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IN THE HIGH COURT OF DELHI

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RSA.No.70/2008

Vijay Pal Singh Appellant
through: Mr.Kumar Sunil, Advocate

VERSUS

Smt.Phoolwati Sharma Respondent
through: None.

DATE OF DECISION

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19.03.2008

CORAM:

Hon'ble Mr.Justice Pradeep Nandrajog

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

: **PRADEEP NANDRAJOG, J.**(Oral)

1. The appellant has suffered two concurrent decrees against him. The appeal came up for a preliminary hearing today.

2. Whether or not a substantial question of law arise for consideration in the instant appeal would depend upon the perusal of the impugned decrees and the contentions urged at

the hearing today.

3. Respondent, Phoolwati Sharma, filed a suit for possession and damages against the appellant alleging unauthorized use and occupation against the appellant claiming that she was the owner of property No.RZ-431-E, Raj Nagar, Palam Colony, New Delhi and had constructed 7 shops on the land. She stated for 2 out of 7 shops, bearing Shop No.2 and 3, she had filed 2 suits for ejectment of the son and wife of the defendant who were tenants under her, after determining their tenancy, and that she impleaded the appellant as a co-defendant in the said 2 suits for the reason appellant was in possession of the 2 shops. She further pleaded that in the said suit appellant took a defence that neither his son nor his wife were tenant in respect of the 2 shops. She further pleaded that the appellant took a defence that the land on which the property was constructed belonged to the Gaon Sabha and that his possession was without the consent or permission, much less under authority of the plaintiff. She stated that having failed in the earlier 2 suits i.e. not being able to prove that the son and the wife of the appellant were tenants under her, she pleaded that she was constrained to file the instant suit for possession treating appellant's possession as unauthorized.

4. The defence taken by the appellant was in harmony

with the defence earlier on taken in the 2 previous suits, namely, that the appellant was occupying the property on land belonging to Gaon Sabha.

5. Two technical defences were taken. Firstly, that the instant suit was barred under Order 2 Rule 2 CPC. Secondly that the judgment in the earlier 2 suits concluded the issue between the parties and operated as res-judicata.

6. At the trial, the identity of the property, with reference to the sale deed, Ex.P-2, relied upon by the plaintiff came up for clarificatory evidence for the reason the sale deed referred to the property as bearing No.RZ-430/D1, Raj Nagar-I, Palam.

7. The plaintiff successfully established that at the time when she purchased the property forming subject matter of the sale deed, Ex.P-2, it bore municipal No.RZ-430/D1, Raj Nagar, Palam but later on was assigned a new municipal No.RZ-431-E, Raj Nagar-I, Palam.

8. The plea that the suit was barred under Order 2 Rule 2 CPC and that the earlier decision operated as res-judicata have been negated by both the courts below.

9. In view of the sale deed, Ex.P-2, and proof that the property bearing No.RZ-430/D1, Raj Nagar-I, Palam was given a new municipal No.RZ-431-E, Raj Nagar-I, Palam it has been

held that the plaintiff has proved ownership of the suit property. The fact that the appellant himself claimed to be in unauthorized possession was held to be sufficient to decree the suit. In respect of the evidence pertaining to rentals, learned Trial Judge has awarded mesne profits @ Rs.2,000/- per month. Appellate Court has concurred.

10. In the instant second appeal it is urged that the earlier decision by which the 2 ejectment suits filed by the respondent were dismissed operate as res-judicata and that additionally the instant suit was barred under Order 2 Rule 2 CPC. It is also urged that the husband of the appellant could not have deposed as her attorney and since husband of the plaintiff was the only witness, it has to be held that the plaintiff has not proved her case.

11. The plea of res-judicata is prima facie not available to the appellant to be urged in the second appeal for the reason, as noted in para 12 of the appellate judgment, at the first appeal, appellant gave up said plea.

12. Learned counsel for the appellant cites AIR 1973 Patna 69, Gauri Shankar Tiwari Vs. Maharani Durgeshwari Sani & Ors.

13. Suffice would it be to state that the decision is clearly distinguishable on account of the fact that in the instant

case, the plea of res-judicata which was available and was urged in the memorandum of appeal before the learned First Appellate Court, consciously was given up during arguments.

14. Be that as it may, independent thereof, the plea of res-judicata is not available to the appellant for the simple reason, in the earlier suit(s) the plaintiff sought ejectment claiming that the wife and the son of the appellant were tenants under her in respect of shop No.2 and 3 respectively. She stated that the appellant was occupying the shops as relation of the tenants. Having failed to establish a landlord tenant relationship, plaintiff lost the battle at the first round. Thus, nothing prevented her from suing on an independent cause.

15. The concept of res-judicata needs to be understood with reference to a cause of action. Needless to state, a previous decision on a cause of action binds the parties and their representatives on the same cause.

16. Thus an earlier litigation on a different cause of action is irrelevant and cannot operate as res-judicata when the second suit is brought on a different cause of action.

17. Pertaining to the plea of Order 2 Rule 2 CPC being attracted, suffice would it be to state that the mandate of Order 2 Rule 2 CPC requires that the plaintiff should include the

whole claim which the plaintiff is entitled to make, in respect of a cause of action. The rule intends not to mandate that different causes of action arising out of a particular set of facts have necessarily to be clubbed. The rule is aimed at preventing different claims, founded on the same cause of action, being enforced in different suits.

18. Thus, Order 2 Rule 2 CPC is not attracted in the instant case for the reason, the cause on which the earlier suits were founded was the stated landlord tenant relationship. Having failed to establish the same, the instant suit was founded on the cause that the possession of the appellant was unauthorized and that the owner was entitled to regain possession thereof.

19. On the issue, whether husband of the respondent could depose as her witness, learned counsel for the appellant cites 2005 SCCR 42, Janki Vashdeo Bhojwani & Anr. Vs. Indusind Bank Ltd. & Ors.

20. The said decision holds that a party cannot appear as a witness for a party in the capacity of that party.

21. There is no law which prohibits a person to act as a witness in his personal capacity. If the husband, as in the instant case, claims to look after the affairs of his wife or activities which most husbands certainly do in India, in relation

to proof of a sale deed executed in favour of his wife to which execution the husband is a witness, surely his testimony is in his personal capacity as a witness and not in the capacity of his wife.

22. Let me illustrate. In ejectment proceedings in which it is stated that the requirement of the landlord is bonafide premised on the fact that the landlord is an old man aged 80 years and desires the company of his grand children, his son may not be a competent witness to depose on the desire of the plaintiff for the reason the desire of the father is in his personal knowledge. But where the ejectment is on the plea that the 80 years old landlord is living with his two married sons and is possessed of only two room accommodation falling short of the requirement of the family, the son would be a competent witness to depose that his father is living with his two sons in a two room accommodation. He would also be a competent witness to depose as regards the number of family members. The reason is obvious. The facts which he deposes are in his personal capacity as his father's witness. He does not depose in the capacity of being the father.

23. No other point has been urged.

24. Thus I hold that no substantial question of law arises for consideration in view of the discussion hereinabove.

25. The appeal is dismissed in limine.

26. No costs.

March 19, 2008
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PRADEEP NANDRAJOG, J.