

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

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Date of decision: 2nd December, 2013.

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RFA 540/2013

SH ASHOK KUMAR

..... Appellant

Through: Mr. Ajay Malhotra with Dr. M.K.
Gahlaut, Advs.

versus

SMT SURJIT KAUR & ORS

..... Respondents

Through: Mr. M.K. Dua, Adv. for R-1 to 6.
Mr. Yeeshu Jain & Ms. Jyoti Tyagi,
Advs.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This appeal impugns the judgment and decree of the Court of the Addl. District Judge (Central) 08, Tis Hazari, Delhi of dismissal of Civil Suit No.172/13 (ID No.02401C0105852012) filed by the appellant consequent to the order of rejection of plaint, on the ground of the suit being by way of re-litigation.

2. The appeal came up before this Court first on 22nd November, 2013 when the counsel for the respondents no.1 to 6 as well as the counsel for the respondent no.7 Director of Rehabilitation, Land & Building Department

appeared, being on caveat/on advance notice; though none appeared for the respondent no.8, the Sub Registrar, Asaf Ali, Road, Darya Ganj, New Delhi but the respondent no.8 being a formal respondent and the plaint of the suit filed by the appellant having been rejected on the application of the respondents no.1 to 6 under Order VII Rule 11 of the CPC, the presence of the respondent no.8 was not deemed necessary and the service of notice of the appeal on the respondent no.8 was dispensed with. Considering the nature of the ground of dismissal of the suit and further considering that the execution of the decree in the earlier suit filed by the respondents no.1 to 6 was informed to be listed on 3rd December, 2013 and which proceeding would have been affected by the pendency of the present appeal, with the consent of the counsels the appeal was finally heard on 22nd November, 2013 itself and while reserving judgment, by way of abundant caution, the Trial Court file was also requisitioned and has been received and perused.

3. The appellant/plaintiff on 6th March, 2012 instituted the suit from which this appeal arises, for the reliefs of:-

- (a) declaration that he is the owner to the extent of half share in respect of property bearing No.16/256-257, Gali No.8-9 Joshi Road, Karol Bagh, New Delhi on the settled and continuous

possession of the said properties to the knowledge of the respondents no.1 to 6 and Shri Karam Singh;

- (b) a decree of possession, directing the respondents/defendants no.1 to 6 to hand over the possession taken by them from the appellant/plaintiff on the basis of the judgment and decree dated 30th April, 2004;
- (c) for a decree of possession by directing the respondents/defendants no.1 to 6 to put the plaintiff in possession of half portion of property aforesaid;
- (d) for permanent injunction restraining the respondents/defendants no.1 to 6 from dispossessing the appellant/plaintiff from the portion of property No.16/257 in his occupation;
- (e) for permanent injunction restraining the respondents/defendants no.1 to 6 from parting with the portion of property No.16/256-257 in their possession or from creating any third party interest therein;

- (f) for permanent injunction restraining the respondents/defendants no.7&8 from causing any mutation in the ownership and possessory rights of property no.16/256-257;
- (g) for mandatory injunction directing the respondent/defendant no.7 to provide residential accommodation to the appellant/plaintiff and his brother as per the provisions of the Rehabilitation Act.

4. The counsel for the appellant/plaintiff during the hearing on 22nd November, 2013 contended (and which contentions were, to avoid any ambiguity, recorded in the order dated 22nd November, 2013 in his presence), as under:-

- (i) that the appellant/plaintiff had filed the suit with respect to two separate but adjacent properties namely properties No.256 & 257, Joshi Road, Karol Bagh, Delhi;
- (ii) that one Smt. Prakashwanti was the owner of property No.256;
- (iii) that Smt. Prakashwanti died in the year 1985 leaving a Will also of the year 1985 with respect to property No.256 in favour of the

appellant/plaintiff who is the son of Smt. Sheelawanti, sister of Smt. Prakashwanti;

(iv) that the respondents/defendants no.1 to 6 are the children of Sh. Karam Singh being the brother of Smt. Prakashwanti and Smt. Sheelawanti;

(v) that the appellant/plaintiff was in possession of one room in property No.256 and the remaining said property was in possession of the respondents no.1 to 6/their predecessor;

(vi) that the respondents no.1 to 6 instituted a suit under Section 6 of the Specific Relief Act, 1963 for possession of the said one room in property No.256 in possession of the appellant/plaintiff;

(vii) though an issue of title of property no.256 was framed in the said suit but in the judgment, finding the suit to be under Section 6 of the Specific Relief Act, the said issue was not decided and possession of the said room in property no.256 was directed to be delivered by the appellant/plaintiff to the respondents/defendants no.1 to 6 on the finding of their prior possession of the said room;

(viii) in compliance of the said decree, possession of the said room in property No.256 has been taken over by the respondents no.1 to 6 in the year 2006;

(ix) that the respondents / defendants no.1 to 6 also filed a suit for mandatory and permanent injunction against the appellant/plaintiff seeking possession from the appellant/plaintiff of the portion of the property No.257 in possession of the appellant/plaintiff;

(x) the said suit was decreed and the first appeal and the Special Leave Petition preferred by the appellant/plaintiff dismissed.

5. It was enquired from the appellant/plaintiff during the hearing on 22nd November, 2013, as to on what basis the appellant/plaintiff is claiming right in property No.256.

6. The counsel for the appellant/plaintiff stated that the appellant/plaintiff is now claiming rights in property No.256, not on the basis of the Will of Smt. Prakashwanti but on the basis of adverse possession.

7. It was next enquired from the counsel for the appellant/plaintiff as to how the appellant/plaintiff could claim right by way of adverse possession in property No.256 when he was admittedly not in possession of any portion of the said property.

8. The counsel for the appellant/plaintiff stated that since the appellant/plaintiff was earlier in possession of one room in the said property, possession whereof was taken under a Court decree, the appellant/plaintiff on the basis of his adverse possession prior thereto, is entitled to claim such right and possession.

9. It was further the contention of the appellant/plaintiff during the hearing on 22nd November, 2013 that in the suit for mandatory and permanent injunction earlier filed by the respondents/defendants no.1 to 6, the appellant/plaintiff had not taken the defence of being in adverse possession of property No.257 and had defended the said suit only challenging the title of the respondents/defendants no.1 to 6 to property No.257 and the appellant/plaintiff was thus now entitled to seek declaration of his title to property No.257 by way of adverse possession. It was his further contention that no finding of title of the respondents/defendants no.1

to 6 of property No.257 was given in the judgment in the said earlier suit for mandatory and permanent injunction.

10. It was further informed during the hearing on 22nd November, 2013 that the respondents/defendants no.1 to 6 have applied for execution of the decree in the suit earlier filed by them for permanent and mandatory injunction directing the appellant/plaintiff to deliver the possession of the portion of property No.257 in his occupation and the appellant/plaintiff had filed objections thereto which were dismissed. It was yet further informed that against the said dismissal, an Execution First Appeal was preferred to this Court and during the pendency whereof the objections were withdrawn.

11. To obviate any controversy, all the aforesaid was also recorded in the order dated 22nd November, 2013 in the presence of the counsels.

12. The learned Addl. District Judge in the impugned judgment/order has found/observed/held:-

- (i) that from the documents on record it was borne out and it was even otherwise admitted by the counsel for the appellant/plaintiff that property No.16/256 was transferred in the name of Smt. Prakashwanti and Smt. Prakashwanti in her

lifetime had sold the same to the respondents/defendants no.1&2;

- (ii) that the respondents/defendants no.1&2 filed a suit for possession of portion of property No.16/256 in possession of the appellant/plaintiff and which was decreed and the appeal as well as the second appeal whereagainst was also dismissed and in execution, the possession of portion of property No.16/256 in possession of the appellant/plaintiff had been delivered to the respondents/defendants no.1&2;
- (iii) so far as property No.16/257 was concerned, both Smt. Sheelawanti mother of the appellant/plaintiff and her brother Shri Karam Singh were claimants with respect thereto but their claims were rejected; Shri Karam Singh preferred the Civil Writ Petition which was allowed vide judgment dated 6th August, 1992 directing the Central Government to transfer the property to Shri Karam Singh; Shri Karam Singh thus became the owner of property No.16/257; Smt. Sheelawanti had also preferred a Civil Writ Petition but which was dismissed on 29th March,

2001; in this way the Smt. Sheelawanti was left with no right in the property No.16/257;

- (iv) thereafter a suit for recovery of possession was filed by the respondents/defendants no.1 to 6 against the appellant/plaintiff and the other legal representative of Smt. Sheelawanti of the portion of the property No.16/257 in their possession and which was decreed;
- (v) the judgment in the aforesaid suit with respect to property No.16/257 did not show the appellant/plaintiff to have taken a defence therein of having become owner of the said property by adverse possession; therefore the contention that this issue was not decided was without any merit; and,
- (vi) that the appeal and the Special Leave Petition preferred by the appellant/plaintiff against the said decree with respect to property no.16/257 had been dismissed.

Accordingly, the suit from which this appeal arises was held to be by way of re-agitation / re-litigation and which is not permitted.

13. Neither has the counsel for the appellant/plaintiff been able to point out any error in the impugned judgment nor do I find any. It is the settled position in law that re-litigation is not permissible and is also an abuse of the process of the Court and against the principle of finality of litigation. Reference in this regard if any needed can be made to ***K.K. Modi Vs. K.N. Modi*** (1998) 3 SCC 573. It was held that it is an abuse of process of the Court and contrary to justice and public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him. It was yet further held that re-agitation may or may not be barred as *res judicata*, but if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of Court and the Court has the power to stop such proceedings summarily and prevent the time of the public and the Court from being wasted.

14. A beneficial discussion in this regard is also to be found in the judgment of the Division Bench of this Court in ***Ram Chander Aggarwal Vs. Union of India*** MANU/DE/0572/2012.

15. The plea of adverse possession, even if available to the appellant/plaintiff for defending his possession of property No.16/257, ought to have been taken by the appellant/plaintiff in his defence to the suit for

mandatory and permanent injunction filed by the respondents/defendants no.1 to 6 against him for recovery of possession of the portion of the said property in his possession. The said plea is now barred by the principle of constructive *res judicata* enshrined in Explanation IV of Section 11 of the CPC which provides that any matter which might and ought to have been made ground of defence or attack in former suit, shall be deemed to have been a matter directly and substantially in issue in such suit. Section 11 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. In ***Madhavkrishna Vs. Chandra Bhaga*** (1997) 2 SCC 203, the respondents / their predecessor, in an earlier suit had pleaded that one Mansaram and his two sons i.e. the predecessor of the appellant and of the respondents were the owners in equal share of the property and had sought partition, it was however held that Mansaram was the exclusive owner and the respondent / their predecessor had no right to claim partition; that decree became final; within 12 years of death of Mansaram, the appellants claiming to have become the owner under the Will of Mansaram, instituted a suit for recovery of possession of property against the respondents; the respondents in the said suit *inter alia* took a defence of

having perfected their title by adverse possession. The Supreme Court held that the plea of adverse possession having not been taken in the earlier suit, barred the respondents from taking the same in subsequent suit.

16. As far as property No.16/256 is concerned, though the appellant/plaintiff claims title thereto under a Will of Smt. Prakashwanti who was admittedly the owner thereof but the appellant/plaintiff as aforesaid is not claiming declaration of his title or possession of half share in the said property under the said Will of Smt. Prakashwanti but by way of adverse possession.

17. Though this Court in *Manmohan Service Station Vs. Mohd. Haroon Japanwala* 54 (1994) DLT 552 held that a suit for declaration of title acquired by adverse possession and for restraining person claiming to be title owner from selling the property to be maintainable but the Supreme Court recently in *Gurudwara Sahib Vs. Gram Panchayat* MANU/SC/0939/2013 held that even if plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership; only if proceedings are filed against such person arrayed as defendant, can he use his adverse possession as a shield / defence. The suit

from which this appeal arises, insofar as for declaration of title by way of adverse possession, thus in any case appears to be not maintainable.

18. Moreover, the very fact that the suit, even though under Section 6 of the Specific Relief Act, had been decreed and which decree also has attained finality, shows that it must have been found and held that the appellant/plaintiff had within six months prior to the filing of that suit dispossessed the respondents/defendants no.1&2 from the possession of the said portion. Without such finding, a suit under Section 6 of the Specific Relief Act could not have been decreed. Once it has been so held, the plea of the appellant/plaintiff of adverse possession fails.

19. I am of the view that even if rights created by adverse possession were to be permitted to be used as a sword, instead of as a shield, for such rights to be asserted, the person claiming such rights has to be in possession on the date of asserting such rights. The appellant/plaintiff is admittedly not in possession in any part of property No.16/256. He thus cannot claim any rights by way of adverse possession in the said property.

20. Insofar as the suit claims relief against respondent No.7, no basis or pleading thereof is found in the plaint.

21. There is thus no merit in the appeal which is dismissed with costs; counsels fee assessed at Rs.20,000/-.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

DECEMBER 02, 2013

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