

Suresh Kumar and Another Vs. Saroj Atal

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Court : Delhi

Decided On : Mar-01-2012

Judge : Valmiki J. Mehta

Appeal No. : RFA No. 482 OF 2011

Appellant : Suresh Kumar and Another

Respondent : Saroj Atal

Judgement :

VALMIKI J. MEHTA, J.

(ORAL)

1. The challenge by means of this Regular First Appeal (RFA) filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 29.1.2011 decreeing the suit filed by the respondent/plaintiff for possession and mesne profits with respect to the property being Flat No. T-1, **3rd Floor (Front Side)**, P-92A, Mayur Vihar Phase-I, Delhi. The impugned judgment is an ex parte judgment as the appellants/defendants failed to appear in the suit in spite of service. I am informed that the appellants/defendants had filed an application under Order 9 Rule 13 CPC to set aside the impugned ex parte judgment dated 29.1.2011, however, the application under Order 9 Rule 13 CPC has been dismissed, and the counsel for the appellants/defendants admits that the order dismissing the application under Order 9 Rule 13 CPC has not been

appealed against. The scope of the present appeal is thus confined to deciding the merits of the impugned judgment, on the position that there is no pleading filed or evidence led on behalf of the appellants/defendants.

2. The facts of the present case are that the respondent/plaintiff filed a suit for possession and damages of the suit property on the ground that the appellants/defendants had purchased a flat being the **first floor, back side**, in the subject property from Smt. Kamlesh Gautam, wife of Sh. Raj Kumar Gautam, and which flat was sealed by the bank, inasmuch as, the appellants/defendants failed to repay a loan for which this first floor flat was equitably mortgaged. When this flat was sealed by the bank, the appellants/defendants asked the respondent/plaintiff for a short stay in the suit property, which is the third floor flat, and this was allowed by the respondent/plaintiff on account of humane consideration. Since the appellants/defendants failed to vacate the property even after the original period for which they were allowed to occupy and for the extended period which is pleaded, ultimately, the subject suit for possession and mesne profits came to be filed.

3. The respondent/plaintiff proved the documents with respect to the suit property executed in their favour, being the Agreement to Sell, General Power of Attorney, Special Power of Attorney and receipt, all of which are dated 25.9.2001. Out of the aforesaid documents, the General Power of Attorney and Special Power of Attorney have been duly registered with the office of Sub-Registrar, Delhi. The respondent/plaintiff also proved and exhibited before the trial Court an election card, Ex.PW1/6, the legal notice dated 18.8.2010 as Ex.PW1/7, and the postal receipts pertaining to the same as Ex. PW1/8 to Ex.PW1/14.

4. As already stated above, since the appellants/defendants failed to contest the suit, there was no evidence led on their behalf, consequently, believing the evidence led by the respondent/plaintiff, the suit for possession was decreed.

5. Learned counsel for the appellants, on query from the Court, does not dispute that no right, title or interest is claimed by the appellants/defendants in the suit property. The rights which are claimed of ownership are only with respect to the two floors on the first floor which are said to have been purchased from Smt.

Kamlesh Gautam, wife of Sh. Raj Kumar Gautam. It is also not disputed that the appellants/defendants are persons who in fact availed of the financial limit from HDFC Bank, and it is the first floor flat which was sealed by the HDFC Bank in September, 2008, and which flat was given as equitable mortgage for the loan which was taken by the appellants/defendants from the HDFC Bank. One thing, therefore, is clear that with respect to one flat whatever ownership rights which the appellants/defendants had qua that flat were fully exercised, inasmuch as, qua that flat on the first floor loan was taken and equitable mortgage was created in favor of the HDFC Bank qua that flat. Therefore, it cannot be said that there is any equity in favour of the appellants/defendants as they themselves equitably mortgaged with the HDFC Bank the flat for taking loan and since the loan was not repaid, this flat on the first floor was sealed by the bank under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. So far as the second flat which was purchased on the first floor itself by the appellants/defendants from Smt. Kamlesh Gautam, wife of Sh. Raj Kumar Gautam, a suit for possession has already been filed by the appellants/defendants against Smt. Kamlesh Gautam and Sh. Raj Kumar Gautam. Therefore, with respect to both the flats which were purchased by the appellants/defendants from Smt. Kamlesh Gautam, wife of Sh. Raj Kumar Gautam, the position is clear in that qua one flat ownership rights have been exercised by equitably mortgaging the same with the HDFC Bank and qua the other flat there are disputes with Smt. Kamlesh Gautam and Sh. Raj Kumar Gautam for which the suit for possession has been filed.

6. Learned counsel for the appellant argues his case under two heads. The first argument was that the respondent/plaintiff failed to prove any license deed executed in favour of the appellants/defendants and therefore, the appellants/defendants cannot be said to be licensee of the respondent/plaintiff. The second argument is predicated on the basis of a recent judgment of the Supreme Court in the case of **Suraj Lamp Industries Pvt. Ltd. Vs. State of Haryana and Anr. 183 (2011) DLT 1(SC)** that the documents dated 25.9.2001 executed in favour of the respondent/plaintiff do not confer any ownership rights and therefore no suit for possession on the basis of such documents would lie.

7. Before adverting to the arguments as advanced on behalf of the appellants, it needs reiteration that there are no legal rights of the appellants/defendants qua the suit property on the third floor, and also, whatever legal rights were there with respect to the two first floor flats purchased by the appellants/defendants, rights qua such flats have been exercised by them i.e. one flat was equitably mortgaged and for the other flat for which possession was not got from Smt. Kamlesh Gautam, the suit for possession has been filed.

So far the arguments raised on behalf of the appellants/defendants are concerned, both of them are interrelated. The arguments are inter-related because if the documents on the basis of which the respondent/plaintiff claims ownership are hit by the judgment of Supreme Court in the case of **Suraj Lamp** (Supra), then the respondent/plaintiff cannot be said to be the owner of the suit property, and it is for this reason that the appellants/defendants have argued that the respondent/plaintiff is not entitled to possession of the suit property. It is argued on behalf of the appellants that if the respondent/plaintiff is not the owner of the suit property, consequently, they cannot be licensees of the respondent/plaintiff, and therefore, the suit for possession was bound to fail.

8. In my opinion, the issue in the present case is not ownership of the suit property as is known in law of the respondent/plaintiff, but the issue as to entitlement to recover possession of the suit property, even assuming strict ownership may not rest with the respondent/plaintiff. Of course, the judgment in the case of **Suraj Lamp** (Supra) squarely applies against the respondent/plaintiff in the facts of the present case because the documents in question executed in favour of the respondent/plaintiff are dated 25.9.2001 and the amended provision of Section 53A of the Transfer of Property Act, 1882 came into force just one day before i.e. on 24.9.2001, however, it would at best mean that ownership rights as is normally known would not rest with the respondent/plaintiff, however, possessory rights of the suit property cannot be disputed to be that of the respondent/plaintiff. These possessory rights were created in the year 2001 itself by means of the documents executed in favour of the respondent/plaintiff. In a suit for possession a plaintiff has to show better title i.e. entitlement than that of the defendant and in the present case, besides the fact that respondent/plaintiff has shown a better

entitlement to possession by virtue of the documents dated 25.9.2001 executed in her favour, the appellants/defendants themselves do not have any equities in their favour inasmuch as qua both the flats purchased by them rights have been exercised. Thus, even if the respondent/plaintiff fails to prove the ownership rights *stricto sensu* to the extent of entitlement of possession, the appellants/defendants cannot defend the suit for possession once no title or interest in the suit property is claimed by them. The respondent/plaintiff, therefore, need not strictly prove, that a license deed ought to have been executed before the suit for possession could be filed by respondent/plaintiff. A license is merely a right to enter and exit a property and for which there is no deed which is required to be drawn up. The stand thus of the appellants/defendants of alleged collusion between the respondent/plaintiff and Smt. Kamlesh Gautam-sister of the respondent/plaintiff, does not take the case of the appellants any further because the registered documents executed in favour of the respondent/plaintiff are of the year 2001 and admittedly appellants/defendants admit to have got possession of the suit property in 2008. I also take on record the statement of the counsel for the respondent/plaintiff that the relations of respondent/plaintiff with her sister have gone bad on account of the dishonesty of her sister-Kamlesh Gautam and her husband-Raj Kumar Gautam.

9. I may finally state that though I have given the detailed factual position, legal position, reasoning and conclusions above, the same are only in deference to the arguments raised on behalf of the appellants/defendants, however, appellants/defendants really have no case, inasmuch as, they have not contested the suit, were proceeded *ex parte*, their application to set aside the *ex parte* judgment has already been dismissed, the dismissal order has not been challenged further and there is therefore no pleading or evidence of the appellants/defendants in the trial Court.

10. In view of the above, I do not find any reason to interfere with the impugned judgment and decree. The present appeal is, therefore, dismissed, leaving the parties to bear their own costs.