

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

% *Judgment reserved on : 09.11.2010*
Judgment delivered on :15.11.2010

+ **R.S.A.No.38/2000**

N. KIRPAL SINGH (Since deceased)

Through L.Rs.

.....Appellant
Through: Mr.Ashish Mohan & Mr.Rohit
Gandhi, Advocates.

Versus

S.HARCHAN SINGH (Since deceased)

Through L.Rs. & Ors.

.....Respondents
Through: Mr.Rakesh Kr.Khanna, Sr.Adv.
with Mr.Rajiv Garg &
Mr.Seema Rao, Advocates.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

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

Yes

INDERMEET KAUR, J.

1. This second appeal has impugned the judgment and decree dated 31.03.2000 which had endorsed the finding of the Trial Judge dated 05.09.1981 thereby decreeing the suit of the plaintiff.

2. The factual matrix of the case is as follows:

- (i) Bunglow No. 2/54 Original Road, Karol Bagh was constructed by Sh. Nand Singh. He died in or about 1993. He left behind his widow Smt. Prakash Kaur, the plaintiff and his 5 sons namely Harbachan Singh, Kirpal Singh, Joginder Singh, Surinderpal Singh and Saranjit Singh. He had three daughters.

- (ii) After the death of Sh. Nand Singh, the legal heirs wanted partition of all the assets left by the deceased Nand Singh. Matter was referred to the arbitration. The arbitrators gave their Award on 20.05.1952 which was made out a Rule of the Court on 20.08.1952.
- (iii) In terms of the decree dated 20.08.1982, the plaintiff i.e. Smt. Prakash Kaur came to be the sole and exclusive owner of the aforestated suit property i.e. Bungalow No. 2/54 Original Road, Karol Bagh. She permitted the defendant i.e. her son Sh. Kirpal Singh, to occupy the portion of this house as a licensee. Thereafter, in spite of requests, the defendant did not vacate the suit property. Suit for mandatory injunction was accordingly filed.
- (iv) Defendant, being the son of the plaintiff, contested the suit. The submission was that the award dated 20.5.1952 was never acted upon; the property continued to remain joint; it was the property of a Hindu Undivided Family (HUF); defendant was entitled to retain it.
- (v) The Trial Judge framed 8 issues. The said issues read as follows:-
1. Whether the suit for mandatory injunction is not maintainable in the present form? OPD
 2. Whether the suit premises was a joint Hindu family property headed by S. Nand Singh as Karta and remained in the same onwards. If so its effect? OPD
 3. Whether the award of the arbitrator was never intended to be acted upon by the parties and further as alleged, if so its effect? OPD
 4. Whether the plaintiff is the exclusive owner of the property in dispute? OPP

5. Whether the suit is properly valued for the purposes of court fee and jurisdiction? OPP
6. Whether the suit is bad for non-joinder of necessary parties? OPD
7. Whether the plaintiff is stopped by way of her own conduct to act upon the said award as alleged: in para 5 of the W.S.? OPD
8. Relief.

On 15.5.78 an additional issue has been framed which reads as follows:

Whether the decree dt.20.8.1952 is a nullity as alleged in pre-objection No.XII & XV? OPD

- (vi) On the basis of the evidence adduced before the Trial Court-both oral and documentary, the suit of the plaintiff was decreed. It was held that the Award which was made into a Rule of the Court although unregistered, yet having converted into a decree as way back as 20.08.1952 was acted upon and could not be said to be a nullity. It was held that it was in terms of this decree the defendant had been granted permissive possession of the part of the suit property. Suit for mandatory injunction filed on 14.06.1976 was maintainable as the decree had not become *non est* in this intervening period.
- (vii) The First Appellate Court vide the impugned judgment and decree dated 31.03.2000 had endorsed this finding.

3. This is a second appeal. On 17.05.2000, it had been admitted and the following three substantial questions of law were formulated. They inter alia reads as follows:

1. Whether the unregistered award dealing with immovable properties could be enforced by way of execution?
2. Whether the appellant, on the facts and circumstances of the case, has proved his case of title by way of adverse possession?

3. Whether the right of the respondent has been extinguished under Section 27 of the Limitation Act?

4. Counsel for the appellant has conceded that the first substantial question of law has become redundant as the Award dated 20.5.1952 was a registered document. Copy of the said document has been placed on record. This is also borne out from the record. In this view of the matter, no arguments have been addressed on this substantial question of law.

5. On the second and third substantial question of law it is submitted that admittedly the defendant is in possession of this property since 1952. He had been permitted to occupy this property in terms of the Award dated 20.8.1952; the defendant had thereafter perfected his title after 12 years by adverse possession. The legal notice dated 22.9.1975 sent by his mother terminating his license after more than 24 years is clearly barred by time. It is submitted that ownership is created in respect of a property on which the claim to adverse possession is based from the date when the parties were put in exclusive possession which in this case would be 20.05.1952; The decree dated 20.08.1952 passed on the Award dated 20.5.1952 could have been executed only upto by 19.08.1964; suit filed on 14.06.1976 was thus barred by time. For this proposition, reliance has been placed upon 1995 Supp (4) Supreme Court Cases 47 titled as Krishan Lal Vs. Vidya Wati & Ors. . The right of the plaintiff to claim possession of this suit property now stood extinguished in terms of Section 27 of the Limitation Act. Reliance has been placed upon AIR 1990 Nagpur 49 Punja Ram Jagoba Teli vs. Ram Chintoo Gond to support a submission that after the expiry of the prescribed period of

limitation not only is the remedy barred but the title also extinguishes in favour of the possessor.

6. It has lastly been contended that a suit for mandatory injunction was not the proper course; a suit for possession should have been filed. It is submitted that the prayer clause is the deciphering clause; perusal of the plaint shows that the prayer sought a direction to the defendant to vacate the suit property. The alleged legal notice had terminated the tenancy on 22.09.1975; suit filed on 14.06.1976 i.e. after a lapse of more than 10 months was not maintainable. For this proposition, reliance has been placed upon a judgment of the full bench of this Court reported in Vol. IV DLT 1968 571 titled as Jugal Kishore Vs. Des Raj Seth; It is pointed out that inordinate delay in filing a suit for mandatory injunction would dis-entitle the party to this discretionary relief.

7. Arguments have been countered. It is submitted that the plea of adverse possession not having been set up earlier, the appellant cannot take up this plea at this juncture i.e. at the stage of second appeal. The written statement is silent on this regard. This is even otherwise a mixed question of law and fact. The appellant has all-along taken the defence that he is a co-owner of the property. Attention has been drawn to his written statement wherein in the preliminary objection it is stated that the defendant is one of the co-owners of the bungalow in dispute. It is stated that the plea of co-ownership is diametrically opposed to the plea of adverse possession and cannot be set up. For this proposition reliance has been placed upon (2009) 13 SCC 229 L.N.Aswathama & Anr. Vs. P.Prakash. It is pointed out that to establish a claim of

adverse possession for 12 years or more the possession of the claimant must be physically and uninterruptedly open and hostile to the true owner for a period exceeding 12 years. This has neither been pleaded and nor any evidence has been led on this score. Reliance has also been placed upon (2008) 15 SCC 150 Kurella Naga Druva Vudaya Bhaskara Rao vs. Galla Jani Kamma alias Nacharamma. It is submitted that this court is not a third fact finding court and cannot go into this question. On the merits of the case it has been pointed out that the question of the title of defendant as to whether he is a co-owner or not had been decided in the Award which had been converted into a rule of court/decreed on 20.8.1992 wherein it had been held that the appellant/defendant is a licensee and had been permitted to use the suit property by way of a permissive user; the plaintiff had a right to evict him at any point of time. This finding in the decree dated 20.8.1952 had attained a finality and would operate as res judicata between the parties. It is pointed out that admittedly no objections had been filed by the parties to the Award. This decree had held that the plaintiff Prakash Kaur was the exclusive owner of the suit property. This finding having since attained a finality could not be disturbed. Under this decree the plaintiff mother had permitted her defendant son to reside in the suit property; she was at liberty to ask the defendant to vacate the portion of the suit property under his occupation as and when she desired which she did so vide a legal notice dated 22.9.1975. Suit filed in 1976 was clearly not barred by limitation. It has lastly been submitted that a suit for mandatory injunction in the present form is maintainable. It was not necessary for the plaintiff to have filed a suit for possession. For

this proposition reliance has been placed upon AIR 1985 SC 857
Sant Lal Jain vs. Avtar Singh.

8. This is the second appellate court. The substantial questions of law formulated by this court on 17.05.2000 have been reproduced hereinabove. The first question of law has become infructuous. Admittedly, the Award is a registered award. Both the courts below had erroneously proceeded on the assumption that the Award was unregistered. The copy of the Award has been placed on record. It is a registered document. This is not disputed by either party. As such this first question of law does not require any answer and is not pressed.

9. Perusal of the record shows that in the written statement the defendant has taken a preliminary objection that he is a co-owner of the suit property; further contention was that the Award dated 20.5.1952 was never acted upon by the parties. No plea of adverse possession had either been set up or had any issue to the said effect been framed. Obviously, for this reason no evidence had been led on this score.

10. The registered Award dated 20.5.1952 had been made into a Rule of court/decreed on 20.8.1952. It has clearly recorded that neither party has filed any objections to this Award. The Award had recited that the disputed house i.e. Bungalow No. 2/54 Original Road, Karol Bagh; that the garage out houses in the site underneath is awarded to Prakash Kaur. It spelt out that her four sons including the defendant were also in occupation of part of this property but they shall have no right to use and remain in occupation of any portion of this bungalow without the express

permission from the owner Prakash Kaur; it would be open to her to eject them from the bungalow at whichever time she likes. The said persons would have no objection. These recitals in the award have since attained a finality. The trial court has further noted that the Arbitrators had taken time to pronounce the Award and before announcing the Award they had spoken to all the brothers as to how the Khoto and the press could be saved.

11. The plaintiff Prakash Kaur vide legal notice dated 22.9.1975 had terminated the license of the defendant. He was called upon to vacate the property; he did not do so. She filed the suit for mandatory injunction on 14.06.1976. It was well within time. Provisions of Section 27 of the Limitation Act are in no manner attracted. The Award converted into rule of court/decreed had only announced the title of the plaintiff Prakash Kaur as the owner of the suit property. It had further recited that the defendant who is in occupation of the suit property can be permitted to remain its occupation only with consent of the plaintiff. The plaintiff would be at liberty to eject her sons including the defendant at any time without any objection from their side. She chose to do so by the aforementioned legal notice. Suit filed by her within nine months thereafter i.e. on 14.6.1976 was well within time. The judgment of Punja Ram Jagoba Teli (supra) has no application.

12. The claim of adverse possession never saw the light of the day in the written statement filed by the defendant. It was for this reason that no issue was framed in this regard. Even otherwise defence of the appellant/defendant was that he was a co-owner. He is not permitted to blow hot and cold; he could not in one

breath claim ownership and in the very next breath claim title by way of adverse possession. In judgment of L.N.Aswathama (supra) on this proposition the Supreme Court has held as follows:

“17. The legal position is no doubt well settled. To establish a claim of title by prescription, that is, adverse possession for 12 years or more, the possession of the claimant must be physical/actual, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period exceeding twelve years. It is also well settled that long and continuous possession by itself would not constitute adverse possession if it was either permissive possession or possession without animus possidendi. The pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Unless the person possessing the property has the requisite animus to possess the property hostile to the title of the true owner, the period for prescription will not commence.”

13. This court is not a third fact finding court. It would not re-examine or disturb finding of fact unless there is any perversity; no such perversity has arisen or has been pointed out. The suit for mandatory injunction in the present form was maintainable. In this regard, the Supreme Court in Sant Lal Jain (supra) had held as follows:

“.... The suit is in effect one for possession though couched in the form of a suit for mandatory injunction as what would be given to the plaintiff in case he succeeds is possession of the property to which he may be found to be entitled. Therefore, the appellant should not be denied relief merely because he had couched the plaint in the form of a suit for mandatory injunction.”

14. There is no reason as to why the plaintiff was not entitled to the discretionary relief which had been granted to her. Substantial question of law have been answered accordingly. There is no merit in the appeal; it is dismissed.

INDERMEET KAUR, J.

NOVEMBER 15, 2010
SS/rb