

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

RESERVED ON : March 20, 2008

DATE OF DECISION : April 2, 2008

+ LPA No. 665/2003 and CM Nos.4204/2004 & 6054/2007

JAGMAL (DECEASED) THR. LRs Appellant

Through: Mr. R.L. Kohli, Advocate

versus

MCD Respondent

Through: Mr. O.P. Saxena, Advocate

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MS. JUSTICE REVA KHETRAPAL

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

: **REVA KHETRAPAL, J.**

1. The challenge raised in this Letters Patent Appeal is to the judgment and decree of the learned Single Judge dated 21.05.2003, passed in a suit for possession and mesne profits filed by the predecessors-in-interest of the appellants, plaintiffs in the suit, mainly on the basis of possession under Section 6 of the Specific Relief Act.

2. The essential facts may be briefly delineated first.

3. It is the case of the appellants-plaintiffs in the suit that since 1989, their predecessor-in-interest, one Shri Jagmal Singh who died during the pendency of the suit and prior to him, Shri Nathu Mal (his father), since 1977, owned and possessed the land comprised in

Khasra No.383 Village Tihar, New Delhi, measuring 4 bighas 9 biswas. Nathu Mal died on 5.02.1989 and thereafter Jagmal Singh continued to hold, own and possess the aforesaid land though a part of it was taken in the *abadi* and for road widening and thus the open land that remained with him was about 2 bighas. The land adjacent to the land of the plaintiff comprised in Khasra No.1573 was in the possession of the Municipal Corporation and the Municipal Corporation had some Municipal Stores there. One Chet Ram filed a suit for recovery of possession against the M.C.D. in regard to this land which had been allegedly encroached upon by the M.C.D. and secured a decree for possession. When the said decree was got executed against the M.C.D., and the M.C.D. was dispossessed, the M.C.D. on 4.4.1993 encroached upon and took illegal possession of the plaintiff's land i.e., the suit land. Thereupon, the plaintiff sent a legal notice dated 28.4.1993 by registered A.D. Post to the defendant-M.C.D. Despite the aforesaid legal notice, the M.C.D. did not remove itself from the suit land and instead, raised unauthorised construction thereon. The plaintiff accordingly on expiry of the period of notice of two months was constrained to file a suit for possession and mesne profits within six months of the date of dispossession i.e., 4.4.1993 under Section 6 of the Specific Relief Act, from which the present appeal arises.

4. The defendant, who is the respondent in the present appeal, sought to contest the suit and apart from raising legal pleas under Sections 477 and 478 of the Delhi Municipal Corporation Act and

Section 10 of the C.P.C., asserted that the land in question belonged to and vested in the defendant-Corporation and that the Corporation was in actual physical possession thereof for the last 20 years without any interruption or hindrance. Significantly also, the defendant alleged that the plaintiff was guilty of suppressing the material fact that he had filed an earlier suit which was pending in the Court of the Civil Judge at the time of institution of the present suit.

5. The appellant-plaintiff, in replication, while reiterating his prior possession over the suit land, categorically admitted having filed an earlier suit in the Court of the Civil Judge, but stated that it was proposed to file a transfer application to enable both the suits to be tried together by this Court. Such a transfer application was never filed nor the outcome of the said suit is known.

6. On the basis of the claims and counter-claims of the parties, the learned Single Judge on 21.3.1996 framed the following issues for determination:

- “1. Whether the suit of the plaintiff is barred under Sections 477-478B M.C.D. Act? OPD.
2. Whether the suit is barred under Section 10 CPC? OPD.
3. Whether the defendant has any right to possess the suit land? OPD.
4. Whether the plaintiff is entitled to decree of possession as alleged? OPP.
5. To what mesne profits is the plaintiff entitled and from what date and at what rate? OPD.
6. What directions are necessary in terms of Order 20 Rule 12 CPC?

7. Relief."

7. The learned Single Judge while deciding issues No.1 and 2 in favour of the plaintiff and against the defendant-respondent, disposed of issues No.3 to 6 together, decreeing the suit in respect of only 350 sq.yds. of the suit land on the ground that the plaintiff had not been able to prove his possessory title in respect of the remaining 500 sq.yds. On the same reasoning, it was held that the question of granting mesne profits to the plaintiff, therefore, did not arise.

8. The findings of the learned Single Judge as reflected in paras 18-23 of the judgment reads as follows:

"18. Plaintiff has claimed his prior possession over the suit land mainly on the ground that father of the deceased plaintiff was in possession of suit land for the last 50 years and in support of this, khasra girdwari Exhibits P-6, P-7, P-8 and P-9 have been filed showing possession in the name of Mr. Nathu father of the deceased-plaintiff from 5.10.1977 to 1989 and thereafter in the name of deceased plaintiff from 1991 to October, 1998.

19. However, the instant suit was filed in 1993. It is contended that entries in khasra girdwari continue unless these are sought to be changed by the person concerned.

20. In support of defendant's claim, Mr. R.D. Jolly, learned counsel for the defendant has filed site plan as well as certificate of SDM. The certificate of the SDM states that suit land is an evacuee property and stands in the name of Yaseen etc. and the site plan also shows

that private houses have been built on the suit property. However, this report was filed by the SDM at belated state and after several directions. However, the 'khasra girdwari' filed by the plaintiff shows Yaseen and others as the owner of the suit property and the plaintiff as cultivator with rent.

21. It is contended by learned counsel for the plaintiff that suit land is vacant over which no property has been except some constructions by defendant-MCD. It comprises of 17 biswas which is equivalent to 850 sq.yds. This claim of the plaintiff particularly in view of khasra girdwari produced by him as well as report of the SDM is not sustainable as it is difficult to imagine that land measuring 850 sq.yds. will remain in vacant possession of the plaintiff for 50 long years without raising any construction. Report of the SDM appears to be correct.

22. The Assistant Engineer and other officers of MCD are present and state that MCD is in possession of 500 sq.yds over which they have raised some constructions. This fact itself shows that plaintiff has been in possession of remaining land measuring 350 sq.yds. right from the days of his father. Had the MCD been in possession of entire chunk of land for the last 20 years it would have used the entire land without leaving the possession of the plaintiff over 350 sq.yds. vacant land.

23. In the result, suit is decreed in respect of 350 sq.yds. as the remaining land can be held to be in possession of MCD. Since defendant has not been in possession of entire 850 sq.yds. and the plaintiff has not been able to prove his possessory title in respect of remaining 500 sq.yds., the question of granting mesne profits does not arise. Decree Sheet be drawn accordingly."

9. We have heard the learned counsel for the appellant as well as the learned counsel for the respondent-Corporation at length. The suit records were also called for and we have gone through the same meticulously. Before, however, we embark upon a discussion of the merits and demerits of the appellants' case, it is worth mentioning that the present appeal was initially filed as a Regular First Appeal, but in view of the provisions of Section 6(3) of the Specific Relief Act, it was directed by a Bench of this Court to convert the same into a Letters Patent Appeal in view of the judgment of the Supreme Court in **Vinita M. Khanolkar Vs. Pragana M. Pai AIR 1998 SC 424**. In the said case, the Supreme Court held in the context of Section 6(3) of the Specific Relief Act that any statutory provision barring an appeal or revision cannot cut across the constitutional power of a High Court unless the statutory enactment concerned expressly excludes appeals under Letters Patent. No such power is discernible from Section 6(3) of the Act.

10. We accordingly proceed to dispose of the present appeal as a Letters Patent Appeal by virtue of the constitutional powers vested in us by Clause 10 of the Letters Patent. At the same time, we take note of the decision of the Supreme Court in **Ashok Nagar Welfare Association and another Vs. R.K.Sharma & others** reported in **(2002) 1 SCC 749** and a decision of this Court in **Arun Khanna Vs. Rajeev Gupta 2006 (129) DLT 14** to which one of us, Hon'ble Justice Dr. Mukundakam Sharma (as His Lordship then was) was a party. In the first case, the Supreme Court ruled that no appeal shall lie from a

judgment and decree of a Court rendered under Section 6 of the Specific Relief Act and that even the power of revision shall not be exercised except in exceptional cases. The ratio of this decision was referred to and relied upon by the Delhi High Court in the latter case.

11. In the course of arguments, the learned counsel for the appellants placed implicit reliance upon the affidavits filed by way of evidence of Smt. Rameshwari Devi, the wife of the plaintiff Jagmal and two others to contend that from the unrebutted evidence on record, it stands established that the plaintiff-Jagmal was in possession of the suit property for the last many years. Reliance was also placed by counsel on the Khasra girdwaris Ex P-6, P-7, P-8 and P-9 showing the possession of Nathu, the father of the deceased plaintiff from 1977 to 1989, and thereafter the possession of the deceased plaintiff Jagmal from 1991 to October, 1998. Counsel for the appellants accordingly urged that the learned Single Judge erred in not decreeing the suit in its entirety.

12. Learned counsel for the respondent-Corporation, on the other hand, sought to support the judgment rendered by the learned Single Judge by contending that the appellants had miserably failed to prove prior possession of the suit land, inasmuch as the appellants are not in possession of any documents in the form of sale deed, title deed, lease deed, etc., to show that they had purchased the suit land or that they were in possession thereof as tenants, licensees, etc. Counsel submitted that the only

documentary evidence relied upon by the appellants were the Khasra girdwaris (Ex.P-6 to Ex.P-9) to establish their possession over the suit land, but no reliance could be placed on the said Khasra girdwaris in view of the fact that they had not been proved by the plaintiffs-appellants in accordance with law. So far as the oral evidence was concerned, no doubt, the appellants had filed three affidavits by way of evidence with a view to prove and establish their prior possession over the suit land, but apart from the fact that the said affidavits by way of evidence merely contained bald assertions of prior possession of the suit land they did not in any manner further the case of the appellants.

13. A look now at the provisions of Section 6 of the Specific Relief Act, which reads as under:

“6. Suit by person dispossessed of immovable

property.- (1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.

(2) No suit under this section shall be brought-

(a) after the expiry of six months from the date of dispossession; or

(b) against the Government.

(3) No appeal shall lie from any order or decree

passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

(4) Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof."

14. It is well established by a long series of decisions analysing and interpreting the provisions of Section 6 of the Act and, indeed, it was not disputed by the counsel for the parties to the present appeal that though to maintain a suit for possession, title is irrelevant, it must be proved and established beyond doubt that the plaintiff was in prior possession of the suit property. It is also trite that such a suit is maintainable against a third party and not a person who claims himself to be the owner of the suit property. It was also not disputed by the counsel for the parties that a suit under Section 6 of the Act, if filed against the owner, the plaintiff must establish and prove a better title than the owner. In the instant case, the contention of the appellant is that the respondent, Municipal Corporation of Delhi, is a third party, whereas the respondent asserts ownership and actual physical ownership of the suit land for a period of twenty years preceding the institution of the suit. Once the defendant, as in the instant case, claims ownership of the suit property, the plaintiff has to establish a better title or fail (See **Nair Service Society Ltd. Vs. K.C. Alexander and others AIR 1968 SC 1165**).

15. On a conspectus of all the facts and circumstances of the instant case, in our considered view, the claim of the respondent-

Corporation that it has been in ownership and possession of the suit land appears to be tenable. We say so on the basis of the following facts.

16. Admittedly, the only documentary evidence placed on record by the appellants to establish their possession over the suit land are the Khasra girdwaris (Ex.P-6 to Ex.P-9). A bare look at the said Khasra girdwaris is sufficient to show that the appellants are not the owners of the suit land and, as a matter of fact, the Khasra girdwaris filed by the appellants show one Yaseen and others as the owners of the suit land and the plaintiff as the cultivator with rent. The said Yaseen and his co-owners have not been impleaded as parties in the suit by the plaintiffs-appellants. Their statements made on oath would have gone a long way in enabling the plaintiffs-appellants to prove on record that they were in actual physical possession of the suit land. The best evidence has, therefore, been suppressed for reasons best known to the appellants.

17. Even otherwise, we are of the considered opinion that no reliance can be placed on the aforesaid Khasra girdwaris for the reason that though the Khasra girdwaris show the name of the deceased plaintiff Jagmal as the cultivator from 1991 to October, 1998, the plaintiff Jagmal's own case is that the respondent-Corporation had encroached upon his land on 4.4.1993. The instant suit was also filed in the year 1993, meaning thereby that even after the filing of the suit wherein the plaintiff alleged that he had been dispossessed from the suit land, the plaintiff continued to be shown

in the Khasra girdwaris to be in possession of the suit land. Thus, it is self-evident that the Khasra girdwaris do not reflect the true and correct state of affairs. It is also trite that the entires in the Khasra girdwaris are continued by the revenue authorities till they are sought to be changed by the person or persons concerned. Such an exercise not having been undertaken on the plaintiff being dispossessed, assuming for the sake of argument that the plaintiff was in possession, it would be highly unsafe to rely upon the aforesaid Khasra girdwaris.

18. There is yet another aspect of the matter which needs consideration. The aforesaid Khasra girdwaris have been filed with the affidavit of Smt. Rameshwari Devi, wife of plaintiff Jagmal. Neither the Patwari, nor the Qanungo nor the Tehsildar have been brought into the witness box to prove their authenticity. The Khasra girdwaris, therefore, cannot be said to be proved by the plaintiff in accordance with law and hence cannot be relied upon.

19. Adverting to the evidence of the plaintiffs-appellants witnesses, three affidavits have been placed on record being the affidavit in evidence of the wife of the deceased plaintiff and the affidavits of two other persons. The record, however, reveals that on account of change in panel, which took place twice over in quick succession, the suit was missed by the respondent-Corporation, and the respondent was proceeded ex parte. The plaintiffs' witnesses were, therefore, never subjected to cross-examination on the aspect of prior possession. Ordinarily the evidence of the plaintiffs'

witnesses being unrebutted on the record, we would have been inclined to place reliance upon the same, but for the fact that the report of the Sub Divisional Magistrate, which affirms that the suit land is an evacuee property standing in the name of Yaseen etc., is accompanied with a site plan which shows that private houses have been built on the suit property. The plaintiffs have nowhere disputed the report of the S.D.M. and the site plan filed by him nor the plaintiffs have staked their claim to the said private houses and, on the contrary, the learned Single Judge has recorded the statements made in Court by the Assistant Engineer and other officers of the MCD, affirming that the MCD is in possession of 500 sq.yds. of the suit land over which they have raised the aforesaid construction. This shows that the plaintiffs were not in prior possession of the suit land and, at any rate, the plaintiffs were not in prior possession of the suit land to the extent of 500 sq.yds. on which the MCD structures exist. The learned Single Judge cannot, therefore, be faulted for holding that the plaintiffs have not been able to prove possessory title in respect of 500 sq.yds., out of the 850 sq.yds. comprising the suit property. Even otherwise, as observed by the learned Single Judge, it is unthinkable that the plaintiffs would have remained in vacant possession of 850 sq.yds. of land for a long span of 50 years without raising any construction thereupon. This by itself lends credence to the report of the SDM and the statements made by MCD officials that the respondent is in possession of 500 sq.yds. only out of the 850 sq.yds. comprising the

suit land.

20. We, therefore, find no merit in the present appeal which is accordingly dismissed. Needless to state that it shall be open to the plaintiffs to file a title suit or any other appropriate proceedings, if not already filed, to stake their claim over the entire suit land and the observations made in this judgment having been rendered in a summary suit shall not be binding in the said suit or proceedings, which shall be considered on its own merits.

21. LPA No. 665/2003 and CM Nos.4204/2004 & 6054/2007 stand disposed of with the aforesaid observations.

REVA KHETRAPAL, J

CHIEF JUSTICE

**APRIL 2, 2008
VK.**

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

RESERVED ON : March 20, 2008

DATE OF DECISION : April 2, 2008

+ Cont.Cas.(C) No.1222-27/2005

SMT.RAMESHWARI DEVI & OTHERS Appellants

Through: Mr. R.L. Kohli, Advocate

versus

MCD & OTHERS Respondents

Through: Mr. O.P. Saxena, Advocate

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MS. JUSTICE REVA KHETRAPAL

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

: **REVA KHETRAPAL, J.**

In view of the reasons recorded in LPA 665/2003, this contempt petition is dismissed accordingly.

REVA KHETRAPAL, J

CHIEF JUSTICE

APRIL 2, 2008

VK.