

Equivalent citations: AIR 2005 Delhi 144

Bench: M Sharma, G Mittal

Prabhu Dayal vs Roop Kumar And Ors. on 14/10/2004

JUDGMENT

Gita Mittal, J.

1. This appeal is directed against the judgment and decree dated 6th February, 1991 passed by the learned Additional District Judge, Delhi in Suit No.60/2001 (Old Suit No.19/1991) decreeing the suit filed by the respondent No.1.

2. One Roop Kumar(respondent no.1 herein) brought a suit for permanent and mandatory injunction against Prabhu Dayal(appellant herein). The appellant and respondent nos.2 to 7 (arrayed as defendant nos. 2 to 7 in the suit) were sons and daughters of late Shri Kapoor Chand. Plaintiff averred that his father Kapoor Chand was a tenant in shop no.7707-07, Dharam Pura Lodge, Clock Tower, Subji Mandi, Delhi(hereinafter referred to as the 'suit property') for the last 40 to 55 years. They carried on business originally of cycle tyres and repairs and laterly sold juice. They were lastly doing the business of cotton in the name of Sharma Cotton Cording and Flour Mills. Shri Kapoor Chand died inter state on 12th November, 1990 and his brother Vasudev died a achelor on 25th November, 1990. According to the plaintiff Shri Vasudev some time lived in the shop and sometimes with the plaintiff. The plaintiff claimed that he had executed a Will dated 22nd November, 1990 bequeathing his entire movable and immovable properties in favor of the plaintiff.

3. According to the plaintiff, defendant no.1-Prabhu Dayal was an employee of Shri Vasudev in the business carried on in the shops in dispute. Since the business of making quilts etc. was carried out late into the night the defendant no.1(appellant here in) sometimes was permitted to reside in the shops. On demise of both Shri Kapoor Chand and Shri Vasudev the plaintiff had requested to Shri Prabhu Dayal, defendant no.1 that his services were no longer required and asked him to leave the shop in disput. Defendant no.1 requested for permission to stay till he made alternative arrangements but later turned dishonest.

4. As the license of the defendant no.1 had been terminated, the plaintiff brought the suit seeking the following prayers:-

The plaintiff prays that this Hon'ble Court be pleased to pass a decree in favor of the plaintiff and against the defendant no. 1.

i) for permanent injunction restraining the defendant no. 1 from entering the shops no. 7706-07, Dharam Pura Lodge Clock Tower, Subjzi Mandi, Delhi; or in the alternative for mandatory injunction commanding and directing the defendant no. 1 to vacate the said shops no. 7706-07 Dharam Pura Lodge Clock Tower, Subzi Mandi Delhi, and/or

ii) for permanent injunction restraining the defendant no. 1 from dealing in any manner whatsoever or disposing off or appropriating to himself any of the assets or properties of Shri Vasu Dev alias Vasu Dev detailed in para 5 of the plaint; and/or

iii) grant permission to the plaintiff under order 2 Rule 2 C.P.C. As per para 14 hereinabove.

iv) award costs of the suit to the plaintiff against the defendant no. 1; and/or

v) grant such other and further relief as may be deemed fit and proper in the facts and circumstances of the case.

5. Defendants 2 to 7, brothers and sisters of the plaintiff admitted the claim of the plaintiff. They sought permission to visit the shops in dispute and to safeguard their interest in the business and make inspections. Defendant no.8 i.e. the WAKF Board also filed a written statement setting up a case that only Shri Vasudev Sharma was a tenant in the shops in dispute and that the tenancy rights could not have been willed away by any person.

6. In the instant matter we are concerned only with the rights of the defendant no.1 to occupy the shop in question. The defendant no.1 in its written statement set up following claim:-

Preliminary Objections That the defendant no.1 has been serving late Shri Vasudev Sharma and used to take care of him during his lifetime. In addition to this, the defendant no.1 has been doing business in partnership with late Shri Vasudev Sharma under the name and style of /s Sharma Prabhu Dayal and Co. vide deed of partnership dated 12.11.1990 commenced orally in the year 1980 by investing capital of about Rupees one lakh in equal shares which was subsequently reduced in writing. The answering defendant was authorised to operate the bank account of the partnership business. The actual business was being run by the answering defendant while late Shri Vasudev Sharma was a sleeping partner and used to supervise the work as per convenience of his health. He had no issue. Further the death of late Shri Vasudev Sharma, the answering defendant is the sole proprietor of the business known as Sharma Prabhu Dayal and Co. Earlier it was under the name of Sharma Flour Mills and Cotton cording Machine in the premises in dispute comprising of shop no.7706-07 Dharampur Lodge, Ghanta Ghar, Subzi Mandi, Delhi. The defendants no.2 to 7 late Kapoor Chand, father of the plaintiff or the plaintiff never remained in possession nor has any right, title or interest or concern either in the premises in dispute or in the business or in the assets. The plaintiff has obtained ex-parte injunction order by making willful false statements in the plaint and suppressing the truth from this Hon'ble Court.

On merits Para 4 is wrong and denied. The defendant no.4 has been doing business in partnership since 1980 which terms were reduced in writing vide partnership deed dated 26.10.90 by investing a capital of about Rs. one lakh in equal shares on the machinery, tool and other assets. After the death of late Vasudev Sharma the entire assets and liabilities have devolved upon the answering defendant who has become the sole proprietor of the concern M/s Sharma Prabhudayal and Co.

7. The defendant no.1 had, therefore, set up a plea of being an heir by testamentary disposition as well as the surviving partner of late Shri Vasudev and claimed exclusive possession of the suit property. He pleaded that the suit for mandatory injunction of the plaintiff were incompetent. The partnership dated 26th October, 1990 was set up by the defendant no.1 besides the Will dated 31st August, 1989 in his favor.

8. The matter proceeded to trial on the following issues framed on 24th March, 2003:-

1. Whether the deceased Vasu Dev had executed any will dated 22.11.1990, as propounded by the plaintiff? If So, whether the said Will was validly executed in sound disposing state of mind?
2. Whether the plaintiff has no locus standi to file the present suit?
3. Whether the suit has not been properly valued for the purpose of court fee and jurisdiction?
4. Whether the defendant no. 1 has inherited the tenancy right as alleged in para 8 of the written statement?
5. Whether the plaintiff is entitled to the relief as claimed?

9. The plaintiff appeared in the witness box himself and examined two witnesses in support of the Will dated 22nd November, 1990. The defendant had filed his affidavit which was tendered in evidence by him. The defendant was subjected to an extensive cross-examination on his deposition on affidavit.

10. After examination of the entire evidence on record, the learned trial judge returned findings on all issues in favor of the respondent no.1 and decreed the suit of the plaintiff vide judgment and decree dated 27th July, 2004 This judgment has been impugned before us principally on two contentions which are as follows:-

(i) The plaintiff's plea of the defendant no.1 being an employee of late Shri Vasudev was based on no evidence.

(ii) irrespective of the plea set up by the defendant no.1 as to the nature of his possession i.e. either as the surviving partner of the partnership firm or as heir of late Shri Vasudev under the Will in his favor which was Exhibit DW-1/DA dated 26th October, 1990, the defendant no.1 was in settled possession of the suit property and could be evicted only by a decree of the court only in a suit for possession. No suit for mandatory injunction directing the defendant no.1 to vacate the suit property could lie. The judgment and decree was liable to be set aside for this ground alone.

11. We have heard learned counsel for the parties and have been taken through the entire record. We may right at the inception deal with the two Wills set up respectively by the plaintiff and defendant no.1. During the course of arguments we were informed that both the parties had filed petitions seeking probates of the respective Wills (plaintiff's will dated 20th February, 1990 and defendant's Will dated 31st August, 1989) in their favor. Both the Wills were disbelieved by the Probate Court and the Probate Petitions dismissed. These adjudications were not further impugned and have attained finality. As such we are not required to return a finding on the testamentary dispositions allegedly made by late Shri Vasudev.

12. We may now deal with the two contentions aforesaid, the first relating to the nature of relationship of defendant no.1 to late Shri Vasudev.

13. We find that the learned trial judge has found that the defendant no.1 was an employee of late Shri Vasudev Sharma at the shop. It has been brought on record that defendant no.1. was running the shop during the life time of Shri Vasudev Sharma with his permission. On the death of Shri Vasudev Sharma the permission to run the shop came to an end. The defendant no.1 in para 3 of his written statement reproduced hereinabove has admitted that he was serving late Shri Vasudev Sharma and used to take care of him during his life time. In his cross-examination, the defendant no.1 had stated that when he came to the shop initially he was only 12 years of age. It is the admitted case of the defendant no.1 that he obtained access to the suit property only by virtue of his service with late Shri Vasudev Sharma. It is in answer to the case of the plaintiff that defendant no.1 tried to set up a case of title under the Will dated 31st August, 1989. The defendant took up a further plea that he was occupying the premises as a partner of late Shri Vasudev Sharma under an oral partnership in the year 1980 which was adduced into writing on 26th October, 1980. The defendant no.1 claimed that this partnership deed was attested by the Notary Public on 12th November, 1990.

14. This partnership deed in original was produced on record before the learned trial judge as Exhibit DW-1/A. We have scrutinised this document as the same is contended to be a forged and fabricated document on the part of the defendant no.1 Examination of this document would show that it does not bear the signatures of late Shri Vasudev Sharma on all the pages. The stamp paper does not appear to have been purchased in the name of either of the partners. The defendant no.1 appears to have signed only the last page of the deed. Pages 1 and 2 are not signed by him. Page no.2 of the deed is not signed by either Vasudev Sharma or by the defendant no.1. Furthermore there is no explanation forthcoming from the side of the defendant no.1 as to the delay on attestation and notarisation of the partnership deed. It has come in the cross-examination of the defendant no.1 that Kapoor Chand who was real brother of Vasudev Sharma had expired on 12th November, 1990 and further that Shri Vasudev Sharma himself had been in and out of

hospitals on account of ill health since 14th November, 1990. The typing appearing at pages 1 and 2 of the partnership deed was different from each other. The partnership deed appears to have bear the signatures of two attesting witnesses. Neither of these witnesses nor the Notary Public was produced in evidence. From the cross-examination of the defendant no.1, it appears that Shri Mahavir Prasad was a witness to both the alleged partnership deed as well as to the Will dated 31st August, 1989 propounded by the defendant no.1. This witness was disbelieved by the probate court and perhaps for this reason he was not produced in the witness box.

15. The partnership set up by the defendant no.1 is to be disbelieved also for the reason that he set up a false plea of having invested capital of Rs. one lac in equal shares Along with Shri Vasudev Sharma in the partnership business in the year 1980. Upon cross examination the defendant no.1 retracted and admitted that he had not invested any amount whatsoever. The defendant no.1 attempted to set up a case that he had been told by Shri Vasudev that the defendant no.1 had capital in the business on account of his working at the shops. The defendant no.1 could not produce an iota of evidence in support of having any aspect of the partnership having been given effect to. We have, therefore, no hesitation in agreeing with the trial court that the alleged partnership deserved to be disbelieved.

16. In any case, the material fact in the instant case is the fact that the defendant no.1 did not set up any plea that he came into the possession of the suit property by virtue of the partnership deed. We may appropriately set out the few material terms of even the partnership deed as set up by the defendant no.1, which are as under:-

1. That the party of the first part Sh. Vasdev Sharma is the tenant in the premises shop no.7706 and 7707, Dharampura Lodge, Ghanta Ghar Chowk, Subzi Mandi, Delhi and the rent of Rs.26.24 p. only that is at the rate of Rs.13.12p. Only per shop respectively for the last more than 40 years and the tenancy will continue will the party of first part and the party of the second part will have to do nothing with the tenancy. However the possession will be a joined possession. The party of the first part will being old in firm person and agreed to be a sleeping partner, and as agreed to just sitting the shop and superwise the work as per convenience to his health.

8. That on the death of any of the partners/parties the survived party shall continued the business in the name of the firm. In case of the death of first party of all the capital, goods, machinery and tools and extra with all the money in the account other firm the second party are is legal heirs will possession own everything and can the business with the consent of the landlord. Because the first party has got no issue and alone. He has been looked after and served very nicely by the second party and his children.

17. Therefore, even as per the case set up by the defendant no.1 he has no right to the tenancy or to occupy the suit property. In any event, as per the document relied upon by the defendant no.1, the partnership stood dissolved upon the death of Shri Vasudev on 28th of November, 1990.

18. In this background it is necessary to examine the nature of possession of the defendant no.1 and protection, if any, available to him in law.

19. The expression possession fell for consideration in judgment reported at 1994(30) DRJ 597 entitled Shri Sham Lal Vs. Rajinder Kumar and others. It was held as under:-

13. Possession is flexible term and is not necessarily restricted to mere actual possession of the property. The legal conception of possession may be in various forms. The two elements of possession are the corpus and the animus. A person though in physical possession may not be in possession in the eye of law, if the animus be lacking. On the contrary, to be in possession, it is not necessary that one must be in actual physical contact. To gain the complete idea of possession, one must consider"

- (i) the person possessing,
- (ii) the things possessed and,
- (iii) the person excluded from possession.

A man may hold an object without claiming any interest therein for himself. A servant though holding an object, holds it for his master. He has, therefore, merely custody of the thing and not the possession which would always be with the master though the master may not be in actual contact of the thing. It is in this light in which the concept of possession has to be understood in the context of a servant and a master.

20. It is settled law that possession of a servant is possession of the real owner. The defendant no.1 having been an employee of late Shri Vasudev Sharma cannot be said to be having any interest in the suit property. Such occupation by a servant does not entitle him to exclude his master and the person having the rights in the property from his possession or exercising right to possess the suit property.

21. We are unable to hold that the defendant no.1 was in such settled possession as would entitle him to exclude his master from enjoying or claiming possession of the property or as would entitle to compel the master from sitting away from his own property. The defendant no.1 was permitted entry into the suit property only because he was a servant of late Shri Vasudev when he was 12 years of age. The defendant no.1 has failed to disclose the time or the manner in which he came into exclusive possession even. As such we would agree with the learned trial judge that the defendant was merely in unauthorised occupation of the premises inasmuch as the license of the defendant no.1 stood terminated upon the death of Shri Vasudev on 25th November, 1990 and gain whether plaintiff asked the defendant no.1 to vacate the suit premises.

22. The Will relied upon by the defendant no.1 stands disbelieved and rejected by the probate court. We are bound by the findings recorded by the probate court which have attained finality. It is thus apparent that the defendant no.1 had no right or entitlement to occupy the suit premises on account of succession under a testamentary dispossession by late Shri Vasudev Sharma. We have already found that the defendant no.1 had no right whatsoever to occupy the premises by virtue of the partnership date 26th October, 1990.

23. In support of the objection to the maintainability of the plea defendant no.1 has relied upon a judgment reported at AIR 1964 JandK 99 entitled Milka Singh and others vs. Diana to contend that the suit was not maintainable. Counsel for the appellant contended that even if the plea of termination of license of the defendant no.1 was accepted, the defendant no.1 did not become an unauthorised occupant and the plaintiff was bound to have filed a suit for possession which would be covered under Section 7(iv) of the Court Fee Act, 1870. The suit in the instant case being a suit for mandatory injunction on which court fee had been affixed in accordance with Section 7(iv)(d) of the Court Fee Act, 1870 was not competent and was liable to be dismissed.

24. In order to test this plea, which is to be examined in the light of our finding that the defendant no.1 was a mere licensee which stood terminated on the death of Shri Vasudev Sharma we may advert to the valuation given by the plaintiff in the plaint:

13. That the valuation of the suit for the purposes of Court fee and jurisdiction is as under :

Relief Value for Value for Court C/fee jurisdiction fee paid

1. for the relief of

permanent injunction

restraining the

defendant no.1 from

entering the said

shops 130/- 130/- Rs.13/-

In the alternative for

Mandatory injunction

directing the defendant

no.1 to vacate the

said shops 25000/- 25000/- Rs.2100/-

2. for permanent

injunction restraining

the defendant no.1

from dealing with or

appropriating any of

the assets proeprty of

Shri Vasu Dev including

the Goods lying in the

said shops and FDRs in

the Subzi Mandi Branch

of Punjab National Bank,

Delhi 130/- 130/- Rs.13/- _____

Rs.2126/-"

25. In its written statement the defendant no.1 had set up a vague plea that the suit was not valued appropriately for the purpose of Court Fee and jurisdiction and in reply to para 13 stated as under:-

13. Para 13 is incorrect and denied. The suit is not property valued for the purposes of the Court fee and jurisdiction.

26. It was also held by the Division Bench of the Jammu and Kashmir High Court in Milka Singh's case(supra) that a mere license does not create any estate or interest in the property to which it relates; it only

makes an act lawful which without it would be unlawful and thus the status of a licensee is essentially different from that of a trespasser or a tenant. It was further held that possession of a licensee is not a judicial possession but only an occupation with the permission of the licensor and hile the actual occupation remains with the licensee, the control or possession of the property is with the licensor through his licensee.

27. Counsel for the respondent has placed reliance on the judgment entitled Sant Lal Jain vs. Avtar Singh wherein the Supreme Court affirmed the principles of law laid down in AIR 1964 JandK 99. It was held that the Supreme Court has held that a licensee is always a licensee and it is not open to him, during the subsistence of the license or in the suit for recovery possession of the property instituted after the revocation of the license to set up title to the property in himself or anyone else. It was held that it is his plain duty to surrender possession of the property as a licensee and seek his remedy separately in case he has acquired title to the property subsequently through some other person. The facts of said cases are similar to the facts of the case in hand. In the said case the defendant/respondent took from the appellant on license for one year under a deed dated 10th December, 1969 the suit shed for carrying on the work of repair of motors, tractors etc. an to him and his brother Urminder Singh, who died because of the beatings given by Deepak Chopra, Sanjay, Virender Singh and Raj Pal. On this statement a case was registered and the investigation was conducted by ASI Raj Singh, who during investigation, repared the site plan, got the spot photographed, recorded the statement of the witnesses and got conducted the post mortem on the dead body of Urminder Singh. On 17.11.1987, he arrested the accused persons and recovered the hockey, which was used in the commission of the offence, on the pointing out of accused Virender, collected the MLC, sent the exhibits to CFSL and after completion of investigation, filed the challan in the court of concerned Metropolitan Magistrate, who committed this case to the Court of Sessions, being exclusively friable by it as such.

5. The prosecution in order to establish its case has examined 21 witnesses. Of these, PW-1 Shiv Charan was the employee at the shop of the deceased and has deposed that on 16.11.1987 at about 8 or 8.15 p.m. he and Sawal Mal (PW-2) were present at the counter of the shop of Urminder Singh Sethi (since deceased). Accused Sanjay, who was earlier employed with the deceased, passed in front of the shop of the deceased, when Urminder Singh (since deceased) asked him to return the advance which he had taken whole in service. An altercation took place between Sanjay and Urminder Singh. Meanwhile, accused Virender Singh armed with hockey, Deepak Chopra and Raj Kumar also came there. While accused Sanjay and Urminder Singh were grappling, Virender broke the glass of the counter of the shop and gave hockey blow on the arm of this witnesses. Virender also gave two kick blows to PW-2. Accused Sanjay gave fits blows to Urminder Singh Sethi. He has also stated that when Sanjay was giving the blows, Urminder Singh struck against the counter and fell down inside the shop. Thereafter, Urminder Singh got up and came out of the shop. Accused persons were present outside the shop when the police reached there. PW-2, Sawan Mal, supported the version of PW-1. P-5, Surinder Singh, has also narrated the incident and supported the prosecution's version. PW-6, Constable Dharam Bir Singh, is a photographer. PW-8, Dr.K.G.Sachdeva, has proved the MLC Ex.PW8/A. PW-9, Dr.M.S.Sagar, has proved the post-mortem report E.PW9/A of Urminder Singh Sethi. In this report he has opined that the cause of death was shock due to haemorrhage as a result of ante-mortem injury, that is, laceration of liver which was produced by blunt force. PW-13, Dr.Sushil Kumar Bhattacharya, has proved the MLC of Sawan Mal which is Ex.PW13/B. PW-15, Dr.Rajesh Kumar Chopra has proved the OPD Card of Surinder which is Ex.PW15/A. PW-14, S.I.Balbir Singh, draftsman, has proved the site plan of the spot which is Ex.PW14/A. PW-16, ASI Tula Singh, Duty Officer, has proved DD No. 10/A which is Ex.PW16/A as also the FIR Ex.PW16/B. PW-19, Inspector S.K.Giri, has deposed that on 17.11.1987 he reached the spot where the fight was taking place. PW-20, Gurbax Singh, SHO has deposed that he joined the investigation of this case and arrested the accused persons.

6. From the evidence of witnesses as also from the recovery and the medical evidence, it can safely be said that the prosecution has been able to prove its case beyond the shadow of doubt.

7. On the question of sentence, it is submitted by counsel for the appellants that the appellants are facing the ordeal of trial for over 17 years and that no weapon was used in the present case. He further submitted

considering the peculiar facts and circumstances of this case, the same can be dealt with under Section 360 Cr.P.C. and the appellants can be given benefit of Probation of Offenders Act, 1958. He draws my attention to the statement of Dr.M.S.Sagar. who admitted in his cross-examination the injuries mentioned in the post-mortem are possible by falling on hard surface. He further submitted that the deceased may have ruptured his liver by a fall or by sudden contraction of abdominal muscle and that the above findings could be the cause of death as has been stated by PW-1 that Urminder Singh fell on the counter of the shop and thereby hurt himself in the stomach. Counsel for the State has submitted that in a case where originally the accused persons were charged under Section 302 IPC for murder, surely the provisions of the Probation of Offenders Act would not be applicable.

8. Heard counsel for the parties on the question of sentence and have also gone through the statements of witnesses. It appears to me that the fight took place on a spur of the moment and there was no intention whatsoever to cause the injury to the liver or cause such an injury as would be known to cause death. In that event of the matter, since the Court of Sessions has already held the appellants guilty under Section 304(II) /34 IPC, the case of the appellants can be considered under Section 360 Cr.P.C and also under Probation of Offenders Act, 1958. For this, I draw support from the judgment of the Supreme Court in State of Karnataka Vs. Muddappa [1999 Supreme Court Cases (Cri) 1046]. In this circumstance, while maintaining the conviction of the appellants, the sentence of imprisonment and fine as awarded to them is set aside.

9. Having regard to the circumstances of the case including the nature of the offence and the character of the offenders, it is considered expedient to release them on probation of good conduct. It is, therefore, directed that the appellants be released for a period of three years on their entering into a personal bond in the sum of Rs.10,000/- (rupees ten thousand only) each with one surety each in the like amount to appear and receive sentence as and when called upon during such period and, in the meantime, the appellants shall keep peace and be of good behavior. The requisite bonds to be furnished by the appellants and the surety to the satisfaction of the trial court. The fine, if already, paid, is directed to be treated as litigation expenses of the State.

10. With this modification, the order under challenge is upheld. The appeals stand disposed of. The bail bonds and sureties stand discharged. Fresh bonds and sureties, as directed to be furnished, shall be furnished within a period of two weeks from today, failing which the sentence awarded by the trial court shall come into effect. A copy of this judgment be given duly to counsel for the appellants.