

Haider Ali vs Harshad Patel on 17 December, 2021

Author: Prathiba M. Singh

Bench: Prathiba M. Singh

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JOSHI
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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ RSA 87/2015
HAIDER ALI Appellant
Through: Mr. Ratnesh Bansal & Ms. Ashu
Singh, Advocates (M-9810713582)
versus
HARSHAD PATEL Respondent
Through: Mr. P.K. Rawal & Mr. Tarun
Aggarwal, Advocates (M-
9810008623)
CORAM:
JUSTICE PRATHIBA M. SINGH
ORDER

% 17.12.2021

1. This hearing has been done in physical Court. Hybrid mode is permitted in cases where permission is being sought from the Court. CM APPLs. 16990/2015, 21030/2016, 28950/2019, 13448/2021, 43254/2021

2. These are applications seeking early hearing or in the alternative, directions for payment of use and occupation charges by the Appellant to the Respondent for occupation of property being A-60, Sarojini Naidu Park, Shastri Nagar, Khureji, Delhi, approximately measuring 50 sq. yds. (hereinafter "suit property"). The present appeal arises out of the impugned order/ judgment dated 26th November, 2014, in RCA 102/2013 titled Sh. Harshad Patel v. Sh. Haider Ali by which the Appellate Court had decreed the suit for possession in favour of the Respondent-Plaintiff, allowing the appeal against the dismissal order of the Trial Court dated 19th November, 2011 in Suit No.264/2007 titled Sh. Harshad Patel v. Sh. Haider Ali.

3. The Respondent - Mr. Harshad Patel (hereinafter "Plaintiff") had filed a suit against the Appellant - Sh. Haider Ali (hereinafter "Defendant") Digitally Signed By:DEVANSHU JOSHI Signing Date:20.12.2021 16:57:56 for possession under Section 5 of the Specific Relief Act, 1963. Initially, vide judgment dated 17th March, 2004 in Suit No.77/04 titled Harshad Patel v. Sh. Haider Ali, the suit was dismissed. The same was appealed against and the Appellate Court vide order dated 15th May, 2006 in RCA No.19/04 titled Harshad Patel v. Sh. Haider Ali, had set aside the said order and

remanded the matter in the following terms:

"13. However, I find from the issues framed in the trial court there is no issue framed concerning the onus of the defendant in proving his title to the property though there is a clear assertion in the written statement filed by him. The defendant has taken a stand that in para 1 at page five of written statement as "that the defendant is living since last more than 30 years and the same was purchased by the defendant from one Shanti Devi wife of R. Prashad as per the power of attorney which copy is attached herewith and further neither the plaintiff nor Jamanat Ali, as well as nor Jaidayal or any other person having any right of construct with the suit property.... "

14. in view of the above assertion, the suit requires further inquiry as to find out the legality of the title of the defendant over suit schedule property. In the circumstances, I find that this is a case which demands remanding to gather the evidence and to return the findings on this disputed question of fact. In the result, the ld. trial court is to return a finding on the following issue which be treated as an additional issue as under:

1. Whether the defendant has any title, right or interest in the schedule property better than that of the plaintiff? OPD

15. The Ld. Court below shall look into answering the issue by re opening the case of the parties and Digitally Signed By:DEVANSHU JOSHI Signing Date:20.12.2021 16:57:56 defendant be given an opportunity to adduce such oral and documentary evidence if any with a right to the plaintiff to lead such rebuttal evidence. Upon such gathering of evidence, the Ld. Court below will answer the issues afresh after hearing and pass appropriate judgment in accordance with law. In result, I pass the following order:-

The appeal is disposed of. The impugned judgment decree dated 17.03.04 in suit no. 77/04 is hereby stands set-aside.

The matter is remanded back to the trial court for disposal of the case in the light of the observations made above. The parties shall appear before the ld. Court below on 27.07.06.

Upon appearance, the defendant be given one opportunity to lead to evidence for proving the additional issue framed in the course of this order.""

4. In the second round, on 19th November, 2011, the suit was again dismissed. However, vide the impugned judgment, the Appellate Court had decreed the suit.

5. When the matter was listed before this Court on 27th February, 2015, a statement was made by the Plaintiff that he would not execute the decree against the Defendant till the next date. On 15th May, 2015, a question of law was framed and stay of the impugned order was granted in the following terms:

"1. The only substantial question of law which would arise for consideration in the instant case is as under:-

"Whether the finding returned by the first appellate court suffers from any perversity in the light of the evidence produced by the parties? If so, its effect?"

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2. The matter would require consideration in detail.

3. ADMIT.

4. List in the category of 'Regulars' at its own turn.

5. In the meantime, the operation of the impugned order is stayed till further orders."

6. Since then, the matter has been adjourned at the request of the Defendant on 20th October, 2015, 17th December, 2015, 15th January, 2016, 18th July, 2016, 27th September, 2016, 9th December, 2016, 20th March, 2017, 16th August, 2017, 10th April, 2018, 22nd May, 2018, 8th August, 2018, 22nd April, 2019 and 16th July, 2019. Costs have also been imposed on at least two to three occasions and the appeal has not been heard. Even before this Court, on 22nd December, 2020, none appeared for the Defendant. Consequently, Court notice was issued. Despite the same, on 11th February, 2021 and on 9th April, 2021, none appeared. On 22nd October, 2021, the Court passed a detailed order and after the order was passed, at around 3:30 p.m., the Defendant had appeared and was apprised of the order. On 27th October, 2021, on behalf of the Id. counsel for the Defendant, some submissions were heard in the matter through video conferencing. However, on 3rd December, 2021, an adjournment was sought again on behalf of the Defendant due to bereavement in his family.

7. Today, the matter has been taken up and the Defendant is also present in Court. The admitted position is that the Defendant is in occupation of the suit property despite the decree in favour of the Plaintiff, being operative since 26th November, 2014. No use and occupation charges have been paid by the Defendant to the Plaintiff. It is the settled position in law that when there is a decree of possession, use and occupation charges would have to be Digitally Signed By:DEVANSHU JOSHI Signing Date:20.12.2021 16:57:56 paid, if the occupant enjoys the property in view of an interim order, in terms of the judgment of the Supreme Court in Atma Ram Properties (P) Ltd. vs. Federal Motors Pvt. Ltd., [(2005) 1 SCC 705], as also the interim order dated 29th October, 2014 in Phool Kumar & Ors. Vs. Shyambir Tyagi, SLP (C) No.29174/2014. The relevant extract from Atma Ram(supra) is as below:

"18. That apart, it is to be noted that the appellate court while exercising jurisdiction under Order 41 Rule 5 of the Code did have power to put the tenant-appellant on terms. The tenant having suffered an order for eviction must comply and vacate the premises. His right of appeal is statutory but his prayer for grant of stay is dealt with

in exercise of equitable discretionary jurisdiction of the appellate court, file ordering stay the appellate Court has to be alive to the fact that it is depriving the successful landlord of the fruits of the decree and is postponing the execution of the order for eviction. There is every justification for the appellate Court to put the tenant-appellant on terms and direct the appellant to compensate the landlord by payment of a reasonable amount which is not necessarily the same as the contractual rate of rent. In *Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd. and Anr.*, this Court has held that once a decree for possession has been passed and execution is delayed depriving the judgment-creditor of the fruits of decree, it is necessary for the Court to pass appropriate orders so that reasonable mesne profits which may be equivalent to the market rent is paid by a person who is holding over the property."

8. On the previous date, the parties had been requested to inform the Digitally Signed By:DEVANSHU JOSHI Signing Date:20.12.2021 16:57:56 Court as to what would be the market rent. The Plaintiff has claimed in his applications Rs.35,000/- per month as use and occupation charges. Mr. Rawal, Id. Counsel for the Plaintiff however submits that he has placed on record a lease deed whereby an amount of Rs.4100/- per month is payable for a 25 sq. yds. property.

9. On the other hand, Id. Counsel for the Defendant submits that the Defendant claims ownership in the property and hence *Aatma Ram(supra)* is not applicable. Admittedly, the Defendant does not have any registered documents in his favour. He claims title through one Ms. Shanti Devi. He further submits that the Defendant is not in the financial condition to pay use and occupation charges and that the Court ought to reserve judgment in the matter and pass the final judgment, as he does not wish to make any oral submissions.

10. However, as per the Plaintiff there was an earlier suit which the Defendant had filed against the Plaintiff qua this suit property, which suit had been dismissed. Id. counsel for the Plaintiff submits that the Defendant was an attesting witness in the documents which were executed by Sh. Jai Dayal, in his favour. One of the receipts of the Plaintiff, is stated to be a registered receipt. A statement under Order X CPC is stated to have been recorded in this earlier suit filed by the Defendant, where he admits to being the attesting witness. Id. counsel for the Defendant disputes that such a statement has been recorded and also contends that the receipt which is registered does not mention the address of the suit property.

11. The Court has heard some submissions in the matter and it is clear that there are at least two earlier proceedings which would have to be referred to in order to arrive at a decision in this second appeal, as the Digitally Signed By:DEVANSHU JOSHI Signing Date:20.12.2021 16:57:56 question of law has already been framed. The records of the said two suits may also be required for adjudication of this second appeal.

12. Considering the fact that the Defendant is enjoying a stay and continuing to occupy the suit property since 2015 and it has been six years and several adjournments have been taken by the Defendant in this matter, this Court is of the opinion that in view of the settled legal position on use and occupation charges, the Defendant would be liable to pay use and occupation charges in this

matter. Needless to add, the same shall be subject to outcome of this second appeal and the Court would either grant adjustment or direct refund, if any, upon the final adjudication of this appeal. Under these circumstances, these applications are disposed of with the following directions:

- i) For the period from 15th May, 2015 till date, the Defendant shall pay to the Plaintiff a sum of Rs.1,50,000/- for past occupation as lump sum use and occupation charges, on or before 15th February, 2022, subject to which, the interim order shall continue.
- ii) Going forward, the Defendant shall pay a sum of Rs.3,500/- per month to the Plaintiff on or before the 10th of every month.
- iii) It is made clear that if there is any default in payment, the interim order shall stand automatically vacated.

13. With these observations, all applications are disposed of.

14. List for hearing, on 25th April, 2022, on top of the board.

PRATHIBA M. SINGH, J DECEMBER 17, 2021 Rahul/Mansi