

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 15th May, 2012

+ **LPA 367/2012**

ZAHUR ALI & ORS Appellants
Through Mr. N.S. Dalal, Advocate
versus

NASIBUDDIN & ORS Respondents
Through Mr. Rajinder Dutt, Advocate for R1
to 6.
Mohd. Noorullah, Advocate for Mr.
Anjum Javed, Advocate for R7,
SDM/R.A.

CORAM :-
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

JUDGMENT

RAJIV SAHAI ENDLAW, J.

1. This intra-court appeal impugns the order dated 18.4.2012 of the learned Single Judge dismissing WP(C) 2048/2011 preferred by the appellants.

2. The predecessor of the contesting respondents No. 1 to 6, had filed an application under Sec. 11 and in the alternative, under Sec. 85 of the Delhi Land Reforms Act, 1954 for declaration of bhumidari rights in respect of two bighas of land in village Mandoli. The said application was contested

by the predecessor of the appellants and non-contesting respondents. The said application was allowed by the Court of the Revenue Assistant vide order dated 3.12.1998. It was held that the predecessor of the contesting respondents was in continuous cultivatory possession of the subject land since the year 1980-81, though his possession was adverse to that of the recorded bhumidar i.e. the predecessor of the appellants. It was also observed that the predecessor of the appellants had filed a suit for declaration that the sale deed purportedly executed by him of the said land in favour of the predecessor of the contesting respondents was bad and for recovery of possession of the said land; the said suit was dismissed vide judgment dated 29.11.1986; it was thus held that from the plaint in the said suit also, the possession of the predecessor of the contesting respondents of the said land stood admitted. Accordingly, the predecessor of the contesting respondents was declared as the bhumidar of the subject land.

3. At this stage, it may be stated that though the predecessor of the appellants had preferred an appeal against the judgment and decree (supra) of dismissal of the suit, but upon declaration of the predecessor of the contesting respondents as bhumidar, the said appeal was withdrawn.

4. The appellants thereafter preferred an appeal to the Deputy

Commissioner against the order dated 3.12.1998 (supra) of the Revenue Assistant declaring the predecessor of the contesting respondents as bhumidar of the land. The said appeal was allowed vide order dated 7.4.1999 on the ground that the name of the predecessor of the contesting respondents had not been entered in the revenue records though he claimed to be in possession since the year 1980-81.

5. The contesting respondents preferred a Revision Petition to the Financial Commissioner. The Financial Commissioner vide order dated 23.2.2011 allowed the said Revision Petition by restoring order of the Revenue Assistant declaring the predecessor of the contesting respondents as bhumidar of the land. Strong reliance was placed by the Financial Commissioner on the factum of the predecessor of the appellants, by filing the suit for possession having himself admitted that he was not in possession and that the predecessor of the contesting respondents was in possession of the land. It was thus held that bhumidari rights had been rightly declared in favour of the predecessor of the contesting respondents.

6. It appears that the contesting respondents during the pendency of the Revision Petition before the Financial Commissioner also applied under Order XLI Rule 27 of the CPC for taking on record certain other documents

(Khasra girdawaris) showing the cultivatory possession of the contesting respondents from the year 1998 onwards. The appellants also, in reply to the said application placed on record before the Financial Commissioner, documents showing khasra girdawris for the years 1998-99, 1999-2000, 2001-02 and 2005-06 in the name of their predecessor. The Financial Commissioner, while allowing the Revision Petition, has qua the said application observed that since the issue was as to who is in possession, documentary evidence produced by both the parties was taken on record for the purposes of deciding the controversy. However, while deciding the Revision Petition it has been held that the khasra girdawris for few years in between in the name of the predecessor of the appellants, who was admittedly dead in those years, were of no avail.

7. The appellants filed writ petition, from which this appeal arises, impugning the aforesaid order of the Financial Commissioner. From a reading of the order of learned Single Judge it appears that the argument urged at the time of hearing of the writ petition was that the khasra girdawris were not evidence of possession and in any case had not been tendered into evidence and no opportunity to prove/rebut the same had been given. The learned Single Judge has held that the Financial Commissioner

has correctly weighed evidentiary value to be given to the respective documents of the parties.

8. Counsel for the appellants before us, has contended that the powers under Order XLI Rule 27 of the CPC could not have been invoked when the Financial Commissioner was exercising revisionary jurisdiction; that such powers can be exercised only in appellate jurisdiction. Without prejudice to the said argument, it is urged that in view of the application under Order XLI Order 27 of the CPC, Financial Commissioner ought to have remanded the matter for decision afresh. It is also contended that the courts below have wrongly relied on the civil court decree which was not qua the subject land, but related to some other land. It is also argued that the consolidation proceedings were pending in the village and the provisions of DLR Act could not have been invoked.

9. We are unable to find any merit in any of the aforesaid contentions. Qua the argument of Order XLI Rule 27 of the CPC, it is sufficient to notice, and as is recorded in the order of the Financial Commissioner, that the appellants themselves, in response to the said application had produced fresh documents in support of their case. It thus appears that the appellants, before the Financial Commissioner, did not challenge the power of the

Financial Commissioner to consider fresh documents. If such had been the case of the appellants as is sought to be set up before us, the appellants ought not to have produced fresh documents of their own and ought not to have sought to rely thereon. Such being the conduct of the appellants, they are now estopped from taking such a plea.

10. We are further of the opinion that the order of the Financial Commissioner does not turn on the documents produced by the contesting respondents along with the application under Order XLI Rule 27 CPC. The said documents in any case pertained to the years subsequent to the filing of the application for declaration of bhumidari rights before the Revenue Assistant and in fact subsequent in point of time to the order of the Revenue Assistant. The said documents were thus in the nature of 'subsequent events' and not such which could have been produced at the time of filing of the application for declaration of the bhumidari rights and which subsequent events can always be taken notice of.

11. We further find that the decision of the Financial Commissioner was primarily based on, the predecessor of the appellants having earlier sued for possession, thereby admitting that he was not in possession and that the predecessor of the contesting respondents was in possession.

12. The argument raised for the first time before us, of the suit being with respect to some other land was admittedly not raised at any earlier point of time and appears to be a figment of imagination at this stage. Similarly, no argument of land being under consolidation was raised. There is also no explanation as to which was the other land with respect to which the suit was filed. The difference in khasra numbers, argued, will not make any difference since according to the appellants themselves, consolidation proceedings have taken place in the village. The appellants never set up a case of the dispute with the respondents being two fold i.e. one subject matter of the suit and the other subject matter of the land of which bhumidari rights were claimed.

13. Once it is found that the predecessor of the appellants himself had sued for recovery of possession of the land, the appellants cannot now claim to have been throughout in possession. It may be highlighted that though an appeal was preferred against the judgment and decree in the suit but was withdrawn after the declaration of bhumidari rights by the Revenue Assistant. The counsel for the appellants has been unable to show that the appellants at that stage took a stand that they were withdrawing the appeal for having come back into possession of the land.

14. We are, therefore satisfied that there is no error in the order of the Financial Commissioner or that of the learned Single Judge. There is no merit in the appeal which is dismissed.

15. No order as to costs.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

MAY 15, 2012/‘raj’