

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

% *Order decided on: September 30, 2013*

+ **C.R.P. No.147/2011 & C.M. No.18559/2011**

B.R. MURAR & ANR Petitioners
Through Mr.M.S.Ahluwalia, Adv.

versus

THEODORE JUSLIN SUNDI Respondent
Through None

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The present petition under Section 115 CPC has been filed by the petitioner against the order dated 21st July 2011 passed by the learned Civil Judge, Tis Hazari Courts, Delhi, whereby a preliminary issue was decided in favour of the respondent in a suit for declaration, permanent injunction and possession filed by the respondent against the petitioner in respect of a flat bearing No.L-II/209 A, Ground Floor, Kalkaji (hereinafter referred to as “suit property”).

2. In the said suit, it was stated that the respondent was the owner of the suit property and allowed the petitioners to reside therein for some time but later terminated their license vide a notice dated 10th March 1985, however, the petitioners failed to vacate the suit property. Meanwhile, the petitioners filed a suit for declaration against the respondent in respect of the suit property. In the said suit, a counter claim was filed by the respondent for grant of damages and also for mandatory injunction to direct the petitioners

to handover vacant and peaceful possession of the suit property back to the respondent. It was stated by the respondent in his plaint in the present suit that in the earlier proceeding, the plaint as well as the counter claim were dismissed on 24th August 2004.

3. In the present suit, petitioners had raised a preliminary objection that the suit is barred by section 11 CPC, as the judgment dated 24th August 2004 passed in the earlier proceedings would operate as resjudicata. Thereafter, the preliminary issue i.e. “whether the suit is barred under section 11 CPC” was framed.

4. While hearing the parties on the said issue so framed, the learned trial court summoned the file of the earlier proceedings from the record room and considered the same. It was opined that the cause of action survived in favour of the respondent and the present suit was considered to be maintainable and not barred by Section 11 CPC.

5. Aggrieved thereof, the petitioners have filed the present petition on the ground that the impugned order suffers from material irregularity.

6. While deciding the issue as to whether the suit is barred under Order 11 CPC framed on 16th August, 2007 which is decided in favour of the respondent and against the petitioners, the learned trial Court has given the following reasons in paras 2 & 3 of the impugned order which read as under:-

“2. I have gone through the record and have heard Arguments advanced by both the parties on the aspect of the maintainability of the suit and the Preliminary Issue framed on 16.08.2007 i.e.

“Whether the suit is barred under section 11 CPC?”

For the purpose of disposing off the said Issue, the file titled “B.R. Murar & Ors Vs DDA & Anr.” suit

No.697A/84 was summoned from the Record Room. The pleadings filed by the respective parties in the aforementioned suit were carefully perused by me. The Judgment in the aforementioned suit dated 24.08.2004 was also considered. In the said suit, the Plaintiff (herein) was the Defendant no.2 whereas the Defendants (herein) were the Plaintiffs. Para no.11 and the para of Relief of the Judgment dated 24.08.2004 is very relevant for the purpose of disposing off the Preliminary Issue framed in the present suit same is reproduced below:

“It is therefore ample clear that the flat in question stands in the name of Defendant no.2 and it can be safely said from the record that the flat was allotted to him on the basis of his Application to the DDA, Plaintiff has failed to make out any case for the relief prayed for in the plaint. This Issue is accordingly decided against the Plaintiff.

Relief

No specific issue was framed with respect to the reliefs in counter claim of Defendant no.2. I am dealing herein the counter claim of Defendant no.2 also. Though, Defendant no.2 in the counter claim has stated that the Plaintiffs were living in the suit flat on license basis and after the termination of the license they are liable to hand over the physical vacant possession of the portion of flat in their possession in favour of Defendant no.2, but these allegations have not been substantiated by the Defendant no.1 by leading evidence that the Defendant no.2 terminated the alleged license in favour of the Plaintiffs on any date, whatsoever or that the Plaintiffs are liable to pay the damages at any rate, whatsoever to the Defendant no.2. When the claim of the Defendant no.2 is not admitted by the Plaintiffs, it was the duty of the Defendant no.2 to prove its case by leading positive evidence to this affect. In the absence of any evidence by

Defendant no.2, the counter claim of this Defendant is liable to fail. Furthermore, no Court fees has been paid by the Defendant no.2 with respect to his counter claim.”

3. The counter claim of the Defendant no.2 (Plaintiff herein) was dismissed on account of nonfiling of Court Fee and lack of evidence on his account. Now, the Plaintiff (herein) has again filed the suit for grant of Possession stating that he has already terminated the license of the Defendants but they have failed to vacate the suit property despite this. It is the plea of the Defendants that the Plaintiffs counter claim in respect of the handing over of possession of suit property has already been dismissed and therefore, his subsequent suit for the same relief is barred by res judicata. The contention of the Defendants is untenable as the cause of action for filing the suit for possession against them is continuous and revives on each occasion as and when they fail to handover the vacant and peaceful possession of the suit property back to the Plaintiff. Now there is a apprehension that the Defendants may create third party interest in the suit property and therefore, the Plaintiff has again requested them to desist from the same and hand back possession to him. However, in vain. Thus, it is manifest that the cause of action survives in favour of the Plaintiff and in view of this, his present suit for grant of Declaration, Permanent Injunction and Possession is maintainable and is not barred by section 11 of the CPC. Accordingly, Preliminary Issue is decided in favour of the Plaintiff and against the Defendants.”

7. It is not in dispute that the respondent/plaintiff filed a suit for declaration, permanent injunction and possession in which the petitioners/defendants filed the written statement and raised the preliminary objection that the suit is barred by resjudicata. The respondent has not denied the fact that the earlier suit for recovery of possession was filed with regard to the

same property, being Suit No.57/1994 and the same was dismissed for non-appearance.

8. The main contention of the petitioners is that since the present suit is also for possession, thus, the same is barred under Order IX, Rule 9 read with Section 11 CPC. However, it is not denied by the petitioners that the earlier suit which was dismissed for non-appearance was not heard and finally decided on merits. It is settled law that if an issue is heard and finally decided by a Court of competent jurisdiction, the same shall operate a resjudicata in the subsequent suit. However, the petitioners have admitted that the earlier suit bearing No.57/1994 was dismissed for non-appearance of the respondent. It is also not disputed by the petitioners that the present suit is also a suit for declaration and permanent injunction. Therefore, I am of the view that the impugned order passed by the learned trial Court does not suffer from any infirmity. The present petition, under these circumstances, is dismissed. Pending application also stands disposed of.

(MANMOHAN SINGH)
JUDGE

SEPTEMBER 30, 2013