

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

%

Judgment reserved on: 05.09.2012
Judgment pronounced on: 12.09.2012

+ **CS(OS) 2329/2011 & IA No.15091/2011 (under Order 39 Rule 1&2 CPC)**

KHUSHI RAM

..... Plaintiff

Through: Mr. B.B. Gupta, Advocate

versus

CHARANJIT KAUR SAHNI & ANR.

..... Defendants

Through: Mr. Prashanta Verma, Advocate for
Defendant no.1

CORAM:

HON'BLE MR. JUSTICE V.K.JAIN

V.K. JAIN, J.

1. The defendant no.1 before this Court, namely Smt. Charanjit Kaur Sahni filed a suit against Shri Subhash Rathi and M/s Som Motors for possession of the property bearing number CN-5, 34/22, Bawana Road, Samaipur Badli, Delhi-110 052 on the ground that they were tenants under her and the tenancy had been terminated vide notice dated 28.12.2007. A decree for possession of the aforesaid property was passed by the learned Additional District Judge, Delhi in that suit, on 23.05.2009. The plaintiff before this Court namely Shri Khushi Ram and one Ms. Suman, who is defendant no.3, in this suit filed objections during execution of the aforesaid decree. Shri Khushi Ram claimed to have purchased 800 sq. yards of land situated in property bearing number 34/22 in the Revenue Estate of Village Samaipur near Badli Extension in the year 1979. He alleged that Subhash Rathi, defendant no.2 in this suit, had illegally trespassed upon his property and on his

objecting to it, Shri Subhash Rathi vacated the said property. He further alleged that the said property was then let out by him to Ms. Suman, defendant no.3 in the present suit. He alleged also that the decree holder Smt. Charanjit Kaur Sahni was trying to take possession of the said property from Smt. Suman, The objector, accordingly sought recall of the warrants of possession issued by the Executing Court.

2. The learned Civil Judge before whom the objections were filed, vide order dated 9.9.2011 held that there was collusion between the objector and the judgment debtors. The objections were dismissed being devoid of any merits.

3. Now this suit has been filed by Shri Khushi Ram seeking injunction against his dispossession from the said land measuring 800 sq. yards. He has also sought declaration that the warrants issued in Execution Case No.74/2009 are not executable against his property.

4. IA No.15091/2011 has been filed by the plaintiff Shri Khushi Ram seeking interim protection during pendency of this suit.

5. Section 11 of the Code of Civil Procedure, to the extent it is relevant, provides that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. Explanation VII to this Section, provides that the provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the

execution of that decree. Explanation VIII provides that an issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as *res judicata* in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.

6. The philosophy behind the doctrine of *res judicata* is that an issue or point which has been decided and has attained finality, should not be allowed to be reopen and re-agitated. The doctrine aims at giving finality to the *lis* between the parties. There is a distinction between ‘issue estoppel’ and ‘*res judicata*’. *Res judicata* debars a Court from exercising jurisdiction to determine the *lis* which has already attained finality between the parties, whereas the doctrine of ‘issue estoppel’ stops a party against whom an issue is decided, from raising the same in subsequent proceedings. ‘The matter in issue’ may be an issue of fact, an issue of law or a mixed issue of fact and law. If a right is claimed by one party and disputed by the other party, that becomes a matter in issue between those parties. When the right asserted by a party has been adjudicated upon by a competent Court, that right cannot again be a matter of *lis* between the same parties.

7. In *Har Pyari Devi v Ghansham Singh*[(1982) 2 SCC 109], one Parvati Devi obtained a decree as owner of a shop for eviction of the judgment-debtor, one Khursheed, who was the tenant. She died bequeathing the said property in favour of the respondent before the Supreme Court. He filed an Execution Petition to enforce the decree obtained by Parvati Devi. The appellant before the Supreme Court also filed an execution petition claiming right as a legal heirs of Smt. Parvati Devi. She also disputed the genuineness of the Will set up by the respondent. The Executing Court, after examining the genuineness of the Will, upheld the same and that finding became final. Thereafter, an interpleader suit was brought by another

tenant wherein the appellant before the Supreme Court was originally impleaded as defendant but eventually transposed as the plaintiff. The Will executed by Smt. Parvati Devi was again challenged in that suit. The High Court took the view that an adjudication having already been made against the appellant, the question of title stood concluded. Agreeing with the view taken by the High Court, the appeal was dismissed by the Supreme Court upholding the binding nature of the earlier adjudication.

In **Mohanlal Goenka v Benoy Kishna Mukherjee and others** [AIR 1953 SC 65), the Apex Court, *inter alia*, observed and held as under:

“20. That the principle of constructive res judicata is applicable to execution proceedings is no longer open to doubt..... See- ‘Annada Kumar v. Sheik Madan, 38 Cal W N 141 and – ‘Mahadeo Prasad v. Bhagwat Narain Singh’, AIR 1938 Pat 427. In the first case an application was made by a certain person for execution of a decree and no objection was raised that the decree was not maintainable at the instance of the applicant and the application was held to be maintainable. It was held that no further objection on the score, of the maintainability of a fresh application for execution on the part of the same applicant could be raised. In the second case a money decree had been obtained on the foot of a loan which was the subject-matter of -a mortgage and the property was sold in execution. The judgment-debtor raised the question of the validity of the execution proceedings and objected that the execution court had no jurisdiction to sell the property in execution of a money decree as no sanction of the Commissioner had been obtained under section 12-A, Chota Nagpur Encumbered Estates Act. The objection was not decided but the objection petition was- dismissed with the result that the property came into the possession of the auction-purchaser. In an action for a declaration that the sale to the purchaser was void for want of sanction of the Commissioner it was held that as the point was raised although not decided in the objection petition under Section 47, it was res judicata by reason of Expl. 4 to Section 11.”

In Sajjadanashin Sayed Md. B.E.Edr. (D) By Lrs. Vs. Musa Dadabhai Ummer & Others [AIR 2000 SC 1238], while dealing with the expression “directly and substantially” in issue used in Section 11 of Civil Procedure Code, the Supreme Court held that if the matter was in issue directly and substantially in a prior litigation and decided against a party then the decision would be res judicata in a subsequent proceeding. If such determination is the immediate foundation of the decision as opposed to merely a preposition which is only collateral or subsidiary, it would be a matter directly and substantially in issue in the prevision litigation. Of course, a preposition which merely forms a part of the reasoning supporting the conclusion cannot be said to be a matter directly and substantially in issue in the litigation. One test to determine whether an issue was directly and substantially in issue is to see whether the issue was necessary to be decided for adjudicating on the principal issue involved in the litigation and was actually decided. If it is so, it would be treated as directly and substantially in issue.

8. In the case before this Court, the plaintiff Khushi Ram specifically alleged in para 1 of his objections that he was the owner in possession of a parcel of land admeasuring 800 sq. yards in Khasra No.34/22, in the revenue estate of Village Sameypur, Badli Extension Industrial Area, Delhi, he having purchased it in the year 1979. He also claimed to be in continuous and exclusive possession. His allegation was that Mr. Subhash Rathi had illegally trespassed upon his land and was using the same to park motor vehicles under repairs. It is not in dispute that the land subject matter of this suit forms part of the land possession of which defendant no.1 is seeking to recover from defendant no.2 Mr. Subhash Rathi.

Dismissing the objections, the learned Additional and District Judge, *inter alia*, observed as under:

“10...The objector no.1 has failed to explain if he was in the continuous possession of the said portion and also used to visit the said portion may not be very frequently then how and why he had not noticed the fact of illegal possession of the JD No.1 during the said period.

11. It is the own case of the objector no.1 that on 19.06.2009 he not only came across the possession of the JDs but also the fact that they claimed to be the tenant of the DH who claimed her right over the said property including the said portion. Counsels for the objectors pleaded that on coming to know the said fact the objector no.1 filed a complaint dated 27.06.2009 which the Chowki Incharge and also filed a suit before the ld. Civil Judge. If the Objector no.1 was aware of the claim of DH on 19.06.2009, then the objector no.1 has failed to explain why he has not initiated any proceedings against DH. The objector no.1 has not filed a single document to show that he ever complained to any authority against the DH. Even the complaint dated 27.06.2009 is silent to that effect. Further, despite the fact about the claim of DH, the objector no.1, surprisingly, opted to file the civil suit only against JDs and no claim was made against DH. It implies that the objector no.1 deliberately has not initiated any action against the DH. In view thereof, an adverse influence can be drawn against the objector no.1.

12. Case of the objectors is that the objector no.1 executed a rent agreement in favour of the objector no.2 on 13.08.2009 regarding the said portion. The entire objection petition is silent as to when the JDs vacated the said portion and the objector no.1 took over the possession from the JDs. It is the specific case of the DH that the objectors are in collusion with JD's and the objector no.2 is the employee of the JD's, the said facts are not disputed by the objectors. The objectors have also not disputed the authenticity of the photographs filed by the DH. Being so, the only influence which can be drawn that there exist collusion between the objectors and the JD's.

Xxx

14. In view of the foregoing discussions, I am of the opinion that the present objection petition is devoid of merits. Therefore, the objection petition is dismissed.”

9. The ownership claimed by the plaintiff in the objections filed by him was a matter directly and substantially in issue in the execution proceedings. The title and possession claimed by him having been denied by the decree holder, it was necessary for the Court to adjudicate upon the right, which the plaintiff claimed in land in question. Therefore, it cannot be disputed that the ownership and possession of the land subject matter of the objections, which is also the subject matter of the present suit, was a matter directly and substantially in issue. The findings of the Executing Court on this issue, therefore, operate as *res judicata* and it is not open to the plaintiff to re-agitate the very same issue by way of an independent suit. The findings recorded by the learned Executing Court, having not been challenged by the plaintiff, attained finality and, therefore, are binding on him.

10. The learned counsel for the plaintiff has relied upon the decision of the Supreme Court in **Mohd. Nooman and others v Mohd. Jabed Alam and others** [(2010) 9 SCC 560]. In that case, the question which came up for consideration before the Supreme Court was as to whether the findings on the question of title in a suit for eviction, would be binding in a subsequent suit for declaration of title and recovery of possession between the same parties. The Apex Court was of the view in an answer to the question would depend on in what manner the question of title was raised by the party and how it was dealt by the Court in the eviction petition. It was further observed that ordinarily in a suit for eviction, even if the Court goes into the question of title, it examines the issue in an ancillary manner and in such cases any observation or finding on the question of title would not be binding in any subsequent suit on the dispute of title. The Court, however, recognized that there may be exceptions to the said general rule and held that the case before it fell

in the category of those exceptional cases. This judgment would not help the plaintiff for the simple reason that it was necessary for the executing court to adjudicate upon the title and possession which the plaintiff had claimed in the land subject matter of the objections which is also subject matter of the present suit. The objections could not have been decided without determining as to whether the objector before the Court (plaintiff in the present case) was the owner in prior possession of the land in question or not. Therefore, the finding that the objector (plaintiff in the present case) had failed to prove his case would certainly operate as *res judicata* and would bind the plaintiff.

11. For the reasons stated hereinabove, I am of the view that the present suit is clearly barred by the principle of *res judicata* contained in Section 11 of the CPC. The suit is dismissed according. IA No.15091/2011 under Order 39 Rule 1 and 2 CPC also stands dismissed. Decree sheet be drawn accordingly. No order as to costs.

V.K.JAIN, J

SEPTEMBER 12, 2012/*rd*