

% Judgment reserved on: 19.05.2011
Judgment delivered on: 20.05.2011

MAQSOOD ALI Appellant
Through: Mr. N.K. Kantawala & Mr.
Satyender Chauhan, Advocates.
Versus

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

1 This appeal has impugned the judgment and decree dated
06.11.2007 which has endorsed the findings of the trial Judge
dated 17.04.2007 whereby the suit filed by the plaintiff Maqsood
Ali seeking possession of the suit property (i.e. property bearing
No. 105/65, Basti Hazrat Nizamuddin, New Delhi) had been
dismissed.

2 The trial Judge had framed the three following preliminary
issues:-

1. Whether the suit of the plaintiff is barred U/o 2 R 2 CPC in view of preliminary objections no. 4 & 5? OPD
2. Whether the suit of the plaintiff is without any cause of action and liable to be dismissed u/o 7 R 11 CPC? OPD
3. Whether the suit of the plaintiff is barred U/o 6 R 2 CPC as well as barred by limitation?

3 The suit of the plaintiff was decided on the aforementioned three preliminary issues and had been dismissed.

4 Plaintiff had filed the aforementioned suit for possession. It was stated that by virtue of a will of Bibi Kamrun Nisha @ Marium dated 17.03.1984 the aforementioned suit property had fallen to the share of the plaintiff. Late Corporal Michal was a tenant in the suit property who has thereafter tenanted it to one Ramo Devi. Ramo Devi had left the premises and thereafter the defendant had been illegally and unauthorisedly occupying the suit premises. Present suit for possession was accordingly filed.

5 In the written statement, certain preliminary objections had been raised; it is stated that the suit is liable to be rejected in view of bar of Order 2 Rule 2 of the Code of Civil Procedure (hereinafter referred to as the 'Code'); plaint was liable to be rejected under Order 7 Rule 11 of the Code; bar of limitation had also been professed.

6 On the pleadings of the parties, the aforementioned three

preliminary issues had been framed. The trial Judge had held issue No. 1 in favour of the plaintiff. It was held that the earlier suit (i.e. Suit No. 477/1987) was filed for a relief which could not have been sought in the present suit; the bar of Order 2 Rule 2 of the Code was not applicable.

7 On the other two issues, the court had returned a finding against the plaintiff. It had noted that the earlier suit No. 477/1987 had been disposed of on 23.10.1989 vide the following order:-

“Present: Counsel for the defendant.
None for the plaintiff.
Be awaited.
Present: None for the plaintiff.
Case called at 03:35 PM. Suit is dismissed in default.
File be consigned to the Records.

Sd./
23.10.1989

At this stage, counsel for the plaintiff has appeared. He wants to make the statement. Let the same be recorded.

Statement of V.M. Issar, Advocate for the plaintiff.
Without Oath.

Since the plaint suffers from technical objection, the plaintiff wants to withdraw the present suit with the permission to file the appropriate suit on the same cause of action.

RO & AC

Sub-Judge/Delhi
23.10.1989

Order Sheet dated 23.10.1989

In view of the statement of the plaintiff's counsel, suit is dismissed as withdrawn. No order as to costs.

File be consigned to the Record Room.

Sub-Judge/Delhi
23.10.1989”

8 Suit had been dismissed as withdrawn without liberty to file a fresh suit. The trial Judge was of the view that the cause of action arose on 01.05.1987 when the defendant refused to vacate the premises; this has been specifically stated in the first suit i.e. Suit No. 477/1987. Under Article 65 of the First Schedule of the Limitation Act, recovery of immoveable property could be affected within 12 years; suit had been filed on 24.08.1999 i.e. after 12 years from 01.05.1987. Suit is barred by time. This finding was endorsed in the first appeal.

9 This is a second appeal. It has been admitted and on 23.07.2008, the following two substantial questions of law were formulated:-

1. Whether the courts below committed error in dismissing the suit on the ground that it was barred by limitation?
2. What is the effect of the order passed by the Special Judge, Delhi dated 23.07.1989 passed in suit No.477/1987?

10 On behalf of the appellant, it has been urged that the cause of action in the present suit has been detailed in para 13 wherein it has been alleged that the cause of action had arisen on 06.06.1995 when the plaintiff became the owner of the suit property in terms of a Will of the erstwhile owner. The suit filed on 24.08.1999 is within limitation.

11 None has appeared on behalf of the respondent.

12 The trial Judge had returned a positive finding that the provisions of Order 2 Rule 2 of the Code are not attracted in the present suit; this has been held after having adverted to the averments made in the first suit and in the present suit. This finding has not been upset in the impugned judgment. The first suit was a suit filed on behalf of Bibi Kamrun Nisha @ Marium who was the owner of the suit property; Maqsood Ali was only the power of attorney holder. In the present suit it has clearly been averred that the plaintiff has become the owner by virtue of the will of Bibi Kamrun Nisha @ Marium. The cause of action has been detailed in the present plaint in para 13 wherein it has been averred that after the plaintiff had become the owner of the suit property on 06.06.1995 by virtue of the Will. The plaintiff has averred that the succession certificate in his favour was issued on 25.03.1998. Under Article 65 of the Limitation Act, a suit for possession of immoveable properties based on title can be filed within 12 years which period has to be counted from the date when the possession of the defendant become adverse to the plaintiff. The plea of adverse possession has been set up in the written statement in para 13; his contention being that he is in adverse possession of the suit land since 1986.

13 Admittedly, this suit has been dismissed on the three preliminary issues as aforementioned; the plea of adverse possession as set up has not been given chance to be proved or disproved. Contention of the plaintiff is that the suit filed on 24.08.1999 was well within limitation; even if the plea of adverse possession is set up; it is pointed out that in the first suit for the first time on 18.11.1987 an application had been filed by the defendant seeking dismissal of the suit; adverse possession can at best be counted from that date i.e. 18.11.1987; suit having been filed on 24.11.1999 was well limitation.

14 These submissions made by learned counsel for the appellant have force. The impugned judgment had dismissed the suit summarily on the ground of limitation which is not always a question which can be decided only on the pleadings; it being a mixed question of facts and law evidence had necessarily to be adduced to substantiate it one way or the other. This exercise had not been adverted to. This is a fit case for remand.

15 Matter is accordingly remanded back to the learned District & Sessions Judge, Delhi who shall assign the case to the concerned Civil Judge to decide the case on its merits after framing of issues and giving a chance to the parties to adduce evidence thereof. The parties are directed to appear before the

District & Sessions Judge, Tis Hazari Court, Delhi on 26.05.2011
at 10:30 AM. Substantial questions of law are accordingly
answered in favour of the appellant and against the respondent.
Appeal disposed of.

(INDERMEET KAUR)
JUDGE

MAY 20, 2011
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