

CASE NO.:
Appeal (civil) 6408 of 2002

PETITIONER:
Sudhir Jaggi & another

RESPONDENT:
Sunil Akash Sinha Choudhury & others

DATE OF JUDGMENT: 11/08/2004

BENCH:
ASHOK BHAN & S.H. KAPADIA.

JUDGMENT:
J U D G M E N T

WITH

CIVIL APPEAL No.2507 OF 2004.

Shashi Properties & Industries Ltd. \005 Appellant

Versus

Sunil Akash Sinha Choudhury & others \005 Respondents

KAPADIA, J.

These two civil appeals are filed by the defendants who were aggrieved by the judgment and decree passed by the learned Single Judge of Calcutta High Court dated 27.9.2001 in Suit No.161 of 1979 ordering repossession in favour of the plaintiffs and which judgment and decree is confirmed by the impugned judgment of the Division Bench of the Calcutta High Court dated 16.7.2002 in A.P.D. No.220 of 2002.

Briefly, the facts giving rise to these appeals are as follows:\027

Plaintiffs are the two executors of the will of one P.K. Chowdhury (since deceased) who agreed, vide agreement dated 8.5.1965, to purchase two flats no.12C and 12D on the 12th floor of the building known as "Monalisa" situate at Camac Street, Calcutta along with two garages on the ground floor for the total consideration of Rs.2,34,168/-, out of which the deceased P.K. Chowdhury paid Rs.2,22,168/-. Originally, it was agreed that two flats would be allotted by the developer (defendant no.1) to P.K. Chowdhury on 8th floor. That agreement was varied and it was agreed that the two other flats would be allotted on the 12th floor. Similarly, the said two garages, as agreed upon, could not be allotted due to technical defect in the construction, so an alternative larger space was allotted at an increased price. Later on, P.K. Chowdhury constructed two complete locked up garages. Apart from two flats, P.K. Chowdhury purchased three rooms spaces in the ground floor. In respect of flat nos.12C and 12D, it was originally agreed between the developer and P.K. Chowdhury that the developer would carry out all internal works in accordance with the suggestions of P.K. Chowdhury. Subsequently, that condition was varied and it was stipulated by and between the parties that P.K. Chowdhury would himself make internal changes at his own costs, for which the developer

agreed to give a rebate. In May, 1967, the developer gave possession of the said two flats which then consisted of outer walls on four sides without any partition, doors and windows. On obtaining possession, P.K. Chowdhury erected walls, partitions, doors, windows and collapsibles at his own costs. These works were of permanent nature. On or about 10.1.1968, accounts between P.K. Chowdhury and the developer were settled. Rs.12000/- was found due and payable by P.K. Chowdhury to the developer being balance amount in full settlement of the consideration for the flats and garages. P.K. Chowdhury agreed to pay Rs.12000/- to the developer upon execution of conveyance in his favour for the two flats. In December, 1975, however, the developer instituted a suit in the City Civil Court, Calcutta being suit no.2180 of 1975 for permanent injunction restraining P.K. Chowdhury from interfering with his alleged possession. The said suit was dismissed, as not maintainable.

On 10.2.1979, the appellants herein wrongfully and illegally broke into the said two flats and obtained wrongful and forcible possession of the two flats. P.K. Chowdhury came to know of the dispossession on 12.2.1979. On 12.3.1979, he filed the present suit. In the present suit, the developer contended that P.K. Chowdhury was never given possession of the suit flats; that he was given access to execute certain masonry works in the said two flats; that P.K. Chowdhury did not pay the full consideration and consequently, he had sold both the suit flats to original defendants no.2 and 3 (appellants in Civil Appeal No.6408 of 2002), who were put in possession of the two flats on 3.1.1979 from which date defendants no.2 and 3 have continued to be in possession thereof.

In the present suit filed on the Original Side of the High Court, extensive evidence, both oral and documentary, was led. On behalf of the plaintiffs, PW1 \026 the wife of P.K. Chowdhury was extensively examined. PW1 in her evidence stated that possession of the two incomplete flats was given to her husband in terms of the modified agreement under which P.K. Chowdhury had agreed to execute the work of permanent nature at his own costs subject to rebate from the developer. That when possession was given to her husband, the flats in question were not habitable. That P.K. Chowdhury had erected the walls, doors and windows. That he had put the collapsibles which were kept locked. That the keys to the suit flats were with her husband. PW1, in her evidence, further deposed that P.K. Chowdhury had paid Rs.2,22,168/- leaving a balance of only Rs.12000/-, which was to be paid on the date when the developer executed the conveyance in favour of P.K. Chowdhury.

In the light of the above evidence, the learned Single Judge came to the conclusion that dispossession had taken place on 10.2.1979 and, therefore, the suit filed on 12.3.1979 was within the period of six months as prescribed by section 6 of the Specific Relief Act, 1963. The learned Single Judge further found that there was no evidence of agreement between the developer and defendants no.2 and 3; that there was no evidence of consideration having been received by the developer from defendants no.2 and 3; that there was no evidence of delivery of possession by the developer to defendants no.2 and 3. In the circumstances, the suit filed under section 6 of the Specific Relief Act, 1963 by the executors of the will of P.K. Chowdhury was decreed in terms of prayers 'a' and 'b'.

Being aggrieved by the judgment and decree passed by the learned Single Judge dated 27.9.2001, the matter was carried in appeal to the Division Bench of the Calcutta High Court. By the impugned judgment dated 16.7.2002, the appeals preferred by the original defendants came to be dismissed. Consequently, the developer (defendant no.1) has come by way of Civil Appeal No.2507/2004 whereas purported bonafide purchasers (defendants no.2 and 3) have come to this Court by way of Civil Appeal No.6408/2002.

Since, common question of fact is raised in these civil appeals, the same are heard and disposed-of by this common judgment.

Mr. N.S. Vasisht, learned counsel appearing on behalf of the developers submitted that P.K. Chowdhury was never put in possession of the suit flats and that he was given only an access to supervise the interiors. It was submitted that P.K. Chowdhury was keen to have the interior dicor inside the flats of his choice, for which access was provided for. That such access cannot constitute control or dominion or possession of the suit flats. It was further urged that P.K. Chowdhury was entrusted with the work of completing the flats on behalf of the developer and, therefore, it was a case of permissive possession. In the circumstances, it cannot be said that P.K. Chowdhury was in possession of the suit flats. It was further contended that in May, 1967, the flats were not ready; that they were shell like structure, without doors, windows and P.K. Chowdhury was permitted to execute the interiors. In such circumstances, it was urged that P.K. Chowdhury was given access to visit the flats and give instructions to decorate the suit flats and, therefore, P.K. Chowdhury was never put in possession as alleged. It was next submitted that there is no evidence of dispossession of P.K. Chowdhury by the developer or by defendants no.2 and 3. That defendants no.2 and 3 were bonafide purchasers who are in possession since 3.1.1979.

We do not find any merit in these civil appeals. Firstly, there is no substantial question of law arising in these civil appeals. Both the Courts below on consideration of the entire evidence, both oral and documentary, on record have come to the conclusion that in May, 1967 two incomplete flats were handed over to P.K. Chowdhury; that under the modified terms P.K. Chowdhury agreed as the purchaser to construct partition, walls, doors and windows inside the flats; that even collapsibles were put by P.K. Chowdhury and that the keys to the suit flats were with P.K. Chowdhury. In the circumstances, both the Courts below have concluded that the dominion/control over the suit flats was with P.K. Chowdhury. We do not see any reason to disturb these findings of fact. Secondly, there is no evidence on record to show that P.K. Chowdhury was allowed to execute the work on behalf of the developer. Thirdly, on evidence, it is established that P.K. Chowdhury was allowed to do the work of permanent nature and that even the keys of the flats were with him which proved beyond doubt that P.K. Chowdhury was in complete control of the suit flats. Fourthly, there is no term in the agreement between the parties under which P.K. Chowdhury was obliged to return the possession of the flats on completion of the work. Hence, the developer has failed to prove "permissive" possession as alleged. Lastly, as held by the Courts below, there is no evidence of transfer of the suit flats by the developer to alleged bonafide purchasers i.e. defendants no.2 and 3. In the circumstances, both the Courts below were right in decreeing the suit under section 6 of the Specific Relief Act, 1963.

In the case of Supdt. And Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and others reported in [(1979) 4 SCC 274], this Court observed that the word "possession" is not purely a legal concept but a polymorphous term which may have different meanings in different contexts. That the word "possession" implies a right and a fact. It involves power of control and intention to control. That the test for determining whether a person is in possession is : whether he is in general control of it. In the present case, as stated above, P.K. Chowdhury was given possession in May, 1967 and it was agreed between the parties that the buyer could construct the walls, partition, doors and windows, which show the intention to put P.K. Chowdhury in possession.

In the case of Kumar Kalyan Prasad & another v. Kulanand Vaidik & others reported in [AIR 1985 Patna 374] while discussing the scope of section 6 of the Specific Relief Act, 1963, it has been held:

"9. In the first instance, a mere reference to the plain language of the provision aforesaid would indicate that the word "dispossessed" has not been used in the narrowly constricted sense of the actual physical possession of immoveable property. Indeed, it talks somewhat widely of dispossession of immoveable property otherwise than in due course of law without the person's consent. If the Legislature intended to narrowly limit the word "dispossessed" there could have been no difficulty by specifying in terms the actuality of physical possession as its necessary and vital ingredient. The word employed is the ordinary word "dispossess". Plainly enough it would include within its sweep actual physical dispossession also but this is no warrant for holding that it necessarily excludes the violation of other forms of possession including a symbolical possession duly delivered by law and contumaciously violated by an aggressive trespasser. On principle I am not inclined to construe the word "dispossessed" in S.6 in any hypertechnical sense and to push it into the procrustean bed of actual physical possession only. Indeed the intent of the Legislature in S.6 to provide early and expeditious relief against the violation of possessory right, irrespective of title, would be equally, if not more, relevant where symbolical possession delivered by due process of law is sought to be set at naught forthwith."

To the same effect is the judgment of the Calcutta High Court in the case of Raj Krishna Parui v. Muktaram Das reported in [(1910) 12 Calcutta Law Journal 605] in which while interpreting section 9 of the Specific Relief Act, 1877 (section 6 of the present Act, 1963) it has been held:

"In a suit commenced under section 9 of the Specific Relief Act, the sole point for determination will be, whether the plaintiffs were in possession of the disputed property within six months previous to the institution of the suit and whether they had been deprived of such possession by the defendant otherwise than in due course of law. It is immaterial, if the plaintiffs were in possession, that such possession was without title. What the plaintiff has to prove is possession of the disputed property and not mere isolated acts of

trespass over that property.

In order to entitle the plaintiff to succeed on the ground of possession, he must prove, firstly, that he exercised acts which amounted to acts of dominion; the nature of these acts of dominion varies with the nature of the property; secondly, that the act of dominion was exclusive. If the occupation by the plaintiff, as indicated by those acts, has been peaceable and uninterrupted and has extended over a sufficient length of time, the inference may properly be drawn that the plaintiff was in possession."

Applying the above judgments to the facts of the present case, we are of the view that both the Courts below were right in coming to the conclusion that P.K. Chowdhury was put in possession of the suit flats in May, 1967 and that he was wrongly dispossessed on 10.2.1979 by the defendants without following due process of law. Hence, there is no merit in the civil appeals.

Before concluding, we wish to clarify that since the impugned decree is passed in a summary suit under section 6 of the Special Relief Act, 1963, none of our observations herein shall preclude the parties herein from raising contention(s) in the substantive suit to establish title and for recovery of possession which the defendants herein may file in accordance with law, if so advised.

For the foregoing reasons, we do not find any merit in these civil appeals and the same are accordingly dismissed, with no order as to costs.