

**IN THE HIGH COURT OF DELHI AT NEW DELHI**

**SUBJECT : CODE OF CIVIL PROCEDURE**

Date of Judgment: 10.3.2011

RSA No.46/2011

VIRENDER KUMAR & ANR.

.....Appellants

Through: Mr.Atul Kumar, Advocate.

Versus

JASWANT RAI & ANR.

.....Respondents

Through: Nemo.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J. (Oral)

1. This appeal has impugned the judgment and decree dated 02.11.2010 which has endorsed the finding of the trial judge dated 9.4.2010 whereby the suit filed by the plaintiff Jaswant Rai seeking relief of mandatory and permanent injunction against the defendant had been decreed. This decree had been passed on an application filed by the plaintiff under Order XII Rule 6 of the Code of Civil Procedure (hereinafter referred to as "the Code").

2. This is an unfortunate dispute between a father and a son. Plaintiffs are the parents of defendant no.1; defendant no.2 is their daughter-in-law. Plaintiff claims himself to be the owner of the property bearing No.H/1-A, Nanda Block, Mahvir Enclave Part-I, New Delhi. Defendants had been permitted to occupy and reside on the first floor of the property comprising of two rooms. Defendants thereafter started torturing and harassing their parents; they also forcibly occupied one room on the ground floor. On resistance, the plaintiffs were beaten by the defendant son and his wife. Various complaints were made interse between the parties. On 10.10.2006 a

publication had been effected by the plaintiff in “Vir Arjun” disowning the defendant. Present suit was thereafter filed.

3. The specific contention of the plaintiff in para no.2 of the plaint was that he is the owner of the suit property. In the written statement, there was no denial. There was an evasive denial that the contents of para 2 are wrong and denied; in fact the defence raised by the defendant was that he had constructed the first floor of the suit property out of his own funds; further that defendant no.2 had been harassed her in-laws for less dowry; the plaintiffs were misbehaving with the defendants.

4. In the course of the proceedings before the trial judge an application under Order XII Rule 6 of the Code had been filed. No reply to the said application had been filed. The findings of the trial judge on this score were returned as follows:

“7. In my considered opinion also the present suit is liable to be decreed at this stage itself in view of the averments taken in the written statement. Though the ownership of the plaintiffs has been disputed on the ground that the suit property is situated in an unauthorized colony this has no bearing on this ownership of the plaintiffs over the suit property. Plaintiffs have categorically averred in para no. 2 of the plaint that they have purchased the suit property vide registered documents. Apart from vague denial of these facts, it has been inter-alia been submitted in reply to para no. 2 of the application that the first floor of the suit property has been constructed by the defendants from their own funds. Even if it is assumed that it is the defendants who have constructed the first floor of the property within their own funds the same does not give them any right or title to the suit property on the first floor of the suit property. It is well settled law that a mere construction of a superstructure cannot give rise to an interest in the land beneath the superstructure. Further though the defendants have asserted that they have been wanting to pay the rent of Rs.400/- to the plaintiffs with respect to the room on the ground floor, as per the own case of the defendants the plaintiffs have never accepted this rent. Merely because the defendants want to become the tenants on the ground floor does not lead to the conclusion that there is a tenancy created in their favour by the plaintiffs. Even the DRC petition filed by the defendants u/s 27 of the DRC Act was dismissed by the Ld. ARC on the ground that since the plaintiffs (herein) were disputing the relationship of landlord and tenant, the defendants (herein) could not be allowed to deposit the rent and were at liberty to raise the said issue in separate proceedings.

8.As narrated hereinabove the plaintiffs are the parents of the defendant no.1 and are senior citizens and they only wish to leave peacefully in the premises owned by them. The defendants no.1 being their son and defendant no.2 being their daughter in law were merely given a right to stay in the suit property and in such facts I am of the considered opinion that the defendants being mere licensees can be directed to vacate the suit property and that the suit filed for mandatory injunction is maintainable and plaintiffs are not required to file a suit for possession. I am also of the considered opinion that the averments made in the written stamen do not raise a defence at all to the claim of the plaintiffs and there is no disputed relevant issues raised by the defendants which require trial.

9.Accordingly, suit of the plaintiff is hereby decreed and defendants are directed to vacate one room on the ground floor and first floor of the suit property bearing house No.RZH/1/A, Nanda Block, Mahavir Enclave, Part-I, New Delhi as shown in the site plan (which for the purpose of identification has been exhibited as Ex.Cw/A) immediately. The defendants are also hereby permanently restrained from interfering in the peaceful enjoyment of the suit property by the plaintiffs. Decree sheet be prepared accordingly. File be consigned to record room.”

5. There findings were endorsed in appeal. The impugned judgment had inter alia recorded its finding in para 22 onwards they read as follows:

“22. The Id.Trial Court rejected the contentions of the defendants that the property being situated in unauthorized area, the plaintiffs for that reason alone can not be the owners thereof. The trial court relied upon the fact that the plaintiff purchase the suit property by virtue of registered general power of attorney, will and the fact that it was situated in an authorized colony will not make any difference to the title of the plaintiffs.

23. The allegation of the defendant that he had constructed first floor of the suit property was rejected on the plea that a mere construction of a super structure can not given rise to an interest in the land beneath the super structure.

24.The trial court also noticed that the application of the defendants under section 27 of DRC Act was dismissed by learned ARC as plaintiffs were denying the relationship of landlord and tenant.

25. While assailing the impugned order, learned counsel for the defendants Sh. Sharad Nagpal has argued that the suit property was purchased by selling ancestral property of the daughter’s of defendant no.1 situated at Rajpura, District Patiala Punjab. Therefore suit property was purchased by plaintiff as Karta of HUF and not as his self acquired property.

26. However, the learned counsel for the appellant conceded that there is no such averment in the written statement and there is no application in this appeal for amendment of written statement for taking the objection that the suit property was purchased by selling ancestral property of the daughters of defendant no.1.

27. When a ground is not raised in written statement, the same cannot be taken in appeal.

28. Therefore, no benefit can be given to the defendant regarding their plea that the suit property was purchased from sale of ancestral property of the daughters of defendant no.1.

29. The defendant's objection that the plaintiffs should have filed a suit for possession and not a suit for mandatory injunction is also without any merits because a suit for mandatory injunction lies against a licensee after the licence is revoked. (See *Joseph Severance & Ors Versus Mathew & Ors*. JT 2005(8) SCC 509).

30. In this appeal, the defendants have given up their case that first floor on suit property was constructed by the defendants as there is no such ground in the appeal. Therefore no benefit can be given to the defendants of this contention as they have themselves given up the said objection in this appeal.

31. However, a licensee's possession is only permissive and he can be thrown out at any time. (See *Sultan Begum versus Prem Chand Jain*: AIR 1997 SC 1006).

32. As per Section 52 of the Indian Evidence Act, 1882, License is defined as under:-

“52. “Licence” defined.- Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence.

33. But relation between the plaintiff and defendant no.1 is not of a licensor-licensee in its strict sense.

34. Concept of permissive possession is different from concept of a licensor. A child lives with his parents in the house of the parents under a permissive possession and not strictly as a licensee. No rights akin to the rights of a licensee are available to a child. (*Ramesh Kumar Handoo Vs. Binay Kumar Basu*: RSA 286/07 dated 19.11.2007).

35. Therefore, even if a son contributes in the construction of part of property owned by his father it cannot be said that the son acting upon the

license has executed a work of permanent character and incurred expenses with the execution.

36. The license had come to an end impliedly when public notice dated 10.10.2006 was published in newspaper "Veer Arjun" disowning the defendants and license was revoked specifically on 09.11.2006 when legal notice claiming possession from defendants was got served by the plaintiff.

37. Therefore, none of the grounds raised in the appeal is sufficient to interfere in the judgment passed by Id.Trial court. The appeal is therefore dismissed. Let lower court record be sent bank. Decree sheet be prepared and file be consigned to record room."

6. This is a second appeal. It is yet at the stage of admission. On behalf of the appellant, it has been contended that these findings are illegal and perverse and there is no absolute and unequivocal admission on behalf of the defendants in the written statement. The defendants were permissive user in the suit property; they could not have been ousted in this manner.

7. In the pleadings i.e. in para 2 of the plaint it has specifically been averred by the plaintiff that he is the owner of the suit property; there is no specific denial. The defendants have not set up any independent claim to the suit property; they were granted permissive user by their parents to occupy two rooms on the first floor. The impugned judgment had noted that the counsel for the defendants before the first appeal court had in fact given up his plea that the suit property had been purchased by selling ancestral property of the daughter of defendant no.1 situated at Rajpura, District Patiala Punjab; this plea has admittedly never been taken in the written statement. Further the contention of the defendants that although their parents had not admitted them as tenants yet had have moved an application under Section 27 of the Delhi Rent Control Act to deposit rent has also been dismissed; this was on the specific plea taken up by plaintiffs that the defendant was never a tenant of the suit property. Even assuming that the defendant had raised money to construct the rooms on the first floor, it would not by itself give any right to the defendant in the land beneath as raising of the super structure would not have made him owner of the suit land. Legal notice dated 19.11.2006 had also admittedly been served upon the defendants terminating their licence which was duly replied by them on 17.11.2006.

8. On an application under Order XII Rule 6 of the Code before a decree can be passed the admissions of the defendant must be clear and

unequivocal. A decree can be passed on such admissions. These admissions may be in the 'pleadings or otherwise'. The defendant has admitted that the plaintiffs are the owners of the suit property; there is no dispute that the only authorization of the defendants to occupy the suit property was in his capacity as son of the plaintiffs. It was a permissive user granted by the plaintiffs to the defendants. Because of the harassment suffered by the plaintiffs the defendants had been publicly disowned by a publication effected on 10.10.2006 in the "Vir Arjun". The plaintiff had also filed a Writ Petition No.1266/2008 seeking protection against his life and property.

It was in these circumstances and in this background that the present suit had been filed. The plaintiffs were rightly entitled to the relief whereby the defendants had been directed to vacate the suit property i.e. one room on the ground floor and two rooms on the first floor and further restrained from interference in the peaceful enjoyment of the property by the plaintiffs. They were unauthorized occupants and having no legal right or title in the suit property they were rightly ordered to be evicted. The impugned judgment calls for no interference. No substantial question of law having arisen, the appeal is dismissed in limine.

Sd/-  
INDERMEET KAUR, J.