

\* **HIGH COURT OF DELHI : NEW DELHI**

**FAO No.47/2009 & CM No. 2539/2009**

% Judgment reserved on: 26<sup>th</sup> August, 2009

Judgment delivered on: 11<sup>th</sup> September, 2009

Sh. Phool Singh,  
S/o Shri Pema,  
R/o Khasra No. 50/01,  
Village Himayun Pur,  
New Delhi-29

....Appellant

Through: Mr. Naresh K. Thanai  
with Mr. Puneet Sharma,  
Advts.

Versus

- (1) Sh. Rajinder Singh  
S/o Late Sh. Khem Chand
- (2) Sh. Sat Prakash  
S/o Late Sh. Khem Chand
- (3) Sh. Satbir Singh  
S/o Late Sh. Khem Chand
- (4) Smt. Vimla  
W/o Chand Ram  
D/o Late Sh. Khem Chand.
- (5) Smt. Kamla  
W/o Anoop Singh  
D/o Late Sh. Khem Chand.
- (6) Smt. Santosh

W/o Satbir  
D/o Late Sh. Khem Chand.

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- (7) Smt. Jeeto  
W/o Late Sh. Bhoru
- (8) Shri Sher Singh  
S/o Late Sh. Bhoru
- (9) Sh. Sri Bhagwan  
S/o Late Sh. Bhoru
- (10) Sh. Jai Bhagwan  
S/o Late Sh. Bhoru
- (11) Smt. Shanti  
W/o Shri Wazir  
D/o Late Shri Bhoru
- (12) Smt. Om Wati,  
W/o Raj Kumar  
D/o Late Shri Bhoru  
All R/o 60-B, Himayun Pur,  
Delhi-29
- (13) Sh. Dalip Kumar  
S/o Late Sh. Hukum Chand.
- (14) Smt. Nirmla Devi,  
W/o Shri Pratap Singh Chikara  
D/o Late Shri Hukum Chand.
- (15) Smt. Krishna,  
W/o Sh. Sumer Singh Chikara  
D/o Late Shri Hukum Chand.

(16) Smt. Bhagwati,  
W/o Shri Mahinder  
D/o Late Shri Hukum Chand

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(17) Smt. Roshni,  
Wd/o Late Sh. Darshan.

(18) Sh. Jagbir,  
S/o Late Sh. Darshan.

(19) Sh. Kuldeep,  
S/o Late Sh. Darshan.

(20) Sh. Balraj,  
S/o Late Sh. Darshan.

(21) Smt. Savita,  
W/o Sh. Ram Avtar  
D/o Late Shri Darshan.

(22) Miss Suman (Minor)  
(aged about 15 years)  
D/o Late Sh. Darshan.  
Through her mother, Smt. Roshni  
(the Pltf. No. 17) as her next friend.

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(23) Smt. Ram Kumari,  
D/o Late Shri Chander Bhan.

(24) Sh. Chattar Singh,  
D/o Late Shri Chander Bhan.

(25) Smt. Laxmi @ Babli,

W/o Shri Jaipal,  
D/o Late Shri Chander Bhan.

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(26) Sh. Jagdev,  
S/o Shri Juglal,  
(deceased through L. R.'s)

- a. Smt. Rati Devi,  
W/o Sh. Jagdev
- b. Smt. Santosh,  
Wd./o Late Sh. Raj Kumar.
- c. Sh. Jai Karan,  
S/o Raj Kumar

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(27) Smt. Chhoto  
Wd./o Late Shri Balbir Singh

(28) Sh. Narain Singh  
S/o Late Shri Balbir Singh.

(29) Smt. Shushma  
W/o Late Shri Rambir Singh  
D/o late Shri Balbir Singh

(30) Smt. Seema  
W/o Late Shri Rakesh  
D/o late Shri Balbir Singh

(31) Sh. Rajinder  
S/o Late Shri Khuba

(32) Smt. Panmeshwari  
S/o Late Shri Khuba

(33) Smt. Phool Kaur  
S/o Late Shri Khuba

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(34) Smt. Dhan Kaur @ Dhanno  
Wd/o Late Shri Balram @ Balbir Singh

(35) Sh. Jai Singh  
S/o Late Shri Balram @ Balbir Singh

(36) Sh. Subhash  
S/o Late Shri Balram @ Balbir Singh

(37) Smt. Roshni  
W/o Sh. Ramphal  
D/o Late Shri Balram @ Balbir Singh

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(38) Smt. Nirmla Devi  
Wd./o Late Sh. Ram Kishan

(39) Sh. Vikram Singh  
S/o Late Sh. Ram Kishan

(40) Sh. Virender  
S/o Late Sh. Ram Kishan

(41) Smt. Savita  
D/o Late Sh. Ram Kishan

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(42) Sh. Mukhtiar Singh

- S/o Late Sh. Ganga Dass  
(43) Sh. Lakhpatt Singh  
S/o Late Sh. Jai Ram
- (44) Sh. Chatar Singh @ Chatre  
S/o Late Sh. Jai Ram
- (45) Smt. Risalo  
Wd./o Late Sh. Jai Ram
- (46) Smt. Dhanpati  
D/o Late Sh. Jai Ram
- (47) Smt. Roshani  
D/o Late Sh. Om Prakash
- (48) Smt. Risalo  
D/o Late Sh. Om Prakash

All R/o Village Himayun Pur,  
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- (49) Shri Tejhbir Singh @ Teju  
S/o Late Sh. Khazan Singh  
(deceased through L. R. 's)
- (a) Smt . Ram Kaur  
W/o Sh. Khazan Singh
- (b) Smt. Manoranjana  
W/o Sh. Tejbir Singh
- (c) Sh. Amit  
S/o Sh. Tejbir Singh
- (d) Sh. Ashish  
S/o Sh. Tejbir Singh
- (e) Sh. Aman

S/o Sh. Tejbir Singh  
All R/o Himayun Pur,  
New Delhi-110029.

....Respondents.

Through: Mr. S.S. Panwar with  
Mr. Sunil Dutt, Advs.

Coram:

**HON'BLE MR. JUSTICE V.B. GUPTA**

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

**V.B.Gupta, J.**

This appeal is against order dated 3<sup>rd</sup> February, 2009 passed by Additional District Judge Delhi, vide which application under Order 39 Rule 1 and 2 Code of Civil Procedure (for short as 'Code') of respondents was allowed.

2. Brief facts as alleged are that respondents are joint owners of suit land, being successor in interest of their respective ancestors, who were joint owners and in possession of the suit land. Land of Khasra No. 50 min. measuring 21 Bighas and 13 Biswas was owned and

possessed by proprietors of Shamlat Thok of Village Himayun Pur, which was partitioned. Land measuring 2 Biswas and 16 Bighas was given a separate Khasra No. 50/1 and fell to the shares of ancestors of respondents.

3. This land was acquired by Government of India for public purpose and award in respect of land measuring 2 Bighas and 3 Biswas, out of 2 Bighas and 16 Biswas was made in faovur of respondents on 31.1.1991. Award in respect of remaining 13 Biswas of land (suit land), could not be made because, appellant filed a civil writ petition in this Court. That writ petition was decided on 24.2.1999, whereby acquisition proceedings with regard to suit land were quashed. It is alleged that after decision of writ petition, appellant attempted to illegally grab the suit land. In first week of January, 2003, he forcibly encroached upon suit land and illegally raised constructions.

4. Respondents filed suit for possession, damages and injunction against appellant restraining him from alienating the suit land and also from raising any further construction.

5. In written statement, appellant has alleged that respondents are neither the co-owners nor they are in possession of suit land. It is the appellant, who is in possession of suit land for last over 60 years. Fore-fathers of appellant were also in possession of suit land thereafter, appellant gained the possession. Appellant has been in open, hostile and uninterrupted possession of suit land and has become owner by adverse possession.

6. It is also alleged that prior to institution of this suit, respondents and/or their predecessors in interest, filed suit for injunction in February 1996. Their application under order 39 Rules 1 and 2 of the Code, seeking relief for injunction restraining appellant from raising construction was dismissed, on 9<sup>th</sup> October, 1966 by the Civil Judge. Appeal was also dismissed and that suit is still pending adjudication. Appellant being owner of suit land, is within his right to raise the construction.

7. It is submitted by learned counsel for appellant that appellant is in settled position and has become owner by way of adverse possession. Being in possession, he has got a prima-facie case and balance of convenience lies in his

favour and it is appellant, who shall suffer irreparable loss and injury if injunction is granted in favour of respondent.

8. It is also contended that earlier there was litigation between the parties and as per report of Local Commissioner, (copy of which has been placed on record at page-62 of paper book) appellant is in actual physical possession. Under these circumstances, impugned order passed by trial court is liable to be set aside.

9. In support of its contentions, learned counsel for appellant cited various judgments; namely ***Salwan Education Trust vs. Lt. Governor, 1986 Rajdhani Law Reporter (NSC) 2***, wherein it is observed;

“If a defendant is in possession of land on date of suit, he cannot be restrained from putting up construction on the same.”

10. In ***Vishnu Bhagwan Mittal vs. Renu Mehta, 1996 III AD (DELHI) 575***, it was held;

“When defendant was in possession of the property in question as on the date when the construction had commenced, there is no reason as to why at the instance of the plaintiff there should be any restriction upon

defendant in construction of the property.”

11. To similar effect is ***Vijay Kumar vs. K.N. Chopra & Ors., 84 (2000) DLT 700.***

12. In ***R.K. Aneja vs. DDA & Ors. 47 (1992) DLT 649,***  
this Court observed;

“That it is a well established principle of jurisprudence which needs no reiteration that once a matter has been heard and finally disposed of once thus got a quietus at the hands of the Competent Court, should not be allowed to be revived again.”

13. On other hand, learned counsel for respondents submitted that respondents are recorded owner of suit property while appellant is an encroacher. Prima facie case and balance of convenience is in favour of respondents. It is respondents who would suffer irreparable loss, if injunction is not granted and there is no illegality or infirmity in the impugned order.

14. In support, learned counsel referred a decision, ***K.V. Narayan v. S. Sharana Gowda and Anr. AIR 1986 Karnataka 77,*** wherein it was observed;

“A trespasser in possession, is not entitled to a temporary injunction as against a true owner.”

15. In ***M/s. G.M. Modi Hospital and Research Centre Medical Science v. Sh. Shankar Singh Bhandari and Ors. AIR 1996 Delhi 1***, this Court observed;

“It is not necessary that every person in possession of property is entitled to injunction. Courts are bound to come to some tentative conclusion whether possession is legal.”

16. It is an admitted case of both parties, that earlier predecessors-in-interest of respondents, Khem Chand and Ors., filed suit for permanent injunction against present appellant. In that suit, application under Order 39 Rule 1 & 2 of Code was filed, seeking relief of injunction restraining the appellant from raising construction. That application was dismissed by Civil Judge, vide order dated 9<sup>th</sup> October, 1996. Relevant portion of which reads as under;

“I am of the view that the plaintiffs are not entitled for discretionary relief by way of temporary injunction as plaintiff have suppressed the material fact from the Court and has not come with clean hands and also on the ground that prima facie defendant is in possession of the suit property and plaintiff are

not in possession of the suit property and they are not entitled to the relief of injunction without claiming recovery of possession. Hence, the application of the plaintiffs U/O 39 Rule 1 & 2 is hereby rejected.”

17. In the present suit, allegations against appellant are that, he illegally and forcibly encroached upon suit land in first week of January, 2003 and started raising unauthorized construction. Along with it, respondents filed an application under Order 39 Rule 1 & 2 of the Code (dated 20<sup>th</sup> February, 2006) which was disposed of, vide order dated 10<sup>th</sup> July, 2007 by Additional District Judge. Relevant portion of the order states;

“The plaintiff has prayed the relief in application under disposal that the defendants be restrained from selling, transferring, alienating or creating any third party interest in respect of the land in question measuring 13 Biswas (650 sq.yards approximately) falling in Khasra No.50/1 min. situated within the Abadi of Village Himayun Pur, Tehsil, Hauz Khas, New Delhi as shown in red and yellow in the site plan annexed with the plaint. The said application is contested by defendants. Sh. Naresh Kumar, Advocate stated that the defendants are in possession of the property for the last more than 60 years.

During the course of arguments, Sh. Naresh Kumar, Advocate, counsel for the defendant in his fairness stated that the defendant has no intention to sell the property in question till the disposal of the suit. However, the defendant has let out the portion of the property in question to different tenants and the defendant may let out or re-let out the portion of the property as per requirement. However, Sh. Naresh Kumar, Advocate stated that the defendant has no intention to sell the property in question in favour of any other person till the disposal of the suit. Sh. Panwar in his fairness stated that when the defendant has stated that he has no intention to sell the property in question till the disposal of the suit in that case, case be proceeded on trial.

In these circumstances, the application under Order XXXIX Rule 1 and 2 CPC stands disposed of.”

18. After dismissal of this application, respondent again filed application under Order 39 Rule 1 & 2 of the Code (dated 6<sup>th</sup> January, 2009) before trial court, praying that defendant (present appellant) be restrained from raising any further construction or making any addition or alteration. In alternative, it was prayed that order dated 10<sup>th</sup> July, 2007, may be modified to the effect that defendant (present appellant) be restrained from raising further construction, addition and alteration.

19. Thus, it is apparent even from averments made by respondents, that appellant is in possession of suit property and respondents' earlier application for injunction filed in 1996 was dismissed. Similarly, in second application for injunction, which was disposed of on 10<sup>th</sup> July, 2007, no relief was granted to the respondents.

20. Supreme Court in ***Satyadhyan Ghosal & Ors. v. Smt. Deorajin Debi & Anr., AIR 1960 SC 941***, observed;

“When a matter - whether on a question of fact or a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceedings between the same parties to canvass the matter again.”

21. Respondents earlier sought similar relief but the same was not granted. It is also an admitted case of respondents, that appellant is in possession of suit property (whether it is legal or otherwise). Appellant being prima facie in possession, cannot be restrained from carrying out any construction or making any addition or alteration in his property. Balance of convenience also lies in appellant's

favour and it is he, who will suffer irreparable loss, if he is restrained from carrying out the construction.

22. Accordingly, present appeal is allowed and impugned order of the trial court is set aside.

23. Parties shall bear their own costs.

24. Trial court record be sent back.

11<sup>th</sup> September, 2009  
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**V.B.GUPTA, J.**