

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

% *Judgment Reserved on: 24.02.2011*
Judgment Delivered on: 01.03.2011

+ **RSA No.85/2004 and CMs. 4643/2004 & 10869/2004**

MR. K.L. CHANDAK Appellant
Through: Mr. Vinod Tyagi, Advocates

Versus

MR. JAI CHAND & ORS. Respondents
Through: Mr. D.K. Rustagi & Mr. B.S. Bagga,
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 appeal has impugned the judgment and decree dated 02.01.2004 which had reversed the findings of the trial Judge dated 18.09.1995. Vide the judgment and decree dated 18.09.1995, the suit filed by the plaintiff Jai Chand seeking possession of the suit property i.e. property bearing Plot No. G-36, Shakarpur, Shahdara Delhi measuring 100 square yards had been dismissed. Vide the judgment and decree dated 02.01.2004, this finding was reversed; the suit of the plaintiff stood decreed.

2 The factual matrix is as follows:-

(i) The plaintiff claimed to be the owner of the aforementioned suit premises. He had purchased it vide sale deed dated 14.08.1985 (Ex. PW-1/2). The possession of the plot had been delivered to him.

He had constructed one room along with a kitchen.

(ii) Defendant sometime in the year 1980 had tress-passed into the suit property and raised an unauthorized construction therein. In spite of requests, the defendant had failed to deliver the vacant possession of the suit land to the plaintiff. Suit was accordingly filed.

(iii) In the written statement, the preliminary objection was that the suit has not been properly valued for the purpose of court fee and jurisdiction; plaintiff has no right/title in the property. Defendant is the lawful owner of the suit premises which he had purchased from Santosh Rani who in turn had purchased it from Mohan Lal and Mohan Lal had purchased the said property from Inderjeet Singh. Inderjeet Singh was the owner by virtue of a sale deed dated 13.02.1970 (Ex. DW-3/1). In the alternative, the defendant had also set up a plea of adverse possession.

(iv) On the pleadings of the parties, the following seven issues were framed:-

- "1. Whether the suit has not been properly valued for the purposes of court fee and jurisdiction? OPD*
- 2. Whether the suit is bad for non-joinder for necessary parties? OPD*
- 3. Whether the suit has not been signed by the competent person? OPP*
- 4. Whether the suit is barred by time? OPD*
- 5. Whether the plaintiff is the owner of the suit premises? OPP*
- 6. Whether the plaintiff is entitled to the decree of permanent injunction as asked for in the plaint? OPP*
- 7. Relief."*

(v) Two additional issues were also framed thereafter. Oral and documentary evidence was led by the respective parties which included two witnesses on behalf of the plaintiff and nine witnesses on behalf of the defendant.

(vi) Issues No. 1 to 4 were decided in favour of the plaintiff; issues No. 5 & 6 were decided against the plaintiff. Trial Court was of the view that the plaintiff has not been able to establish his ownership in the suit property; per contra oral and documentary evidence adduced by the defendant established that he is in possession of the suit land since 1980; balance of convenience was in favour of the defendant. Suit was dismissed. The additional issues had been left open by the trial court. No positive finding was returned on this count.

(vii) The impugned judgment had not challenged the findings on issues No. 1 to 4 for the reason they had been returned in favour of the plaintiff. On issues No. 5 & 6, the Court was of the view that the plaintiff had established that he is the owner of 100 square yards of plot No. G-36; the contention of the defendant that although he had purchased 75 square yards of suit land bearing No. G-33-A, he had failed to show that G-33-A had thereafter been converted to G-36. This contention of the defendant had been repelled; the identity of the suit property was established; it was held that the defendant was in occupation of 100 square yards of land whereas he had purchased 75 square yards of land. He was held to be in illegal and unlawful possession of the plot of land owned by the plaintiff. Suit of the plaintiff was decreed. Additional issues framed qua adverse possession had also been decided against the plaintiff; the finding returned was that the plea of adverse possession set up by the defendant had not been established.

3 This is a second appeal. After its admission on 26.08.2008,

the following four substantial questions of law have been formulated. They read as under:-

“1. Whether a decree passed by trial court in a suit for possession and injunction dismissing that suit is joint and indivisible qua six legal representatives of a sole plaintiff who died during pendency of the suit substituted under Order XXII of the Code of Civil Procedure?

2. Whether first appeal is maintainable if all legal representatives of a deceased plaintiff are not impleaded therein while such decree appealed from is joint and indivisible?

3. Whether courts have rightly decided the question of limitation?

4. Whether the learned first Appellate Court has erred in law in expanding the scope of first appeal by adjudicating the additional issues Nos. 1 and 2 which were not decided by the learned trial court and the respondent No. 1 himself not having prayed for the adjudication thereof by the learned Additional District Judge?”

4 On substantial questions of law No. 1 & 2, learned counsel for the appellant has submitted that the appeal is not maintainable. The suit had been filed by Bhani Ram through his legal representatives. There were six legal representatives namely his one widow, two sons and three daughters. This suit had been dismissed on 18.09.1995 which was a decree against all the plaintiffs. It is pointed out that the appeal has been filed before the first appellate Court only by one legal representative namely Jai Chand without impleading the other legal representatives. The impugned judgment had decreed the suit of the plaintiff on 02.01.2004; result of this decree is that the suit stands decreed qua Jai Chand but qua other legal representatives of the deceased Bhani Ram, the suit stood dismissed on 18.09.1995 which

judgment has since attained a finality. The judgment of the first appellate court reversing that decree qua one legal representative alone would be inconsistent with the decree of 18.09.1995; such inconsistent decrees cannot be allowed to stand. To substantiate this proposition, learned counsel for the appellant has placed reliance upon AIR 1988 SC 54 Mahant Dhangir & Another Vs. Shri Madan Mohan & Others. It is contended that the parties before the lower court should be represented before the appellate court in the absence of which if there are two inconsistent decrees, they cannot be permitted to operate. For the same proposition reliance has also been placed upon AIR 1971 SC 240 Ch. Surat Singh & Others Vs. Manohar Lal & Others, AIR 1971 SC 241 Dev Raj Anand Vs. Bhagwandas & Another, AIR 1972 SC 1181 Ramagya Prasad Gupta & Others Vs. Murli Prasad & Others, AIR 1965 SC 1531 Union of India Vs. Shree Ram Bohra & Others, AIR 1983 NOC 119 (KANT) Vasant Appanna Mang. & Others Vs. Gangadhar Madhavarao Inamdar & Others, AIR 1978 Orissa 91 Suns Majhi Vs. Bhairab Prasad Bahera, AIR 1978 Orissa 224 Fakirmohan Rana & others Vs. Sri Basanti Debi Thakurani & Others, AIR 1974 Bombay 118 Rshmabai & Others Vs. Sona Puna Patil & Another, AIR 1977 HP 56 Prem Singh Vs. Smt. Raj Rani Devi, AIR 1974 Rajasthan 152 Nathu & Others Vs. Laxmi Narani & others, AIR 1971 Canclutta 252 Aswini Kumar Roy & Another Vs. Kshitish Chandra Sen Gupta & Others, AIR 1927 Patna 23 Badri Narain & Others Vs. East Indian Railway & Another, AIR 1974 Karanatak 115 Rajabibi & Others Vs. S. Ameerali & Another and AIR 1973 Allahabad 328 Jamal Uddin & another Vs. Mosque at Mashakganj & others. Reliance has also been placed upon JT 2010 (8) SC 115 Budh Ram

& Others Vs. Bansi & Others. It is pointed out that the suit was even otherwise barred by limitation; Article 65 of the First Schedule of the Limitation Act, 1963 prescribes a period of 12 years for filing a suit for possession and this period of 12 years has to be counted from the date when the possession of the defendant becomes adverse. It is submitted that the defendant was in adverse possession through his predecessor namely Smt. Santosh Rani who in turn had purchased this property from Mohal Lal who in turn had purchased it from Inderjeet Singh in 1970 and as such the adverse possession of the defendant stood established from 1970. The suit filed by the plaintiff in 1984 was beyond this period of 12 years; it was barred by limitation and this has not been correctly construed by the trial court or in the impugned judgment. On the last substantial question of law, it has been urged that the additional issues i.e. question of adverse possession has been decided by the first appellate court when no argument had been urged on this score; it is pointed out that these issues had been left open by the trial court and the first appellate court has committed an error in deciding the additional issues when neither party had pressed them. It has lastly been urged that this Court is a Court of equitable jurisdiction and admittedly since both the parties had alleged that they had purchased the suit property from their respective purchasers through registered documents, it would be proper if this Court orders demarcation of the property to be effected through the appointment of a Local Commissioner; the controversy could be rested.

5 Arguments have been countered. Learned counsel for the respondents has placed reliance upon 1971 (1) SCC 265 Mahabir

Prasad Vs. Jage Ram & Others to substantiate his contention that in view of provisions of Order 41 Rule 4 of the Code of Civil Procedure (hereinafter referred to as the 'Code') even if one single plaintiff or defendant is joined in appeal proceedings, the appeal is competent. It is submitted that in this case a relinquishment deed of June, 1994 had been executed by the remaining five legal heirs in favour of the present respondent namely Jai Chand thereby relinquishing their shares in the suit property in his favour; it was in these circumstances that the appeal came to be filed by the appellant alone. The appeal was well competent and does not suffer from any infirmity. Even otherwise this plea was never raised before the first appellate court. It is pointed out that the plea of limitation now set up before this appellate Court is a mixed question of fact and law and cannot be gone into as no cross appeal had been filed by the appellant before the first appellate court challenging the findings of the trial Judge on the question of limitation which had been returned in favour of the plaintiff/respondent. This submission cannot now be adverted to. It is further submitted that the question of adverse possession was rightly decided by the impugned judgment. The findings on no score call for any interference.

6 Record has been perused. The substantial questions of law as formulated and noted hereinabove shows that the appellant has not challenged the impugned judgment on its merit. He is not aggrieved by the findings returned on issues No. 5 & 6 whereby the impugned judgment had noted that the plaintiff by virtue of his sale deed Ex. PW-1/2 was the owner of the suit land; this measured 100 square yards and had municipal No. G-36; the claim of the

defendant that G-36 had become G-33A had been rejected; the suit land in possession of the defendant was also 100 square yards; case set up by the defendant was that in terms of Ex. DW-3/1 which was the first sale document in favour of his predecessor Inderjeet Singh was for 75 square yards; suit land comprised of 100 square yards; the defendant was held to be an unauthorized occupant of 100 square yards which was owned by the plaintiff; suit for possession was accordingly decreed. This fact finding returned in the impugned judgment has not been assailed as is evident from the substantial questions of law formulated by this Court.

7 Admittedly suit had been filed by Bhani Ram. During the course of the trial, he had expired and his six legal representatives including his one widow, two sons and three daughters had been impleaded. Trial Judge had dismissed the suit of the plaintiff (who were then represented through his six legal representatives) on 18.09.1995. This was a dismissal against all the legal representatives of the plaintiff who were a collective body and the representatives of deceased Bhani Ram. Appeal had been filed by Jai Chand alone. The other legal representatives had not joined the proceedings in the appellate court. The contention before the first appellate court was that the other legal representatives in terms of a registered relinquishment deed dated June, 1994 (admitted document) had relinquished their shares in favour of Jai Chand. This document is prior in time to the date of dismissal of the suit which was on 18.09.1995. In terms of this relinquishment deed Jai Chand alone was the owner of the suit land. This relinquishment deed although had seen the light of the day before the first

appellate court yet this being an admitted document clearly prescribes that in June, 1994 Jai Chand was the owner of the suit land; he alone was the interested party. The decree of dismissal of the suit on 18.09.1995 was thus a decree against Jai Chand alone. It did not affect the other legal representatives as they had no right or title left in the property at that time.

8 The first appellate Court had reversed this finding of the trial court on 01.02.2004. It had decreed the suit of Jai Chand. The question of an inconsistency in the two decrees does not arise; rights of Jai Chand alone had been affected. The first judgment dismissing his suit on 18.09.1995 was a dismissal of the rights of Jai Chand alone; before the appellate Court the suit of Jai Chand alone was decreed. The other legal representatives having relinquished their rights in favour of Jai Chand had no interest left in the suit property. Even before the first appellate court, no such objection was taken; no cross-appeal or cross objections were filed.

9 Order XLI Rule 4 of the Code reads as under:-

“4. One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all- Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.”

Order XLI Rule 4 of the Code thus permits one of the several plaintiffs or one of the several defendants to obtain a reversal of the whole decree. Even assuming that the decree of dismissal (dated 18.09.1995) was a decree against all the legal representatives of Bhani Ram, the appeal filed by one legal

representative namely Jai Chand was competent. Rule 33 of the said Order is relevant. It reads as under:-

“Power of Court of Appeal.-The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees].”

Rule 33 of this Order give wide powers to the appellate court to pass any decree and to make any order notwithstanding that the appeal has been filed only by one person; decree can be passed against those respondents as well who have not filed any appeal or objection; condition being that they must be parties to the suit. This provision is based on the salutary principle that the appellate Court should have the powers to do complete justice between the parties. It confer a wide discretionary power on the appellate court notwithstanding the fact that the appeal is with regard to a part of a decree or that the parties in whose favour the power is proposed to be exercised has not filed any appeal or cross-objection. The words ‘as the case may require’ in fact has been given the widest power to the appellate Court to pass any order or decree to meet the ends of justice. Order XLI Rule 4 of the Code has to be read in conjunction with Order XLI Rule 33 of the Code which thus empowers the appellate court to do complete justice between the parties by passing such an order which ought to have been passed or made although none of the parties affected of the decree have

appealed against it. The judgments relied upon by learned counsel for the appellant on this score are all inapplicable to the facts of the instant case. These are on the issue of abatement and if & when it arises; each case is distinct. In 33 (1987) DLT 363 Chander Bhan and Others Vs. Pehlad and Others a Bench of this Court had held that where one of the original defendants had died and his legal heirs had not been brought on record, appeal filed by the co-defendant when the case of both the defendant was common was maintainable; it had not abated. In 1980 RLR 440 Banarsi Das etc. Vs. Mewa Devi it was held that where an eviction order is made against more than one tenant and all the tenants do not appeal or are made respondents even then eviction order can be got set aside by one of the tenants by filing an appeal.

10 Substantial questions of law No. 1 & 2 are answered accordingly.

11 Substantial questions of law 3 & 4 are bordered on issue of limitation. Issue No. 3 had been framed by the trial court on this point. This issue had been decided in favour of the plaintiff. Obviously, the plaintiff was not aggrieved by this finding; he had restricted his appeal only on the findings of the trial Judge on issues no. 5 & 6. Issue No. 3 was never his grievance. No cross-appeal or cross-objection had been filed by the defendant/appellant. The appellant cannot now raise this issue in second appeal. Even otherwise this was a mixed question of fact and law; it was not question of law alone. Facts have necessarily to be gone into to answer the plea as to whether the suit was within limitation or outside limitation.

12 At this stage, it would also be relevant to state that additional

issues which related to adverse possession had been left open by the trial Judge. The impugned judgment had returned a finding that the defence set up by the defendant of adverse possession is negatived; it had been rejected. The impugned judgment had nowhere faulted in arriving at this conclusion. This finding had been returned in the last but one para of the impugned judgment. It reads as follows:-

"The respondent-defendant has set up ownership on the basis of title documents, against the claim of the appellant-plaintiff having purchased the suit property on 25.04.1981 and further has disputed the identity of the property and thus, the plea of adverse possession is not available to the respondent-defendant. Moreover, the respondent-defendant has traced his possession over the suit property from Mrs. Santosh Rani, who had come in possession of the suit property only in the year 1979 vide GPA 'Mark-I' and thus the possession of the respondent-defendant has not matured to the status of being adverse to the appellant-plaintiff. Therefore, it cannot be said that the respondent-defendant has become the owner of the suit property by adverse possession.

In view of the aforesaid discussion, the judgment and decree dated 18.09.1995 of the ld. trial court is set aside and the suit of the appellant-plaintiff is decree and the appellant- plaintiff shall ve the possession of the property bearing No. G-36, Laxmi Nagar, Shakarpur, Shahdara, Delhi-110092 and the respondent defendant is restrained from creating any third party interest in the suit property. "

13 The submission of learned counsel for the appellant that these additional issues could not have been decided when the appellant had not assailed is a plea bereft of any merit. A first appellate court is duty bound to reappraise and reexamine the pleas taken by the respective parties including the reappraisal and reexamination of the evidence both oral and documentary. It is not the case of the appellant that the evidence before the first appellate court to decide these additional issues was insufficient or

some other evidence had to be led by the defendant. No perversity has been pointed out on the merits of this finding; only contention being that these additional issues could not have been decided in the absence of any plea in this behalf. There is no merit in this contention. Plea of adverse possession set up by the defendant having being negated, the question of limitation by adverting to the provisions of Article 65 do not have to be gone into. Article 65 deals with recovery of immovable property where the defendant sets up the claim of adverse possession. This claim has been rejected.

14 The case set up by the plaintiff is that he is the owner of the suit property and he claimed his possession from the defendant who is an unauthorized occupant. The defendant had also set up a counter claim of ownership; he having purchased it from Santosh Rani who in turn had purchased it from Mohan Lal who had vide Ex.DW-3/1 purchased it from Inderjeet Singh. In one breath the defendant was claiming ownership in his own right and in the second breath he was claiming adverse possession. This plea of adverse possession tracing it back to the first purchaser i.e. Inderjeet Singh is absolutely absurd; plea of adverse possession was available to the defendant; Inderjeet Singh is nowhere in the said category. These are even otherwise two inconsistent pleas and cannot be taken.

15 The plea of equity set up by the appellant also has no force. Suit had been filed on 21.02.1984. The documentary evidence relied upon by the defendant i.e. Ex. DW-1/1, Ex.DW-2/1 & Ex. DW-2/2 were all documents which were after the date of filing of the suit; contention of the respondent is that these documents had

been created; they were forged; they were rejected on this count; under these circumstance equity does also not lie in favour of such a party.

16 The substantial questions of law 3 & 4 are answered against the appellant.

17 There is no merit in this appeal.

18 Appeal as also pending applications are dismissed.

INDERMEET KAUR, J.

MARCH 01, 2011

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