when he enters into the witness box as D.W. 1. This document was placed on the record by the plaintiffs in suit No. 509/74 instituted on October 7, 1974 for a declaration and injunction when the defendants wanted to place a signboard and neon sine on the first floor of the property. Shri M.R. Chhabra, Advocate was appearing for the defendants in that suit. Shri M.R. Chhabra recorded the hand-writing and signatures admitted. Both D.W. 1 and D.W. 8 admit that Shri M.R. Chhabra, Advocate was appearing on behalf of the defendants and must have appeared on April 9, 1975 when the original of Ex. Public Witness . 1/3 was admitted into

evidence in that Court. D.W. 1 specifically denies the admission but D.W. 8 cannot say whether Shri M.R. Chhabra, Advocate had recorded that hand-writing and signatures admitted. The certified copy of the statement recorded on April 9, 1975 is tendered by the defendants and is Ex. D. 3. Shri Jaswant Rai, the previous attorney of the plaintiffs appeared in that Court on April 9, 1975. He deposed that two years back, the defendants had given in writing, i.e. Ex. Public Witness . 3/13 in that suit and agreed that the defendants would vacate the first floor and remove the goods on the asking of the plaintiffs. In the cross-examination, no question is put to Shri Jaswant Rai about this writing. Before the statement of Shri Jaswant Rai was recorded on April 9, 1975, the plaintiffs had served a notice on the defendants on January 28, 1975, copy Ex. P. 1. In para 5 of this notice, it is stated that the defendants had agreed in writing as also orally that they would vacate the first floor (terrace/ roof) but in spite of request made to the defendants by the plaintiffs, the defendants had not vacated the portion aforesaid illegally and unauthorisedly occupied by them. In the reply dated February 17, 1975, Ex. Public Witness . 2/5, the counsel for the defendants, however, denied para 5 of the notice. This writing again finds mention in the replication dated February 10, 1976, Ex. D. 2, when it is pleaded that defendant No. 1 had given in writing to vacate the first floor of the suit property. Ex. Public Witness . 1/3 thus is pleaded by the plaintiffs before the defendants set up the plea of adverse possession on July 10, 1976. Lot of arguments have been addressed by the counsel for the defendants that the admission made by Shri M.R. Chhabra is not binding on the defendants and that it was made without any authority ; the admission, if any, is not conclusive and that has been withdrawn by the defendants ; the admission contained in Ex. Public Witness . 1/3 is not in accord with state of facts existing in January, 1973 as in 1973, there was in existence the construction on the first floor ; the existence of the sheds in 1965 and again in the Survey Report of 1969 as proved by D.W. 2 Sanitary Inspector of the Municipal Corporation of Delhi, certified copy of the entry, Ex. D.W. 2/1 has been established on the record but Ex. P.W. 1/3 is silent about it. This document is alleged to be not on the letter head of the defendants who were carrying on the partnership business and, therefore, it could not be a genuine document. These contentions have no merit. The admission made by Shri M.R. Chhabra, Advocate on behalf of the defendants is on the strength of the power

conferred by the defendants on Shri M.R. Chhabra, The defendants admit that Shri M.R. Chhabra was given a power of attorney for the conduct of the suit which impliedly proves the right to make admission on behalf of the defendants. The admission made by Shri M.K. Chhabra, Advocate on or before April 9, 1975 has never been withdrawn by the defendants in those proceedings. Even when Shri M.R. Chhabra was replaced by another counsel in July, 1976 (whether on account of the death of Shri M.R. Chhabra or otherwise), even then no application is made to that Court that admission by Shri M.R. Chhabra was either erroneously made or unauthorised. The admissions of counsel are binding on the party under Section 18 of the Evidence Act, 1872 (See 'Risal Singh and Another v. Manohar Lal and Others' A.I.R. 1927 Lah 748 and 'Sunder Parmanand Lalwani and others v. Caltex (India) Ltd.,' : AIR1969 Bom24). The document, Ex. Public Witness , 2/3, therefore, shows the permissive possession of the defendants in January, 1973.

(15) The plaintiffs had filed a suit for declaration and injunction, being suit No. 509/74 in October, 1974 and claimed a decree for declaration that the defendants are not entitled to use, occupy or possess any other portion except the accommodation in their tenancy of house No. 5332, Chandrawal Road, Subzi Mandi, Delhi and for restraining the defendants by permanent injunction from misusing or illegally occupying possessing the other portions of the house property on the first floor or putting any signboard or neon sine on the front portion of the first floor or any other portion of the said property. The copy of the original plaint is not on the record but the amended plaint dated November 17, 1975 is Ex. D. 1. The written statement dated October 21, 1974 of the defendants is Ex. P. 9. This written statement is admitted to be signed and verified by defendants 2 and 3 and is also signed by Shri M.R. Chhabra, Advocate. The amended written statement dated January 19, 1976 is Ex. P. 5. This is also similarly signed and verified by defendants 2 and 3 and is also signed by Shri M.R. Chhabra, Advocate. Shri Harish Chand Gupta, defendant No. 2 as D.W. 1 deposes that the facts stated in this written statement are not correct. He wants this Court to believe that the written statements were drafted by the counsel either without instructions or against the instructions of the defendants and that the defendants signed and verified those written statements without ascertaining the correctness of the averments made therein. In my opinion, such is not normal course of human

conduct. Parties do not execute documents or file pleadings in Court without intending to do so. The verifications in the written statements verify that the contents of various paras are true to their knowledge and other paras on information received and believed to be true. I can conceive of no reason why the counsel should draft a pleading either without instructions or against the instructions of a party. The inference is irresistible that the defendants must have instructed Shri M.R. Chhabra as to the existing state of facts in October, 1974 or Jan. 1976 and those pleas were incorporated in the written statements. The plea taken in those written statements is that Shri Harish Chand Gupta took the premises bearing No. 5332, Chandrawal Road, Subzi Mandi, Delhi comprising of one big hall, two small rooms, three mezzanines, one bath room and one W.C. on the ground floor with use of the terrace on the first floor and was taken by M/s. Elite Electronics Industries through defendant No. 1 from the plaintiffs. It is pleaded that the said firm was authorised to carry out additions or alterations in the premises and to raise any structure on the first floor. In para 10 of the written statement, the plea is that the defendants are tenants in respect of the accommodation on the ground floor as well as the first floor. The averments made in the written statement dated January 19, 1976 is after the exchange of notices dated January 28, 1975. Ex. P. I, reply dated February 17, 1975, Ex. Public Witness . 2/5 and the recording of the statement of Shri Jaswant Rai on April 9, 1975 when he proved Ex. Public Witness . 2/13 in that case, copy Ex. Public Witness . 1/3 in this case. This was also so after the filing of the written statement dated August 14, 1975, Ex. P. 10 in the eviction case. In that case, the plea is that the construction was raised in the year 1962 without any objection of the petitioners (plaintiffs-herein) under due permission from the petitioners. The stand taken by the defendants in the pleadings was put in issues on February 12, 1976 in that suit. Ex. P. 3 is the certified copy of the order of the Court dated February 12, 1976. Issue No. 8 in that suit is whether defendants are tenants on the first floor of the suit premises. Till July 12, 1976 when the application for amendment of the written statements was made by the defendants, the defendants had always taken the stand that even though they are tenants on the ground floor, they had a right of the use of the terrace on the first floor and at other places they had taken the stand that the defendants are the tenants in respect of the accommodation on

the ground floor as well as the first floor.

(16) The application for amendment of the written statement in the eviction suit was made on July 26, 1976, copy Ex. P. 11 and there is oral evidence of the defendants that a similar application was made for amendment of the written statement in the civil suit on July 12, 1976. The amended written statement dated July 12, 1976 was filed in that suit and copy is Ex. P. 6. Para 2 of Ex. P. 6 still contains the averment of the defendants of tenancy on the ground floor with use of the terrace on the first floor and that defendant No. 1 was authorised to carry out additions and alterations of the premises and to raise any structure on the first floor. In para 16 the plea is again that the defendants are tenants in respect of the accommodation on the ground floor as well as the first floor but para 16-A and 16-B are added in that written statement which take the plea that on the showing of the plaintiffs themselves the defendants were in an unauthorised possession of the first floor and have raised unauthorised constructions and hence the defendants were and are in adverse possession of the first floor of the property in suit openly and in the knowledge of the plaintiffs.

(17) There is another document in the record of the Municipal Corporation of Delhi i.e. the Survey Report for the year 1969-70. Its copy is Ex. D.W.2/1. The Corporation frequently surveys the buildings and a record is maintained by the Corporation in the usual course of its duties for the purpose of assessing the rateable value of the properties. The entries show that the defendants are tenants on the ground floor of the space mentioned therein at a monthly rent of Rs. 575.00 and the reasonable rent is also mentioned in the appropriate column as Rs. 575.00 . So far as the first floor is concerned, defendant No. 1 is shown as in possession of the portion one big hall tin roof 30' x 20' and two khokhas of 10' X 10' each. In the column meant for the monthly rent paid by the occupant, the word 'included' is mentioned. In the column meant for reasonable monthly rent, it is left blank. It put it to the counsel for the defendants as to the meaning assigned to the word 'included' given in Ex. D.W.2/1. No satisfactory Explanationn was forthcoming. In my opinion, it was obviously represented either by the occupier or anyone on his behalf that no separate rent was payable for one big hall tin roof and two khokbas on the first floor and that is included in the monthly rent of Rs.

575.00 . If that had not been so, then the Surveyor would have given a reasonable monthly rent for this in column No. 7 instead of leaving it blank. In all other five entries, the monthly rent as paid by the occupier is given as also the reasonable monthly rent. The yearly rent is then calculated as Rs. 10,320.00 and giving a deduction the rateable value is calculated. Whether the amount was actually paid or not, the Corporation would have given a reasonable rent for the purpose of assessing the rateable value but when it was represented that it is included in Rs. 575.00 , then no separate rental value of this portion is assessed and added in calculating the rateable value. I, therefore, draw an inference that even in 1969-70 it was represented that the defendants were tenant on the ground floor at a total rent of Rs. 575.00 as well as the first floor. The above noticed documentary evidence shows that the defendants merely claimed to be a tenant also of the vacant first floor with the tenancy on the ground floor. The adverse possession was claimed for the first time on July 12, 1976. The commencement of adverse possession in favor of a person implies that person is in actual possession, at a time, with a notorious hostile claim of exclusive title, to repel which the true owner would then be in a position to maintain an action. His adverse possession cannot commence unless he obtains actual possession with the requisite animus. The possession became hostile only on July 12, 1976 and in any case not before 1973-74. The possession in order to be adverse has to be open and as of right. Such possession is said to be hostile to the true owner by reason of the fact that it is adverse or prejudicial to his interest. The possession has not been open and there have been admissions and concealment at all stages. The possession at best commenced in 1965 when unauthorised constructions were made by the defendants in July, 1965. I will assume that the unauthorised constructions continued to be in existence and were not demolished. The unauthorised constructions could be with permission or without permission. In 1969-70 at the time of survey, a representation is made by the occupiers that it is part of the tenancy on the ground floor. When protests were lodged in January, 1973, the defendants again accepted the possession and title of the plaintiffs and sought permissive possession to keep material on the first floor and the permissive possession was granted. Again in 1974, 1975 and 1976 the stand is taken by the defendants even by concealment at the stages of the filing of the pleadings in

Court that they had a right to use the first floor along with the tenancy premises on the ground floor. No hostile title is set up till July 12, 1976.

(18) The other evidence placed on record by the parties may be noticed. P.W. 5 Phool Chand God had prepared a report about the construction on the first floor of the premises in dispute. The report is Ex. D.W. 5/1 and the plan is Ex. D.W. 5/2. It shows the extent of the construction. He opines that the entire construction existing on the first floor was made in 1960- 1962. The report of the architect produced by the plaintiffs is Ex. Public Witness . 2/1. In the report the architect had given in 1979 as the age of the building as 22 years. From this the counsel wants to make a capital that even the architect produced by the plaintiffs gives the constructions having been made sometimes in the year 1957 or thereafter. In my opinion, it is not possible to draw this inference from a mere statement about the age of the building. Admittedly, the tenancy commenced only in 1961 and I have found from the unimpeachable documentary evidence maintained by the Municipal Corporation of Delhi that the commencement of the construction was some time in July, 1965. The oral testimony of Public Witness . 1 and Public Witness . 2 on behalf of the plaintiffs is that the plaintiffs had always access on the first floor till the year 1973-74 from which date they were obstructed from going on the first floor. The oral testimony of D.W. 1, D.W. 6, D.W. 7 and D.W. 8 is that the plaintiffs or their agents were never allowed to go on the first floor. It is not necessary to resolve this conflict. If the possession of the defendants was permissive and it may be exclusive to them without any interference by the plaintiffs, this will not make any difference. The exclusive possession of the defendants is only a circumstance to show whether the defendants asserted a hostile title to the plaintiffs. The hostile title was set up only in July 12, 1976. The result of the above discussion is that the defendants have failed to establish that they came into adverse possession of the first floor beyond 12 years of the date of the Institution of the suit. The nature of the property in which the title by adverse possession is claimed is also such that there cannot be an exclusive title vested in the defendants on the first floor. The ground floor of the building is only constructed and is in the possession of various tenants including the defendants. On the first floor, according to the completion certificate, the plaintiffs had constructed walls of two rooms up to the door level. One room is admittedly in possession of Lala Bhagwan Dass and his successors.

In interest who are the tenants of the plaintiffs. The other portion is only an open space of the roof of the ground floor. In such a case it is incapable of exclusive possession so as to a title by adverse possession of the property. The defendants admittedly are tenants and the user of the roof of the ground floor has always been considered by the parties as permissive. The defendants had claimed a right of user of the roof of the ground floor and impliedly considered as part of amenity with the tenancy on the ground floor and this is the stand taken by the defendants till July 12, 1976 when there was a some terrace in the stand of adverse .possession, which the defendants have miserably failed to establish on the record of this suit prior to July 12, 1176. Accordingly, I bold issue No. 1 against the defendants.

(19) Issue No. 3 The averments made in the plaint are that the terrace floor even without any construction would have fetched an amount of Rs. 400.00 to Rs. 500.00 per month but the plaintiffs claim from the defendants a mense profits of Rs. 300.00 per month for a period of three years for the dispute portion. In the written statement, the plea of the defendants is that the demand of the plaintiff is highly excessive and unreasonable. Public Witness . 1 does not give any reasonable letting value of the space on the first floor. Public Witness . 2 again does not make his statement based on any comparable rents paid in the locality to other owners. He merely states that the plaintiffs would have fetched a sum of Rs. 300.00 per month for use and occupation of the property. The mesne profits have to be based on some cogent and independent evidence which has not been placed by the plaintiffs on the record. However, there is only an admission of D.W. 1 that if the plaintiffs had let out the space on the first floor it would have fetched a maximum rental value of Rs. 50.00 per month at that time. The plaintiffs are, therefore, not entitled to mesne profits beyond Rs. 50.00 per month and I hold issue No. 3 accordingly.

(20) Issue No. 4. Relief. The result of my findings on issues 1 and 3 is that the suit of the plaintiffs is decreed. It is declared that the defendants are in illegal and unauthorised occupation of the area on the terrace floor/first floor of property No. 5332, Chandrawal Road, Subzi Mandi, Delhi as shown yellow in the plan dated February 3, 1979 attached with the plaint including the room 'H' as shown in the

said plan. I also grant a mandatory injunction directing the defendants to demolish the unauthorised construction on the first floor/terrace floor of the said property. I further pass a decree in favor of the plaintiffs and against the defendants for delivery of possession of the portion on the first floor (terrace floor) of property No. 5332, Chandrawal Road, Subzi Mandi, Delhi in possession of the defendants either by themselves or through any person acting on their behalf. I also pass a decree for the recovery of Rs. 1,300.00 as mesne profits for a period of three years prior to the institution of the suit. The plaintiffs are awarded costs of the suit against the defendants.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com