

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **RFA No.324/2000**

Reserved On : 10th March, 2008

Date of Decision : 17th March, 2008

IQBAL SINGH & ORS. Appellants

Through: Mr. Harish Malhotra, Sr. Adv. with
Mr. APS Gambhir, Adv.

versus

ANJANA DEVI & ORS. Respondents

Through: Mr. J. P. Sengh, Adv.

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE S.L. BHAYANA

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

% **JUDGMENT**

17.3.2008

MUKUL MUDGAL, J

1. This appeal arise out of the judgment/decreed dated 20th December, 1999

passed by the learned Additional District Judge, Delhi, by the learned Judge had held Issue No.4 in favour of the respondents 1 and 2 and against the appellant and dismissed the suit of the appellant/plaintiff on the ground that the suit was barred under Order II Rule 2 of the Code of Civil Procedure.

2. The facts of the case briefly stated are as follows:-

a) M/s. Bharat builders and Colonisers A-14/3, Asaf Ali Road, New Delhi agreed to sell a plot No.E-102, Mansarovar Garden, New Delhi for a consideration of Rs.3600/- on 31st October, 1957 in favour of Sh. Budh Singh, 81, Gaffar Market, Karol Bagh, New Delhi. Sh. Budh Singh died leaving behind his Legal Heirs (hereinafter referred to as LRs), who are the appellants in this appeal.

b) The said M/s. Bharat Builders and Colonisers failed to execute the sale deed, so the LRs of Sh. Budh Singh filed the suit for specific performance, which was assigned to Sh. Gian Inder, Sub Judge, Delhi, numbered as Suit No.212/67.

c) Since said plot no. E-102 was transferred by M/s Bharat Builders and

Colonisers to Sh. S.R. Kapur during the pendency of the suit, consequently, Sh. S.R. Kapur was also impleaded in the said suit. On 14th May, 1968, the decree for the specific performance of the contract of sale was passed in favour of heirs of Sh. Budh Singh and against M/s. Bharat Builders and Colonisers and Sh.S.R. Kapur.

d) Since the Judgment Debtors failed to execute the sale deed as directed by the judgment dated 14th March, 1968 then the Court of Sh. B.B.Chaudhary, Sub-Judge, Delhi executed the sale deed on 20th February, 1978 in favour of the L.R.s of Sh. Budh Singh. In the execution proceedings, possession of the plot was also obtained on 10th April, 1978.

e) The Decree Holders remained in actual possession of the suit plot till 7th January, 1980. On 7th January, 1980 it was informed that the appellant no.6 Sh. Sant Singh (defendant No.2 therein) collected bricks near the plot and tried to create a boundary wall.

f) The Decree Holders filed the Suit No. 07/80 for perpetual and mandatory injunction against the said appellant no.6 for raising any construction. The

appellant no.6 appeared and pleaded the ownership of the respondent no.1 Smt. Anjana Devi (Defendant No.1 therein) and claimed to raise the construction. The said respondent no.1 also was impleaded in the said suit.

g) The said suit was ultimately dismissed by Sh.A.K. Garg, Sub-Judge, Delhi vide judgment dated 25th May, 1983 holding that the appellants no.1 to 5 herein, i.e., the legal heirs of Budh Singh were not in possession of the suit plot, and accordingly the suit for mandatory injunction was not maintainable. It was held in the said judgment that the remedy for the plaintiffs was to file a suit for possession. It was also held that the evidence disclosed that the respondent no.1 and appellant no.6 took forcible possession of the suit plot during January 1980, and they are in its unauthorized possession. They have also not surrendered the vacant possession of the suit plot inspite of having been required to do so.

h) Consequently, to the aforesaid judgment dated 25th May, 1983 dismissing the suit upon holding that the remedy of the appellant was to sue for possession, the appellant/plaintiff filed the suit for possession against the

respondents/defendants in respect of the suit property, viz., Plot No. E-102, Mansarovar Garden, New Delhi, in the learned court of Additional District Judge, Delhi being Suit No. 222/89. The other legal representatives of late Sh. Budh Singh were impleaded as proforma defendants.

i) The issues framed in the Suit No. 222/89 are as under:-

- i. Whether the plaintiffs and the defendants 3 to 5 are owners of the plot? OPP
- ii. Whether the defendants no.1 and 2 have taken forcible possession of the plot during Jan,80? OPP
- iii. Is the suit correctly valued for the purpose of court fees and jurisdiction, if not, what is the correct valuation? OPP
- iv. Is the suit barred by Order 2 Rule 2 CPC, if so, to what effect? OPD
- v. Whether Sh.S.R. Kapur and M/s. Bharat Builders and Colonisers are necessary parties to the suit? OPD
- vi. If the suit for possession is not maintainable against defendants 1 and 2? OPD
- vii. Whether decree dated 14.5.68 is a nullity for the reasons mentioned in para 5 of the written statement of defendants 1 and 2, if so, its effect? OPD

viii. Is the suit within time? OPD

ix. Is the defendant No.1 purchaser of the plot for value without notice, if so its effect?
OPD

x. Relief.”

j) Sh. G.S. Jugti, the Additional District Judge, Delhi, delivered his impugned judgment/decreed dated 20th December, 1999, thereby dismissing the suit of possession of the owners/landlords of the plot bearing No. E-102, Mansarovar Garden, New Delhi-110015. The learned ADJ, Delhi had given a verdict in favour of the appellants on the issue No.1, 3,5,7 and 8. The learned ADJ, Delhi, had held issues no. 4 and 6 in favour of the respondents no.1 and 2 and against the appellants/plaintiffs and dismissed the suit of the appellants on the ground that the suit was barred under Order II Rule 2 of the Code of Civil Procedure.

k) Being aggrieved by the said impugned judgment/decreed dated 20th December, 1999, passed by the ADJ, Delhi, Sh. G.S. Jugti, the appellant herein

preferred the present appeal.

3. Since the other issues were held in its favour the appellant has challenged the finding of the learned Additional District Judge only on the issue No.4 which reads as follows:

“Issue No.4: Is the suit barred by Order 2 Rule 2 CPC, if so, to what effect? O.P.D.”

4. The reasoning of the Additional District Judge qua issue no.4 is to be found in paragraph 17 of the impugned judgment which reads as follows:

“17. The present plaintiffs filed the suit for permanent injunction against the present defendants No.1 and 2. The said suit has been decided by the Court of Sh. A.K. Garg, Ld. Sub-Judge, 1st Class (as he then was) on 25.5.83. In the said suit it was held that the present plaintiffs were not in possession of the plot and the possession was with defendant No.1 and IA Defendant No.1 is Sh. Jagdish Lal and Defendant No.1A is Smt. Anjana Devi. Accordingly, the suit of the plaintiffs was dismissed on 25.5.83. After having failed in the said suit, the plaintiffs have filed the present suit for possession. This suit for possession clearly shows that plaintiff are not in possession and the possession is with the defendants. In the

said suit before the Court of Sh. A.K. Garg, Sub Judge, 1st Class Delhi, no relief of possession was claimed. No application filed for reserving this relief of possession to be claimed in subsequent suit. There is no such order by the Trial Court also for granting such permission. When the relief was available under a particular cause of action, it was not claimed in the suit, it clearly means that it was given up and it was omitted in the said suit. The defendants have taken a defence that the present suit for possession is barred by order 2 rule 2, so it is not maintainable, Order 2 Rule 2 is hereby reproduced as under:

Suit to include the whole claim:-

2(1) Every suit shall include the whole of the claim which the plaintiff's is entitled to make in respect of the cause of action; but the plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.

Relinquishment of part of claim-(2)

Where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Omission to sue for one of several reliefs(3)

A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with leave of the Court, to sue for all such

reliefs, he shall not afterwards sue for any relief so omitted.”

5. Thereafter the learned Additional District Judge relied upon the following judgments to hold the issue of Order 2 Rule 2 of the CPC against the appellant:

- (i) **Krishna Ji Ramchandra v. Raghunath Shankar and others**, AIR (1954) Bombay 125.
- (ii) **Gnanaprakasam v. Sabasthi Ammal**, 1980-Madras Law Journal Reports-182.
- (iii) **Indubai v. Jawahar Lal**, AIR (1980) MP 80.

6. Thereafter, the rationale for finding the issue No.4 against the appellant is in the following terms:

“21. In the present case, the first suit was filed by the plaintiffs for permanent and mandatory injunction before the court of Sh. A.K. Garg, the Ld. Sub-Judge (as he then was), and that was dismissed on 25.5.83. That suit was also related to plot No.E-102, Mansarover Garden, against defendant No.1 Sh. Jagdish Lal, and defendant No.1-A Smt. Anjana Devi. In the present case they are also defendant

No.1 Smt. Anjana Devi and defendant No.2 Sh. Jagdish Lal. In the earlier suit the relief of mandatory injunction was nothing but a relief of possession, though cleverly worded in order to save Court fees being paid on the plaint. Cause of action in the first suit decided on 25.5.83, by the court of Sh. A.K. Garg, and the cause of action in the present suit is the same between the same parties touching the same property. If the relief of possession was not claimed in the earlier suit then it would mean that it was given up and omitted. The same relief of possession cannot be claimed in the present suit in view of order 2 rule of CPC.

In the earlier suit, the issue No.3 and 5 were framed as under:-

Issue No.3: Whether the suit is not maintainable? OPD

Issue No.5: Whether the plaintiff is entitled to the relief as claimed? OPP.

Both these issues have been decided against the plaintiffs in the said suit, who are now plaintiffs also in the present suit. When the issues in the earlier suit have been decided between the parties touching the same property, these issues will operate as res judicata also, even then the suit is not maintainable. So the relief of possession claimed in the present suit by the plaintiffs cannot be allowed in view of the bar of order 2 rule 2 read with the section 11 of CPC.”

7. The issues framed in the impugned judgment by the Additional District Judge in Suit No. 222/89 are as follows: -

- i. Whether the plaintiffs and the defendants 3 to 5 are owners of the plot? OPP
- ii. Whether the defendants no.1 and 2 have taken forcible possession of the plot during Jan,80? OPP
- iii. Is the suit correctly valued for the purpose of court fees and jurisdiction, if not, what is the correct valuation? OPP
- iv. Is the suit barred by Order 2 Rule 2 CPC, if so, to what effect? OPD
- v. Whether Sh.S.R. Kapur and M/s. Bharat Builders and Colonisers are necessary parties to the suit? OPD
- vi. If the suit for possession is not maintainable against defendants 1 and 2? OPD
- vii. Whether decree dated 14.5.68 is a nullity for the reasons mentioned in para 5 of the written statement of defendants 1 and 2, if so, its effect? OPD
- viii. Is the suit within time? OPD
- ix. Is the defendant No.1 purchaser of the plot

for value without notice, if so its effect? OPD

x. Relief.”

None of the above issues pertains to res judicata.

The issue nos. 1,3,5,7 and 8 were decided in favour of the appellants.

However, the learned Additional District Judge held the issues no.4 and 6 in favour of the respondent no.1 and 2 and had dismissed the suit of the appellants to this extent.

8. The issues in the previous suit decided by Sh. A.K. Garg on 25th May, 1983 in suit no. 7/80 filed by the appellant are as follows:-

“(1) Whether the defts No.1 & 1(a) are bound by the decree passed against S.R. Kapoor by the Court of Sh. Gian Inder Singh, the then Sub-Judge, 1st Class, on 14.5.68? OPP

(2) Whether the deft. No.1 & 1(a) are not bound by the sale-deed dated 20.2.78 executed by the court of Sh. B.B. Choudhary, the then SJIC, Delhi on behalf of the M/s. Bharat Builders & Colonizers and S.R. Kapoor? OPD

(3) Whether the suit is not maintainable? OPD

(4) Whether the suit has not been properly

valued for the purpose of court-fee and jurisdiction?

OPD

(5) Whether the plaintiff is entitled to the relief as claimed? OPP

(6) Relief.

(7) Whether there was no privity of contract between S.R. Kapoor and Plaintiffs? If not its effect?"

The finding on issue no.3 by the learned Additional District Judge , A.K.

Garg is as follows:-

"Issue No.3: -

12. The plaintiffs pray for mandatory injunction as well as perpetual injunction. They seek perpetual injunction restraining the defendants No.1 & 2(a) from interfering with their possession. Obviously this relief is being claimed on the assumption that the plaintiffs are in possession of the suit land. Similarly the mandatory injunction is also being claimed on the same assumption. The evidence, however, discloses that the plaintiffs are not in possession of the disputed land. Plaintiff No.1 Iqbal Singh as (*sic* has) examined himself as PW1. He has stated that the physical possession of the plot in dispute is with the defendants. He further admits that a chowkidar employed by defendants No.1 & 1(a) is residing in a covered room on the disputed place. He further admits that the cement sheets on the covered place was laid by the defendants. He also concedes that there is a door in the boundary wall constructed by the defendants. All these admissions made by the plaintiff demolish the case for

perpetual injunction. When the plaintiffs are not in possession, where is the question of protecting them against dispossession. They are already out of possession and as such their remedy would be a suit for possession and not a suit for injunction. Since the plaintiffs are not in possession, it would not be possible to grant them the relief of mandatory injunction because that would serve no purpose.

Ld. Counsel for plaintiff has cited A.I.r. 1978 Madhya Pradesh-76, Amrit Lal Vs. Kesari Parshad, wherein it was held that when any land or immovable property is not of any use to the owner, the doctrine that possession follows title applies. There can be no dispossession or discontinuance of possession by the mere absence of use and enjoyment when the land or the property is not capable of any use or enjoyment. I do not know how this authority helps the plaintiffs. Admittedly, there was no boundary wall around the plot in dispute. There is also a room constructed on it. A Chowkidar employed by defendants No.1 & 1(a) is residing there. How then can it be said that the property is not capable of any use or enjoyment. Moreover, the plaintiff has expressly admitted that defendants No.1 & 1(a) are in possession. It, therefore, does not lie in the mouth of the plaintiffs to argue that they are still in possession.

In view of the above discussion, I came to the conclusion that the suit for injunction is not maintainable.”

9. In our view, the learned Additional District Judge in the impugned judgment dated 20th December, 1989 in Suit No. 222/89 has completely ignored the aforementioned underlined portion where it is clearly postulated that the remedy of the appellants was to file a suit for possession. The above

findings, in our view, though not in explicit terms but nevertheless by necessary implication do permit and indeed enable the appellant to file a suit for possession, as the omission to sue for possession lead to the rejection of the Suit No. 07/80 by Sh. A.K. Garg. Thus, the entire rationale of the impugned judgment qua issue no.4 leading to the dismissal of the suit on the basis of Order II Rule 2 CPC is unsustainable. This apart, the finding of *res judicata* while discussing Order II Rule 2 CPC cannot also be sustained as there was no issue framed qua *res judicata*.

10. Besides, the interest of justice also shows that the appellant has since 14th May, 1968, when he secured a judgment in his suit for specific performance in his favour, been battling to enjoy the fruits of such a judgment. The original claimant Budh Singh has already died and his legal heirs even after about 40 years are still struggling to obtain possession of the suit premises.

11. Consequently, the appeal is allowed, the impugned judgment/decreed dated 20th December, 1999 passed by the learned Additional District Judge, Delhi, is set aside to the extent of findings on issue No.4 and 6. The cross objections of the respondent not having been pressed are thus dismissed. The respondents 1 and 2 or any one seeking to derive title / possession from the respondents 1 and 2 are directed to hand over the possession of the suit premises at E-102, Mansarovar Garden to the appellants on or before 30th April 2008.

MUKUL MUDGAL
(JUDGE)

S.L. BHAYANA
(JUDGE)

March 17, 2008
dr/sk