

**(2017) 01 MP CK 0084**  
**MADHYA PRADESH HIGH COURT**  
**Case No:** 359 of 2001

Vijay Kumar S/o Hemraj Tegar &  
others

APPELLANT

Vs

Siddhnath Singh S/o Dulesingh &  
others

RESPONDENT

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**Date of Decision:** Jan. 20, 2017

**Acts Referred:**

- Code of Civil Procedure, 1908, Order 22 Rule 3, Order 6 Rule 17

**Hon'ble Judges:** Jarat Kumar Jain

**Bench:** Single Bench

**Advocate:** Ankur Modi, B.L.Bakhliya

**Final Decision:** Allowed

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**Judgement**

1. Defendants filed this First Appeal against the judgment and decree dated 25.06.2001 passed by the Fourth Additional District Judge, Dewas in Civil Suit No.1A/01 (old No.7A/85) whereby plaintiff's suit decreed for possession of the suit rooms and mesne profit @ Rs.250/- per month; whereas the plaintiffs filed a cross-objection claiming mesne profit @ Rs.1,000/- per month.

2. This is a second round of litigation the plaintiff's suit 7A/85 was decreed on 03.12.1993 by Second Additional District Judge, Dewas. The defendants had challenged the judgment and decree before this court in First Appeal No.2/94. This court vide judgment dated 03.04.2001, set aside the judgment and decree and remanded the case to the trial court for recording a definite finding with regard to the death of plaintiff Dulesingh and thereafter passing appropriate order on the application under Order 22 Rule 3 of CPC and to dispose of the suit after hearing the

parties. In compliance of this direction learned Fourth Additional District Judge vide order dated 11.05.2001 decided the application under Order 22 Rule 3 of CPC and on 25.06.2001 decided the application under Order 6 Rule 17 of CPC filed by the defendant and on the same day passed the judgment and decreed the suit. The same is challenged in this appeal.

3. Brief facts of this case are that plaintiff Dulesingh (since deceased), filed the suit against the heirs of Hemraj appellants herein, for their eviction from the suit rooms and mesne profit on the ground that Hemraj was licensee in suit rooms. After the death of Dulesingh his LRs respondents herein, taken on record.

4. The suit was resisted by the defendants that Hemraj had purchased the plot in the name of Dulesingh and thereafter on half plot of the north side Dulesingh has constructed the house; whereas on south side of the plot Hemraj has constructed the house. Thus, Hemraj was the owner of suit rooms and not the licensee and after his death defendants became the owner of the suit rooms and they are not licensee of the plaintiffs. In alternate it is pleaded that defendants were residing in suit rooms since 1964 continuously and peacefully with the knowledge of plaintiffs, therefore, they had acquired the title by way of adverse possession.

5. Trial Court on the pleadings of the parties framed 11 issues. Both the parties adduced the evidence. Trial Court gave a finding that plaintiffs are owner of the suit rooms and defendants were residing there as licensee and on 14.10.1984 appellant No.1 admitted this fact in writing (Ex.P/14) and agreed to handover the possession of the suit rooms till 31.01.1985; whereas defendants have failed to prove that they had acquired title by adverse possession. Thus, decreed the suit and directed the defendants to deliver the vacant possession to plaintiffs within two months and also pay mesne profit @ Rs.250/- per month from the date of suit till delivery of possession. Being aggrieved the defendants have filed this appeal; whereas plaintiffs claimed mesne profit @ Rs.1,000/- per month.

6. The appeal is filed on the following grounds :-

(i) The trial court has wrongly held that plaintiff died on 11.04.1992; whereas defendants have proved that he died on 11.02.1992. Thus, LRs of the plaintiff have not taken on record in time, hence, the suit is abated.

(ii) Defendants application under Order 6 Rule 17 CPC is not decided on merit, however, there is no bar in the remand order of High Court.

(iii) The Court has wrongly placed reliance on the written admission (Ex.P/14) of defendant No.1. He was not the karta of family, therefore, his admission cannot bind other heirs of Hemraj i.e. defendants No.2 to 6.

(iv) Plaintiffs" have failed to disclose the source of money for construction of the suit rooms.

7. During the course of arguments it is submitted by learned Counsel for appellants that during pendency of suit appellant Arvind became major, therefore, as per order dated 29.04.1991 his guardian-ad-litem was removed, however, no proper opportunity for contesting the suit was given, thus, the decree is not binding on him. For this purpose placed reliance on the judgment of Malkiyat Singh V/s. Omprakash reported in AIR 1995 Rajasthan 38.

8. After hearing learned Counsel for the parties, perused the record.

9. Firstly I have considered the objection in regard to the order passed on application under Order 22 Rule 3 of CPC. Earlier this application has not been decided by the trial court, hence, this court set aside the judgment and remanded the case to the trial court for recording a definite finding with regard to the death of plaintiff Dulesingh, thereafter the parties have adduced the evidence. On the basis of oral evidence which is supported by the documentary evidence i.e. death message, Death Certificate and prescription of Doctor trial court gave a finding that plaintiff Dulesingh has been died on 11.04.1992; whereas the defendants have not adduced any reliable evidence in rebuttal, therefore, it is found that the application for bringing Dulesingh's legal representatives on record filed within limitation. Learned Counsel for the appellant fails to point out any illegality or perversity in this finding, hence, trial court has rightly decided the application under Order 22 Rule 3 of CPC.

10. Now, I have considered whether after remand order it was obligatory on the part of the trial court to decide defendants' application under Order 6 Rule 17 of CPC.

11. The defendants' application under Order 6 Rule 17 of CPC has been dismissed by the trial court vide order dated 29.04.1991. The order was challenged in Civil Revision No.183/1991 before High Court, however, the same was dismissed on 13.03.1992. Thereafter on 03.12.1993 suit was decreed. The judgment and decree was challenged by the defendants in First Appeal No.2/94 before the High Court and High Court vide judgment dated 03.04.2001 remanded the matter. In this appeal there was a ground in regard to dismissal of application under Order 6 Rule 17 of CPC but this court has not made any direction in the remand order, hence, trial court has declined to consider the application afresh. I am of the view that there is no illegality in the order passed by the learned Trial Court.

12. Now, I have considered whether the proposed amendment is relevant for the purpose of deciding controversy between the parties. This Court while dismissing the Revision found that the proposed amendment is not necessary for deciding the controversy between the parties and the application was filed with an intention to protract the trial.

13. Now, I have considered whether appellant No.5 Arvind has not given proper opportunity to contest the case.

14. Rajasthan High Court in the case of Malkiyat Singh (supra) held that :-

"As a matter of fact, if following conditions are fulfilled by the defendant attaining majority during pendency of the litigation, the courts will ordinarily permit him or her to file a fresh written statement but if the courts do not find any of the grounds mentioned hereinbelow and application for filing a fresh written statement is found to be mala fide with ulterior motive then such defendant should not be allowed to file fresh written statement in place of written statement already filed by their guardians :-

(a) If courts of law are satisfied that the case on behalf of minor-defendant was not properly contested by their natural guardian ad litem or by next friend.

(b) The interest of the guardian or guardian ad litem is found to be adverse to the interest of minor-defendant who attained majority during pendency of the litigation.

(c) Where a serious prejudice is caused to the interest of the minor-defendant during pendency of the litigation due to mis-conduct or gross negligence of his natural guardian or guardian ad litem.

(d) The application for leave of the Court to file a fresh written statement in place of earlier written statement filed by his or her natural guardian or guardian ad litem is bona fide and has not been moved with ulterior motive."

15. In the present case learned Counsel for the appellant is unable to satisfy this court that the case on behalf of Arvind Kumar was not properly contested by his guardian-ad-litem or the interest of guardian-ad-litem is found to be adverse to the interest of Arvind or a serious prejudice is caused to the interest of Arvind during pendency of litigation due to misconduct of his guardian-ad-litem. On the other hand no such ground was taken in the earlier First Appeal and in present appeal. This ground is raised at the time of argument, thus, the plea is not bona fide and has taken with ulterior motive.

16. Now, I have considered the ground in regard to written admission (Ex.P/14) by Vijay Kumar as a karta of family. The Ex.P/14 reads as under :-

VERNACULAR MATTER OMITTED

17. On 29.04.1989, plaintiff has closed his evidence and the case was fixed for defendants' evidence. After granting ample opportunities defendants/appellants have not produced any evidence, ultimately on 29.04.1991 right of evidence was closed. It seems that they have no defence in rebuttal, therefore, they have not adduced any evidence. On the other hand plaintiffs have proved that defendant No.1 had given a written admission (Ex.P/14) as karta of the family that they vacate the suit rooms till 31.01.1985. This document is binding on defendants. It is not the case of the defendants/appellants that the interest of the appellants No.2 to 6 are adverse to the interest of appellant No.1 Vijay Kumar. In such circumstances, trial court has rightly placed reliance on the Ex.P/14 and passed the decree.

18. Learned Counsel for the appellants/defendants submitted that Dulesingh deposed that he has constructed the suit rooms, however, he has not disclosed the source of money for construction.

19. Admittedly the plot is in the name of Dulesingh. He has obtained the requisite permission for construction then if the appellants/defendants are claiming title over the suit rooms then the burden was on the appellants/defendants to prove their case, but they have not produced any evidence. Hence, there is no substance in this submission.

20. With the aforesaid, I am of the view that the Trial Court has rightly held that the appellants' father Hemraj was the licensee of the plaintiff Dulesingh and after the death of Hemraj the appellants were in possession of the suit rooms as licensee of Dulesingh. Thus, the Trial Court has rightly decreed the suit for possession.

21. Now I have considered the cross-objection for enhancement of mesne profit @ Rs.1,000/- per month. Trial Court in Para 17 of the judgment discussed that the plaintiff deposed that he is entitled for mesne profit @ Rs.400/- per month. Plaintiff's witness has supported his evidence and deposed that the suit rooms can fetch rent @ Rs.700/- to Rs.800/- per month and in rebuttal the defendants/appellants have not produced any evidence, even then Trial Court fixed the rent @ Rs.250/- per month on his own estimation. However, there is no such evidence.

22. I am of the view that the Trial Court without any basis ignored the evidence of respondent/plaintiff and gave a finding that the respondents are entitled for the mesne profit @ Rs.250/- per month. Thus, the cross-objection is allowed and it is held that the respondent is entitled for mesne profit from the date of decree @ Rs.400/- per month as claimed and proved. At the time of execution the respondent shall pay court fees on the amount of mesne profit.

23. With the aforesaid the appeal is dismissed; whereas the partly allowed. The appellants shall pay the litigation expenses to the respondents. Counsel's fee be calculated as per the schedule. Decree be drawn accordingly.