

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

+ RSA 8/2009

%

Date of Decision: July 1, 2013

TRIVENDER SINGH

..... Appellant

Through : Mr.V.B.Andley, Sr.Advocate with
Mr.Priyank Sharma, Advocate

versus

MOTIA WANTI

..... Respondent

Through : Mr.Sandeep Chandna, Advocate

CORAM:

HON'BLE MS. JUSTICE VEENA BIRBAL

VEENA BIRBAL, J.

1. A challenge by means of this regular second appeal is made to the impugned judgment and decree dated 15.10.2008 passed by the lower appellate court, by which the Id. Appellate Judge, Delhi has set aside the judgment and decree dated 26.2.2005 passed by Id. Civil Judge, Delhi in Suit No.182/1999 whereby the suit of respondent/plaintiff for possession was dismissed and has decreed the suit for possession and mesne profits.

2. A suit for possession was filed by the respondent herein i.e., plaintiff No.2 and her husband Shri Bal Mukund i.e. plaintiff No.1 before the learned Civil Judge, Delhi against the appellant herein i.e., defendant before the learned Civil Judge wherein Shri Bal Mukund claimed himself to be the owner of property number RZ-5, Hans Park, Sagar Pur West, New Delhi measuring 107 sq.yds and property no.RZ-9K, Shankar Park, Sagar Pur

(West), New Delhi. He had alleged having raised super structure on both the above plots. Shri Bal Mukund i.e., plaintiff no.1 claimed to have agreed to sell property no.RZ-9K, Shankar Park to his wife i.e., plaintiff no.2. Therefore, she was joined as a party by way of abundant caution although no right title or interest was created in her favour. In the month of December, 1987, plaintiffs had gone to Punjab and asked the appellant/defendant to look after the suit properties. On their return, they found appellant/defendant to be in illegal occupancy of property No.RZ-9K, Shankar Park, Sagar Pur (West), New Delhi and one room and kitchen in property No.RZ-5, Hans Park, Sagar Pur (West), New Delhi. On objection being raised, appellant promised to vacate the same but he did not vacate. He instead filed a suit for permanent injunction against them claiming himself to be their adopted son and having contributed in raising the construction of the suit properties and had sought a relief that he should not be dispossessed from the suit properties. The said suit was subsequently withdrawn by him on 15th March, 1999. Since the appellant/defendant did not vacate, they had to file a suit against him for recovery of possession of suit properties and for mesne profits. They had alleged that appellant/defendant had no right in the suit properties.

3. Respondent/Plaintiffs had alleged that the appellant had no concern with the suit properties hence the decree for possession in respect of the suit properties be passed in their favour.

4. The appellant i.e. defendant contested the suit by filing written statement alleging therein that he was adopted by the respondent/plaintiff No.2 and her deceased husband/plaintiff No.1 from his natural father Shri Avtar Singh when he was only 1½ years old as the couple had no issue of

their own. He had also stated that Sh. Bal Mukund, i.e. plaintiff No.1 was his maternal uncle. Since the day of adoption he had lived with them as their son. He had studied up to class 10th and thereafter took training with some private electricians and when he was 16-17 years old he started earning and was contributing for the purchase and construction of aforesaid properties. He had alleged that with his savings, the plaintiff no.1 Bal Mukund had purchased a plot bearing No. RZ-5, measuring 107 sq. Yards, Hans Park, Sagarpur West, New Delhi in the year 1972-73. Subsequently, a super-structure was raised thereon in the year 1975. The entire amount was arranged by him. As a matter of faith the plot was purchased in the name of Bal Mukund, the head of the family. On 15.04.1977 the appellant/defendant joined Indian Railways as class IV employee. He was giving his entire salary/earnings to the plaintiff no.1. Again in the year 1980 the other plot that is RZ-9K, measuring 60 sq. Yards, Shankar Park, Sagarpur (West), New Delhi being adjacent to RZ-5 was purchased. In the year 1983 he got married and his marriage was arranged by the respondent/plaintiff No.2 and her husband and all the ceremonies of parents were performed by them and even after marriage he and his wife continue to live in a joint family. The appellant/defendant had alleged that he was giving all his income to the respondent/plaintiff No.2 and her husband. In the year, 1985 a super-structure was raised on RZ-9K and the entire money was paid by him. He had alleged that from 1985 onwards he started living with his wife in house No.RZ-9K, however, he had retained one room and kitchen in RZ-5 as there was no kitchen in house No.RZ-9K. He had alleged having permitted plaintiffs being his adoptive parents to stay in house no.RZ-5 and he and his wife had been in possession in RZ-9K. He has been living in the house no.

RZ-9K for the last more than 15 years as owner and there was no question of him illegally occupying the same in December, 1985 as was alleged. The appellant/defendant alleged that he has been in occupation of the suit properties as owner so he could not be asked to vacate the same. The appellant/defendant claimed the ownership of both the properties i.e. RZ-5 and RZ-9K and had alleged that his possession cannot be disturbed. He had admitted in written statement having withdrawn the suit filed by him on 15th March, 1999.

5. Replication was filed by the respondent/plaintiff denying the allegations made in the written statement and they had reiterated the stand taken in the plaint.

6. During the pendency of the suit, one room and kitchen of property no.RZ-5, Hans Park, Sagarpur West, Delhi in possession of appellant/defendant was delivered to the respondent/plaintiff No.2 and her husband i.e. plaintiff No.1 and claim in respect of said property was satisfied on 27.2.2001.

7. Shri Bal Mukund, plaintiff no.1 had died on 5.11.2001. He was, therefore, deleted from the array of parties by the Ld.Civil Judge vide order dated 29.4.2002.

8. The following issues were framed by the learned Civil Judge:-

- (i) Whether defendant is the adopted son of plaintiff?
- (ii) Whether the plaintiff is entitled for the recovery of possession of property bearing no.RZ-9K, Shankar Park, Sagarpur West, New Delhi.
- (iii) Relief.”

9. To prove her case, respondent/plaintiff tendered her evidence by way of affidavit Ex.P1 and proved sale deed of RZ-5, Hans Park, Sagarpur West dated 04.05.1973 Ex.PW1/1, site plan Ex.PW1/7, sale deed Ex.PW1/8, GPA dated 15.01.1980 Ex.PW1/8 & 9, electricity bill Ex. PW1/10, house tax receipt Ex.PW1/11, assessment dated 15.01.1980 and the affidavit of the same date that is Ex.PW1/13 and Ex.PW1/14. She was cross examined at length by appellant/defendant.

10. To prove his stand appellant/defendant examined Sh. Mukesh Kumar DW-1, LDC from the Office of Food and Supply Department. He also tendered his evidence by way of affidavit Ex.DW2/A and relied upon photocopy entry of ration card in the record of Food and Supply Department as Ex.DW1/1. The appellant/defendant was cross examined by the counsel for respondent/plaintiff.

11. After hearing the parties, learned Civil Judge held that the appellant/defendant could not prove himself to be the adopted son of the plaintiffs. The other issue about entitlement of the respondent/plaintiff to recover possession of property no. RZ-9K, Shankar Park, however, was decided against respondent/plaintiff on the ground that the appellant/defendant was able to prove to be in occupation since last more than 15 years, therefore, it was held that the claim of respondent/plaintiff for recovery of possession was barred by time.

12. Aggrieved with the judgment of learned Civil Judge, the respondent/plaintiff preferred an appeal before the learned Additional District Judge, Delhi being RCA No.10/2005. The learned ADJ vide judgment dated 25.7.2006 set aside the judgment and decree dated 26.02.2005 passed by the learned Civil Judge and held that the suit of

respondent/plaintiff was not time barred by limitation and from the evidence on record it is not established that the possession of the appellant/defendant became adverse to the respondent/plaintiff at any time conferring ownership upon him. It was held that mere silent occupation in the absence of any claim of adverse possession by any overt, hostile and open act, against the title of the true owner cannot be construed as an adverse possession. Accordingly, the appeal was allowed and the judgment and decree passed by the Civil Judge was set aside. Learned ADJ also ordered that the respondent/plaintiff shall be entitled to recovery of mesne profits @ Rs.2000/- for the last 3 years from the date of filing of suit till the possession of the suit property is handed over to respondent/plaintiff.

13. Aggrieved with the aforesaid judgment, the appellant/defendant filed RSA No.285/2006 before this Court wherein show cause notice was issued to respondent/plaintiff on 06.09.2006. In the said regular second appeal it was argued that the first appeal was disposed of without disposing of the application of the appellant therein i.e. respondent/plaintiff under Section 5 of Limitation Act. Learned counsel for respondent/plaintiff has argued that the application under Section 5 of the Limitation Act was filed along with the appeal but inadvertently that application escaped the notice of the learned lower appellate court and it was stated that respondent/plaintiff had no objection if the appeal be remanded back to the lower appellate court to deal first with the limitation application and then if the need arises to deal with the appeal afresh. Accordingly, vide order dated 03.09.2007 the judgment passed by the lower appellate court dated 25.7.2006 was set aside and the matter was remanded back to the learned ADJ with the directions for deciding the application under Section 5 of the Limitation Act at first

instance and then deal with the appeal if need arises on merits.

14. On remand, the lower appellate court vide order dated 18.05.2008 allowed the application under Section 5 of the Limitation Act. Learned ADJ observed that five days were spent in getting the certified copy of impugned judgment/decreed passed by Ld.Civil Judge and excluding that period the appeal was preferred on the 30th day as such there was no delay in filing the appeal and the same was within limitation and alternatively the respondent/plaintiff had sufficiently explained the delay of 2 days as per her calculations and accordingly the delay was condoned. Thereafter, the first appeal was listed for final arguments. After hearing the arguments, the Ld.Lower appellate court had set aside the finding of the learned Civil Judge and the appeal was allowed on 15.10.2008 directing the appellant/defendant to deliver the vacant and peaceful possession of the suit property to the respondent/plaintiff and a decree of mesne profits @ Rs.2000/- from the date of filing the suit till the delivery of possession was also passed in favour of respondent/plaintiff.

15. Aggrieved with the same present regular second appeal is filed. Following substantial questions of law were framed on 25.08.2009 by this court:-

“1. Whether in view of the provisions under Order 41 Rule 3-A CPC an application filed under Section 5 of the Limitation Act was maintainable and could be entertained by the Appellate Court while condoning the delay in filing an appeal?

2. Whether the Appellate Court was right in granting a decree for pendente lite and future mesne profits without holding an inquiry contemplated under Order 20 Rule 12 CPC and if such a decree is a nullity and non-est?

3. Whether the respondent had no right to challenge the findings of the Trial Court on issue no. 1 before the Appellate Court in the absence of cross objections?

4. Whether the Court has the jurisdiction to draw adverse inference against the appellant who failed to cross examine the witness, on the basis of statement of the witness which otherwise is inadmissible in evidence?”

16. Ld. senior counsel for the appellant/defendant has contended that the appeal before lower appellate court was not accompanied by an application under Order 41 Rule 3A of Civil Procedure Code, as such, the lower appellate court ought not have entertained the application under Section 5 of the Limitation Act. Ld. Senior Counsel has also contended that Order 41 Rule 3A of Civil Procedure Code mandatorily require an application duly supported by an affidavit to be filed along with the grounds of appeal for condonation of delay in presenting the appeal. It is contended that in the present case, the appeal was admittedly presented after the period of limitation as such in the absence of any application under Order 41 Rule 3A of the Civil Procedure Code, the lower appellate court had no jurisdiction to hear and decide the appeal. It is contended that the lower appellate court ought not have entertained the application under Section 5 of the Limitation Act.

17. On the other hand, learned counsel for the respondent/plaintiff has contended that as per the calculations of respondent/plaintiff there was delay of only 2 days in filing the appeal and sufficient cause was stated in the application under Section 5 of the Limitation Act and the learned lower appellate court considering that the sufficient cause was shown by the respondent/plaintiff had condoned the delay. It is further stated that the

lower appellate court had also given a categorical finding that after excluding the time spent in obtaining the certified copy of judgment/decreed passed by Ld. Civil Judge the appeal was filed within the period of limitation and alternatively it was held that sufficient cause for condonation of delay had been disclosed and as such the delay, if any, was condoned. It is further contended that even if no application under Order 41 Rule 3A was filed that does not mean that the power of the court in condoning the delay under Section 5 of the Limitation Act has been taken away. In support of the contention, ld. counsel has relied upon Miss Nirmala Chaudhary v. Bisheshar Lal: AIR 1979 Delhi 26.

18. It may be noticed that the objection that the appeal before the lower appellate court is not accompanied by an application under Order 41 Rule 3A of the Code of Civil Procedure was neither urged nor argued before the lower appellate court. The same was also not urged or argued before this court when earlier RSA No. 285/2006 was filed wherein with the consent of the parties appeal was remanded back to the lower appellate court. The said appeal was disposed of on 6.9.2006 with the direction to the lower appellate court to decide the application under Section 5 of the Limitation Act first and thereafter decide the appeal on merits in case need arises. In compliance of said directions, the lower appellate court had decided the application u/s 5 of the Limitation Act and condoned the delay.

19. The provisions of Order 41 Rule 3A of the Civil Procedure Code reads as under:-

“3A. Application for condonation of delay –

(1) When an appeal is presented after the expiry of the period of limitation specified there for, it shall be accompanied by an

application supported by affidavit setting forth the facts on which the appellant relies to satisfy the court that he had sufficient cause for not preferring the appeal within such period.

(2) xxxxx xxxxx xxxxx xxxxx

(3) xxxxx xxxxx xxxxx xxxxx”

20. The object of inserting Rule 3A(1) in Order 41 of the Code was to put an end to the practice of admitting of an appeal subject to the decision on the question of limitation. The object is that the question of delay must be considered before any other order is passed in the appeal. In *Nirmala Chaudhary's* case (supra) it has been held that the provisions of Rule 3A are both procedural and substantive in nature, it provides procedure as to how and when the application for condonation of delay will be filed and also confer power on the court to condone the delay if sufficient cause is made out. It has been further held that the power which is conferred by Rule 3A is in addition to power conferred by Section 5 of the Limitation Act. It has been held in the aforesaid case that if a party has not availed the right conferred under Order 41 Rule 3A of CPC that does not mean that the power of condonation of delay under Section 5 of the Limitation Act is also exhausted. The relevant para of the judgment is reproduced as under:-

“35. It must, therefore, be held that in spite of Rule 3A of Order 41 of the Code, the court still has power to condone the delay under Section 5 of the Limitation Act and/or proviso to sub-section (2) of Section 38 of the Act as the case may be. The power conferred by Rule 3A of Order 41 of the Code is in addition to the power conferred by the aforesaid provisions.”

21. In view of legal position discussed above, the contention raised by Ld. Sr. counsel appearing for appellant/defendant has no force. Further, in any

event, there was delay of only 2 days in filing the first appeal. The respondent/plaintiff had submitted before the Ld.ADJ that she being old lady of 75 years of age could not chase her lawyer who was not taking interest in the matter. Ultimately, she changed her lawyer, as a result of which, 2 days delay had occurred. Considering that she had shown sufficient cause, delay was condoned. Further the lower appellate court also noticed that there was no delay after excluding time taken in certified copy of judgment/decreed passed by Ld. Civil Judge, the first appeal was filed within time. No illegality is seen in the said finding.

22. In view of above discussion the lower appellate court had rightly entertained the application under Section 5 of the Limitation Act. It is also settled position of law that citing of a wrong provision that too in a misc application would not mean that the application is not maintainable. The substantial question of law is answered accordingly.

23. The substantial questions of law at serial nos. 2 and 4 are taken up together. Learned Sr. counsel for the appellant has argued that the lower appellate court was not right in granting decree for pendente lite and future mesne profits without holding an inquiry as contemplated under Order 20 Rule 12 of CPC. It is further contended that there were no pleadings for the grant of mesne profits as such evidence on aforesaid aspect was inadmissible.

24. On the other hand, Id. counsel for respondent/plaintiff has argued that there was sufficient evidence before the court to award mesne profits as such there was no question of holding an inquiry. It is further contended that the

lower appellate court has awarded mesne profits subsequent to filing of suit till delivery of possession, as such, the same are rightly awarded. It is further contended that there was specific prayer in the suit for the grant of mesne profits during the pendency of suit till the recovery of possession as such the evidence of respondent/plaintiff was admissible.

25. Order 20 Rule 12 of the Code reads as under:-

“12. Decree for possession and mesne profits.- (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—

(a) xxxxx xxxxx xxxxx xxxxx

(b) xxxxx xxxxx xxxxx xxxxx

(ba) for the mesne profits or directing an inquiry as to such mesne profits.”

26. This statutory provision envisages that a suit for recovery of immovable property can be decreed along with decree of mesne profits. Directing of an inquiry as to such mesne profits is in the alternate. This alternate will come into play where there is no sufficient evidence before the court to decree the mesne profits. In the present case, the respondent/plaintiff in her evidence by way of affidavit Ex.P1, has categorically stated that similar type of property can fetch Rs.2000/- per month as charges for use and occupation and since appellant/defendant is illegally occupying the same, he is liable to pay mesne profits at said rate. The appellant/defendant has not cross-examined her nor led any evidence to the contrary. The evidence of respondent/plaintiff on mesne profits has gone un rebutted. In any event it is a matter of common knowledge that the market

rent for a property located at Shankar Park, Sagar Pur (West), New Delhi and constructed on a plot of 60 sq.yds are much higher. In the present case, there is un rebutted evidence. In these circumstances, the finding of pendente lite mesne profits is based on evidence on record. Further the court has not awarded past mesne profits. There is specific prayer in the plaint for the grant of mesne profits during the pendency of suit till the recovery of possession as such it can't be said that evidence of respondent/plaintiff was inadmissible as is contended. In these circumstances, the pendent lite and future mesne profits are rightly awarded. The substantial questions of law formulated at sr.nos.2 and 4 are answered accordingly.

27. On the substantial question of law at sr.no.3, the learned senior counsel for the appellant has contended that the issue of appellant/defendant being adopted son of the respondent/plaintiff was decided by the trial court in favour of respondent/plaintiff and against the appellant/defendant. The appellant/defendant did not file any appeal against the said finding of the trial court nor filed any cross-objection in the appeal filed by the respondent/plaintiff. Learned senior counsel for the appellant/defendant has contended that even without preferring the cross-objections in an appeal, the appellant/defendant can question the adverse findings. It is contended that the filing of cross-objections is optional and not mandatory. In support of his contention, Ld. senior counsel has relied upon **Ravinder Kumar Sharma vs. State of Assam and Others: AIR 1999 SC 3571**.

28. On the other hand, ld. counsel for the respondent/plaintiff has contended that without preferring cross-objections in an appeal, a finding against a party cannot be reversed by the appellate court. Learned counsel

has contended that appellant/defendant should not have any grievance as without filing the cross-objection, the lower appellate court has considered the entire evidence and affirmed the findings of Id.Civil Judge. It is contended that there is no perversity in the finding given.

29. I have considered the submissions made by the parties.

30. Perusal of impugned judgment of lower appellate court shows that though the court has observed that the appellant/defendant has not preferred cross-objections on the issue of adoption which was decided against him. However, the Id.appellate court has gone through the entire evidence and has held that the entire evidence suggests that the appellant/defendant was neither being treated nor acted as their adopted son. The lower appellate court has observed that the onus to prove that the appellant/defendant was the adopted son of the plaintiff was on the appellant/defendant. As per the evidence on record, appellant/defendant was about 1½ years old when he was given in adoption however, no independent witness about this fact or any third party who had witnessed the adoption was produced by him in the evidence nor he has proved any ceremony in which he was alleged to have been given by his natural parents and taken by the respondent/plaintiff and her husband as their child has been proved on record. It has also been observed by the Id. trial court that appellant/defendant at the time of recording of his evidence has given the name of his natural father i.e. Shri Avtar Singh while giving his particulars. Even in cross-examination he has stated that in the record of Railways the name of his father is written as Sh.Avtar Singh. He admitted that he had passed 10th class and in all his school certificates/Board certificates name of his natural father Sh. Avtar

Singh is written. He also stated that he was admitted in school by his natural father Sh. Avtar Singh. He is working in Indian Railways and in the records of the Railways the name of his father as Avtar Singh is there and he is deriving all the benefits from Railways like travel passes etc. for his father Sh. Avtar Singh. He has further stated that he has come to know of his adoption only after the death of his father Sh. Avtar Singh in 1983 when he was told by his relatives that he was given in adoption to the respondent/plaintiff and her husband Bal Mukand. He stated that he cannot show any documentary proof that he was adopted by them. It has also come in the evidence that his natural mother is alive. Even she was not produced in evidence to substantiate his stand of adoption. The finding of the Ld.Civil Judge on issue no.1 is as under:-

“The onus to prove this issue was upon the defendant. He had deposed that he was adopted by defendant when he was about 1 ½ years old. No independent evidence regarding this fact or any right any third person who had witnessed this adoption had been brought on record. Neither plaintiff was able to prove any ceremony in which he was given by his natural parents and taken by the plaintiff as their child has been moved on record. On the contrary in the cross examination the name of his original father i.e. Avtar Singh is mentioned. He has further deposed in his cross examination that all the service benefits has been availed by his natural father Avtar Singh, so, from the record it appears that defendant has taken plea of adoption subsequently for the sake of raising feeble defence. Now, it is a clear case that as per the defendant he was adopted when he was 1 ½ years old and from that day onward he is living with his adopted parents. Had it been the case then there is every likelihood that defendant should have represented plaintiffs as their parents. He should have disclosed the name of adopted parents in the service record of his employment but his conduct is reflecting contrary as all the service benefits has

been availed by his natural father namely Sh.Avtar Singh so, it appears that present plea of the defendant that he was adopted by the plaintiff goes unproved so, this issue is decided against the defendant and in favour of the plaintiff.”

31. The finding of the Ld. ADJ on this issue is as under:-

“Even otherwise he failed to substantiate that he had severed all his ties with the family of his natural parents and was projected and treated as the son of plaintiffs for all purposes. Except that the marriage of defendant was performed by the plaintiffs, the entire evidence suggests that he had neither been treated nor acted as their adopted son. Defendant claimed to have been informed of adoption after death of his natural father in June, 1983 by his mother and other relatives. Neither those witnesses have been examined by him nor their availability doubted”.

32. The finding that the appellant/defendant is not the adopted son of respondent/plaintiff has been given by both the courts below on the basis of evidence on record. There is no perversity in the same. Even the finding of the courts below that appellant/defendant had failed to prove having contributed for the purchase of suit property is correct. It has been rightly observed that no proof was furnished by him in this regard nor he put his defence to respondent/plaintiff in her cross-examination. No perversity is seen even in the said finding.

In view of above discussion, the appeal is dismissed. There is no order as to costs.

VEENA BIRBAL, J

JULY 1, 2013
ssb/srb