

IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA No. 524/89 & Cont.Cas(C) No.243/2008

17th February, 2011

1. RFA No. 524/89

SH.BABU RAM

..... Appellants
Through: Mr. B.B.Sawhney, Sr. Adv. with
Mr. R.C.Nangia, Mr. Sunil Kumar &
Mr. Lakshay Sawhney, Adv.

VERSUS

MANGAT SINGH & ORS.

..... Respondents
Through: Mr. J.S.Attri, Sr.Adv. with
Ms.Protima Parihar, Adv.

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CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 is to the impugned judgment and decree dated 13.10.1989 whereby the suit of the plaintiffs/respondents/legal heirs of Ghasi was decreed by granting the **RFA No. 524/89 & Cont.Cas(C) No.243/2008**

relief of declaration with respect to the subject land that the possession thereof was not of the appellants/purchasers from Smt. Khazano Devi, Smt. Chajia and Sh.Chander Bose and that the consent decree passed by the Court of Sh.R.P.Gupta, ADJ, Delhi was obtained by collusion. In essence, it was held that actual physical possession of the subject lands was with the legal heirs of Ghasi.

2. Out of the issues framed by the Trial Court, two issues pertained to the jurisdiction of the Court and of the suit being barred by the principles of res judicata. These issues are issue nos.5 and 7 which read as under:-

“5. Whether this court has jurisdiction to try this suit?

7. Whether the suit is barred by the principles of resjudicata?”

On these issues, the Trial Court has held the suit was not barred by res judicata, meaning thereby, that the findings on the issue of possession as held by the Reference Court u/s. 146 of Criminal Procedure Code, 1898 was not res judicata against the legal heirs of Ghasi, because, the filing of a fresh suit was not barred in view of the provisions of Section 146(1)(1E) of the Criminal Procedure Code, 1898. Issue no.5 has also been accordingly decided by holding that the Court had jurisdiction to try the suit. The relevant findings with regard to these issues are contained in paras 12 & 13 of the impugned judgment and decree which read as under:-

“12. The ld. counsel for the plaintiffs has argued that in view of the provisions of Sec.146(E) Cr.P.C. of 1898, this

court has the jurisdiction to try the present suit as the plaintiffs want to establish their rights in the land in dispute. On the other hand, Id. counsel for the defendants has argued that as the question of possession has already been decided by reference court u/s. 146 Cr.P.C. so the suit of the plaintiffs to re-establish their possession through the present suit is not maintainable in law and that a suit u/s. 146(1)(1E) Cr.P.C. could be filed only to establish the titled in the property. This argument of Id. counsel for the defendants is again devoid of any force because the provisions of Sec.146(1)(1E) Cr.P.C. does not state that the subsequent decision of a court of competent jurisdiction should be about the title of the property and as such the suit of the plaintiffs for establishing their possession in the land in dispute is fully maintainable in law and this court has jurisdiction to try the present suit. It was further argued by Id. counsel for the defendant that provisions of Sec.146(1)91E) Cr.P.C. of 18989 has since been repealed so the present suit of the plaintiffs under the said provisions is not maintainable in law. This argument of Id. counsel for the defendants is devoid of any force because admittedly the proceedings for attachment of the land in dispute with respect to the land in dispute is pending since the year 1972 and the amended Cr.P.C. came into force in 1973 and as per Sec.484 of Amended Cr.P.C. if any proceedings, appeal, application, trial, inquiry or investigation are pending before the dates on which this code came into force, then the same shall be disposed of in accordance with the provisions of Cr.P.C. of 1898 and as the proceedings for attachment of the land in the present case were still pending since the year 1972, so the same has to be disposed of in accordance with the provisions of Cr.P.C. of 1898 for which separate proceedings u/S.146(1)(1E) are maintainable. This issue is accordingly decided in favour of the plaintiffs and against the defendants.

Issue No.7.

13. The learned counsel for the defendants has argued that the present suit filed by the plaintiffs is barred b y principle of resjudicata, as the court of Shr. R.S.Mahla, Sub-Judge, Delhi has already decided through judgment Ex.P11 upon reference by SDM that the defendants were in possession of the land in dispute and that Shri Gahsi predecessor of the plaintiffs was not in possession thereof and that the said judgment has been confirmed by the Hon'ble High Court of Delhi through judgment whereby CM(Main) filed by the plaintiffs against the order of Shri

R.S.Mahla, Sub.Judge Delhi was dismissed and that the Id. finance commissioner through its order dt.21.3.1978 Ex.D3, has also decided that Shri Ghasi was not in possession of the land in dispute. As far as the order of the High Court of Delhi passed in CM(Main) filed against the said order of the Finance Commissioner. High Court of Delhi against the said order are concerned the same cannot be said to be resjudicata in view of the provisions of Sec.146(1)(1E) Cr.P.C. of 1898. The decisions upon reference u/S. 146 Cr.P.C. is subject to subsequent decision by a competent court and a party is fully entitled to establish his right through a separate suit or proceedings and the orders passed u/S. 146 Cr.P.C. cannot be said to be resjudicata. Similarly the order of Hon'ble High Court of Delhi which is also passed under the proceedings u/S. 146 Cr.P.C. cannot be said to be resjudicata. Moreover, it has been held in AIR 1961 Raj. 216 that the decision of a civil court u/S.146(1)(1E) Cr.P.C. and that of the Magistrate based thereon u/S. 146(1)(1E) Cr.P.C., would be subject to decision of a court of competent jurisdiction according to Sec. 146 Cr.P.C. is maintainable and that the said orders cannot be challenged by means of a writ petition and as such the orders even if challenged by the plaintiffs under Art. 226 and 227 of the Constitution of India are not of any consequence. As regards the order of Financial Commissioner ex.D3 is concerned in my opinion, the present suit cannot be said to be barred under the principle of resjudicata by the said order, firstly because decision of Id. Financial Commissioner is with regard to a particular crop i.e. for the correction of Khasra Girdwari of 1970-71 and the same cannot be said to be resjudicata for subsequent period crop 2. Moreover as per provisions of Sec.146(1)(1E) Cr.P.C. of 1898 the orders passed u/S. 146 Cr.P.C. is subject to the subsequent decision by a competent court and the orders of the Id. Financial Commissioner was passed on 21.3.1978 i.e. even before the passing of the order by Shri.R.S.Mahila, Sub.Judge Delhi and for that reason also the same cannot be said to be resjudicata against the plaintiffs for filing the present suit and as such I hold that suit of the plaintiffs is not barred principle of resjudicata. This issue is accordingly decided in favour of the plaintiffs and against the defendants (Emphasis added)."

3. During the course of the arguments, I brought to the notice of the learned counsel for the parties two decisions of the Supreme Court

reported as ***Ramchandra Aggarwal & Anr. vs. State of Uttar Pradesh & Anr. AIR 1966 SC 1888*** and ***Bhinka and Ors. vs. Charan Singh AIR 1959 SC 960*** and as per which judgments, proceedings before the Reference Court under Section 146 are civil proceedings and what is left for being decided under Section 146(1)(1E) is only the entitlement to possession i.e. title to claim possession or right to claim possession and that who is in actual physical possession is an issue which attains finality as per the decision of the Reference Court under Section 146 of the Criminal Procedure Code, 1898.

4. A reference to the plaint in the present case shows that Sh.Ghasi has not claimed any title to the land either by purchase from Lakhi, the original owner or by devolution from him or by purchase from the legal heirs of Lakhi. It is possible that Ghasi and his legal heirs may have (and I do not pronounce upon this in any manner) rights being devolved upon them under certain provisions of Delhi Land Reforms Act, 1954. This position is of course very vehemently disputed by learned senior counsel for the appellants. Whether Ghasi and his legal heirs had or had not any title, was not an issue in the subject suit because neither was such a case made out in the plaint nor was the case argued on such basis. Since parties were ignorant of the decisions of the Supreme Court in the cases of ***Ramchandra Aggarwal*** and ***Bhinka*** (supra), the subject case was contested with respect to who was in possession, although, in view of the decisions in the case of ***Ramchandra Aggarwal*** and ***Bhinka*** (supra) this aspect was no longer open for being

decided by a Civil court under Section 146(1)(1E). As already observed above, in view of the decisions of the Supreme Court, entitlement of Ghasi has necessarily to be on the basis of a legal right, title or interest to the subject lands.

5. Learned senior counsel for the respondent, faced with the aforesaid, has therefore argued that Ghasi and thereafter his legal heirs were under a bonafide belief that the issue with regard to actual physical possession would not be barred from being decided in the subject suit in view of the provisions of Section 146(1)(1E) of the Criminal Procedure Code, 1898. Learned senior counsel for the respondent further states that since the issue of right, title or interest in the subject land was not an issue in the subject suit, the legal heirs of Ghasi must have liberty to get this question of entitlement to possession declared by a competent Civil Court. Learned senior counsel for the legal heirs of Ghasi is apprehending that as on date, the Civil Court may hold that his suit may have in fact become time barred, having been filed beyond the statutory period of limitation as prescribed under Article 65 of the Limitation Act, 1963. This apprehension, in my opinion, is not well placed because I am sure the concerned Civil Court before whom the suit comes up for deciding the entitlement to the subject land on the ground of title of Ghasi or his legal heirs, will give a benevolent view legally permissible to the provisions of Section 14 of the Limitation Act so as to decide the exclusion of the period spent with regard to the subject suit for the filing of the fresh suit. However, I may clarify that the appellants will definitely be entitled in the

meanwhile, to the rights which flow from the decision of the Reference Court under Section 146 of the Criminal Procedure Code, 1898 and which have attained finality right to this Court in the earlier proceedings between the parties.

6. In view of the above, the appeal is accepted by setting aside the impugned judgment and decree which has decided the question of actual physical possession on the date when the disputes arose, although, the aspect of actual physical possession stood finally decided by the Reference Court in the earlier proceedings between the parties under Section 146 of the Criminal Procedure Code, 1898. Liberty is granted to the legal heirs of Ghasi to file an appropriate civil suit if so advised, to pursue their legal rights for their claims to the subject property, although I must hasten to add that no liberty is required as the fresh suit will be on a separate cause of action of a legal right/entitlement, title or interest in the subject lands. Decree sheet be prepared. Trial Court Record be sent back.

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Dismissed as not pressed.

FEBRUARY 17, 2011
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VALMIKI J. MEHTA, J.