

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

+ **CM(M) No.1538/2007, 1539/2007 & 638/2008**

% **Date of decision:11th December,2009**

OM PRAKASH Petitioner

Through: Mr.J.S.Chauhan, Advocate.

Versus

DEVI RAM ... Respondent

Through: Mr. Ramesh Kumar, Advocate.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may
be allowed to see the judgment? No
2. To be referred to the reporter or not? No
3. Whether the judgment should be reported
in the Digest? No

RAJIV SAHAI ENDLAW, J.

1. These three petitions, all under Article 227 of the Constitution of India arise from the same suit and from common order in three connected appeals arising from that suit and have been heard together and are disposed of by this common judgment.

2. Shri Devi Ram, respondent in all these appeals had instituted the suit from which these petitions arise, against Om Prakash, petitioner in all the petitions, in or about the year 1987, for permanent injunction restraining Om Prakash from dispossessing Devi Ram from property No. 1261/1, Pana Paposian, Narela, Delhi

(hereinafter called suit property). It was, inter alia, pleaded in the plaint that the suit property belonged to the father of Devi Ram; that upon the demise of the father of Devi Ram the suit property fell to the share of the respondent Devi Ram in a family settlement; that the suit property comprises of an open area admeasuring 24 sq yds. and bounded by four walls; that the suit property is adjacent to property No. 1286 owned by Om Prakash; that Devi Ram had let out the suit property to one Shri Surinder Singh for use as a *gher*; that Shri Surinder Singh had vacated the suit property in June, 1987 and since then it is in exclusive possession of Devi Ram; that Om Prakash had tried to grab the suit property in connivance with Shri Surinder Singh aforesaid and by breaking the wall between his property and the suit property; Devi Ram had then in or about 1984 instituted a suit for permanent injunction against Om Prakash and in which suit Om Prakash put forth his claim as owner of the suit property and on which plea an issue was framed in the earlier suit; that the said issue was decided in favour of Devi Ram and against Om Prakash; however during pendency of the earlier suit Om Prakash had attempted to demolish the wall between his property and the suit property; that the earlier suit was dismissed on the ground that the threats of Om Prakash were over after he had reconstructed the demarcation wall. Devi Ram further pleaded in the suit that Om Prakash had again, just prior to institution of the suit in 1987 attempted to demolish the wall between his property and suit property and to dispossess Devi Ram from the suit property. Hence the suit was filed.

3. The suit was accompanied with an application under Order 39 Rules 1 and 2 CPC for restraining Om Prakash from demolishing any portion of the suit property and/or from dispossessing Devi Ram therefrom. The said application for interim relief was allowed and Om Prakash restrained from demolishing the wall between his property and the suit property and from dispossessing Devi Ram from the suit property.

4. Om Prakash preferred an appeal (first appeal) against the order on the application under Order 39 Rules 1 and 2 of the CPC. In the meanwhile, Devi Ram filed an application under Order 39 Rule 2A of the CPC alleging that Om Prakash had in violation of the interim order dispossessed Devi Ram from the suit property. The appellate court where the first appeal of Om Prakash was pending held that Om Prakash could not be heard till he purges the contempt; the appeal was accordingly adjourned sine die.

5. The application of Devi Ram under Order 39 Rule 2A CPC was however dismissed on the failure of Devi Ram to produce any evidence on the same. Devi Ram applied for review of the said order which was declined. Devi Ram preferred an appeal thereagainst (Second appeal).

6. Om Prakash thereafter applied for revival of first appeal which has been adjourned sine die.

7. Devi Ram thereafter filed another application under Order 39 Rules 1 and 2 CPC in the suit for restraining Om Prakash from selling, transferring or parting with the possession of the suit property to any other person. The said application was allowed by the trial court. The trial court vide order dated 17th August, 1996 on application of Devi Ram also ordered the suit property to be sealed. Om Prakash preferred another appeal thereagainst also (Third appeal). The order of sealing was stayed during pendency of the appeal.

8. The two appeals aforesaid (i.e. the First and the Third appeal) of Om Prakash were dismissed by the Appellate Court. The Appellate Court while dismissing the appeals stayed the operation of the order of sealing of the property for some time to enable Om Prakash to avail legal remedies. Upon Om Prakash preferring a petition before this court, the operation of the order of sealing was stayed. The property accordingly has not been sealed till now. The appeal of Devi

Ram (Second appeal) was also dismissed by the Appellate Court. Two of the three CM(M) petitions before this court have been preferred by Om Prakash against i) the order of dismissal of his appeal (First Appeal) against the order of the trial court on an application under Order 39 Rules 1&2 CPC and ii) the order of dismissal of his appeal (Third Appeal) against the order of sealing of the property. Devi Ram has not challenged the order of dismissal of his appeal (Second Appeal) effectively against the order of trial court dismissing his application under Order 39 Rule 2A CPC. That order has accordingly attained finality.

9. Today the factual position is as under:

- i. Devi Ram at the time of institution of the suit in 1987 claimed to be in possession of the property.
- ii. Om Prakash of course controverts the same. The counsel for Devi Ram also contends that Om Prakash, in fact, in his pleadings did not controvert the possession of Devi Ram. However, it is not relevant to adjudicate the same as of now. Today admittedly Om Prakash is in possession of the property. Of course, Devi Ram contends, in violation of the interim order.
- iii. the orders of the trial court and the appellate court restrain Om Prakash from alienating, encumbering or parting with possession of the property and demolishing the wall between his property and suit property and also direct the sealing of the property.
- iv. the order of sealing has been kept in abeyance first by the appellate court and now by interim order in these proceedings.

10. The suit has been pending since 1987. On inquiry it is informed that issues have not been framed as yet.

11. After some hearing it was suggested to the counsel for the parties that instead of this court in these petitions deciding as to whether sealing is valid or

not, the two CM(M) petition with respect to the interim order and the order of sealing be disposed of with the following directions:

- i. A direction be issued to the trial court to dispose of the suit within one year from today since it has already been pending for the last 21 years.
- ii. Om Prakash for the said one year be permitted to continue in possession of the suit property. However, he shall not alienate, encumber or part with the possession of the property and shall also not raise any construction therein or make any addition, alteration thereto.
- iii. Since the property is not being sealed and Om Prakash will continue to enjoy the same, in the event of it being held in the suit that Devi Ram was in possession of the property at the time of institution of the suit and had been dispossessed therefrom in violation of the interim order of the court, Om Prakash shall not only be liable to give back the possession of the property to Devi Ram but shall also pay mesne profit/damages for use and occupation thereof at such rate as may be determined by the trial court.

12. Both the counsels are agreeable to the CM(M) petitions preferred against the interim order and the order of sealing being disposed of in terms of the above. CM (M) 1538/2007 & CM(M) 1539/2007 are disposed of in terms of the above. The trial court is directed to dispose of the suit within one year from today.

13. That leaves the third petition being CM(M)638/2008. That has been preferred by Om Prakash against the order of the trial court dismissing his application under Order 6 Rule 17 of the CPC for amendment of the written statement. Om Prakash by way of amendment sought to incorporate the pleas in the written statement *inter alia* to the effect –

- i. that the suit for injunction is not maintainable since Devi Ram had agreed to sell the suit property to Om Prakash vide written agreement to sell, power of attorney etc. and had in part performance of agreement to sell put Om Prakash into possession of the suit property.
- ii. that Om Prakash after purchasing the property in 1974 had removed the intervening wall between his property and the suit property.
- iii. denying that Devi Ram had let out the suit property to Shri Surinder Singh.
- iv. denying that Devi Ram has been in possession of the suit property.
- v. averring that it is Om Prakash who has been in possession and Devi Ram who has been trying to forcibly dispossess him from the suit property.
- vi. denying that Devi Ram is the owner of the suit property after having sold the same to Om Prakash.

14. The trial court dismissed the application for amendment vide order dated 16th April, 2008 *inter alia* on the ground –

- a. that Om Prakash could not be permitted to take the plea of ownership of the property on the basis of agreement to sell, power of attorney etc since he had taken a similar plea in the earlier suit filed by Devi Ram in 1984 and in that suit on the basis of the same documents it had been held that Om Prakash was not the owner of the property; Om Prakash never challenged these findings which have become final.
- b. that Om Prakash had filed the documents in the suit as far back as in 1996 and there was no reason which prevented him from raising the pleas in the written statement earlier.
- c. that the proposed amendments were within the knowledge of Om Prakash but in his wisdom he did not choose to incorporate the same in the written statement.

- d. that in the earlier suit as well as in the interim orders in the present suit it had been held that Devi Ram was in possession of the property and after the said findings he could not be permitted to amend the written statement to take the plea that Devi Ram was not in possession of the property.
- e. that the plea of Section 53A of the Transaction of Property Act has been rejected by the appellate court in appeal against the order under Order 39 Rules 1 and 2 of the CPC.

15. The counsel for Devi Ram has also taken me through the written statement originally filed by Om Prakash and contended that therein Om Prakash has not at all contended that he is the owner of the property or that he is in possession of the property. The traverse in the written statement, of claims in the plaint of Devi Ram being the owner in possession of the property is, stated to be a bare denial.

16. Insofar as the trial court has rejected the amendment on the ground of issue of ownership having become final by the judgment in the earlier suit, the same cannot be sustained in law. The final judgment in the first suit was in favour of Om Prakash and against Devi Ram; the suit was dismissed. It is the settled legal position that the final judgment being in favour of Om Prakash, Om Prakash could not have appealed therefrom and thus any finding therein cannot be *res judicata* on Om Prakash. The said reasoning thus has to be rejected.

17. The contention for the counsel for Devi Ram that Om Prakash had in the written statement, as originally filed, not taken the plea of ownership and being in possession, though attractive, again cannot be sustained. As noticed hereinabove it was the case of Devi Ram himself in the plaint that Om Prakash in the first suit had been claiming himself to be the owner in possession of the property. A perusal of the judgment in the first suit also shows that it was the plea of Om Prakash in the suit that he was the owner in possession of the property. The

judgment in the first suit held Om Prakash not to be the owner merely for the reason that there was no registered sale deed in favour of Om Prakash. However, the Division Bench of this court in *Ashma M. Jain Vs. The Canara Bank* 94 (2001) DLT 841 has held that judicial notice has to be taken of the fact of the properties being transacted in the city of Delhi on the basis of power of attorney, agreement to sell etc. Once Devi Ram himself in the plaint has stated that Om Prakash has been claiming to be the owner in possession of the property, it cannot be said that Om Prakash for the reason of non specific traverse of the claims in any way admitted the ownership or possession of Devi Ram.

18. I have been shown the agreement to sell and power of attorney admittedly executed by Devi Ram in favour of Om Prakash. As per the said documents the possession of the property stood delivered to Om Prakash. On inquiry as to what is the defence of Devi Ram to the said documents, it is informed that the same were in pursuance to a loan transaction and not intended to be acted upon. In the said state of facts, there is no question of Om Prakash, by way of amendment, withdrawing any admission to the prejudice of Devi Ram. The parties appear to have been throughout aware of the respective cases. Merely because the advocate of Om Prakash who filed the original written statement did not draft the same correctly, as is expected of an advocate, ought not to deprive Om Prakash of setting up the correct pleas in his defence.

19. The other reasoning of the trial court based on the finding of the appellate court in appeals against Order 39 Rules 1 and 2 CPC is also not correct. The order in appeal against interim order, returned a prima facie finding only and observation therein qua the plea under Section 53A of the Transfer of Property Act cannot bar the said plea from being taken or adjudicated in the final decision of the suit. The fact remains that the suit, though of 1987, has remained embroiled in applications for interim relief and no progress had been made therein till when the application for amendment was filed or even till now. Thus mere delay cannot come in the way of the amendment which otherwise is found to be necessary for complete adjudication of the matter in controversy between the parties from being allowed.

20. Accordingly, CM(M) 638/2008 is allowed. The order dated 16th April, 2008 of the trial court dismissing the application of Om Prakash for amendment of the written statement is set aside. The application for amendment is allowed. The parties are left to bear their own costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**December 11, 2009
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