

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

+ CM(M) No.455/2014

% **18th November , 2014**

MAHESH CHAND

.....Petitioner

Through: Mr. Krishan Kumar and Mr. Deepak
Vohra, Advocate.

VERSUS

SUMNESH KUMAR CHATURVEDI

..... Respondent

Through: Mr. N.S.Negi, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? (Yes)

VALMIKI J. MEHTA, J (ORAL)

1. This petition under Article 227 of the Constitution of India impugns the order of the trial court dated 22.2.2014 by which the trial court has dismissed the suit on the ground that the suit is barred under Order IX Rule 8 of the Code of Civil Procedure, 1908 (CPC).

2. The subject suit is a suit for recovery of possession of flat no.2077, DDA Janta Flats, GTB Enclave, Delhi-110093. Petitioner-plaintiff purchased the suit property from one Smt. Devki; who was the mother of the defendant; through registered documents dated 10.2.2006 being agreement

to sell, power of attorney, Will etc. The case of the respondent-defendant in getting the preliminary issue framed for dismissal of the suit under Order IX Rule 8 CPC was that Smt. Devki the mother of the defendant had filed a suit for possession being suit no. 97/2005 and which was dismissed on account of non-prosecution by the order of the civil court dated 21.4.2007. It is therefore argued that the subject suit for possession on the same cause of action was not maintainable by the successor-in-interest of Smt. Devki and the only remedy of the petitioner/plaintiff was to apply for restitution of the suit which was dismissed in default on 21.4.2007.

3. Trial court has relied upon the judgment of the Supreme Court in the case of *M/s Parasram Harnand Rao Vs. M/s Shanti Parsad Narinder Kumar Jain (1980) 3 SCC 565* for dismissing the suit by making the following observations:-

“Admittedly, the plaintiff has purchased the said property from Smt. Devki on 10.12.2006 while her suit was still pending. Question which arises is whether the present plaintiff can maintain this suit after having purchased the said property from Smt. Devki Devi. In the case of *M/s Parasram Harnand Rao versus M/s Shanti Parsad Narinder Kumar Jain (supra)*, the Hon’ble Supreme Court was considering a similar question. In para 5 of the said report, it was held as under:-

“5. In the first place it was argued that so far as point 1 is concerned, the High Court was wrong in holding that the application of respondent 1 was not barred by the

reason of the dismissal of the appellant's suit for setting aside the ex parte decree by the principle of res judicata or Order 9 Rule 9, CPC. It was contended that even if the previous suit filed by respondent 1 for declaration of his status as a tenant was dismissed for default but as the application for setting aside the decree also failed, there was an adjudication against the then plaintiff-respondent 1 and therefore the present suit was clearly barred by the principles of res judicata or Order 9, Rule 9. At any rate there can be no escape from the position that the application of respondent 1 would be clearly barred by the principle contained in Order 9 Rule 9, CPC. In case of Suraj Ratan Thiran v. Azamabad Tea Co., this Court held thus:

We are not however impressed by the argument that the bar imposed by Order 9, Rule 9 creates merely a personal bar or estoppel against the particular plaintiff suing on the same cause of action and leaves the matter at large for those claiming under him. Beyond the absence in Order 9 Rule 9 of the words referring "to those claiming under 'the plaintiff'" there is nothing to warrant this argument. It has neither principle, nor logic to commend it... The rule would obviously have no value and the bar imposed by it would be rendered meaningless if the plaintiff whose suit was dismissed for default had only to transfer the property to another and the latter was able to agitate rights which his vendor was precluded by law from putting forward."

Hence, the Hon'ble Supreme Court reiterated that it was not permissible for a subsequent purchaser of property to file a fresh suit if the suit of his predecessor in interest had been dismissed for default. Such suit would be barred under Order IX Rule 9 of the CPC. Hence, the provisions of Order IX Rule 9 CPC are attracted to the present case. I have gone through the case law cited by the counsel for the plaintiff but unfortunately none of them are relevant or applicable to the facts of the present case."

4. In my opinion, the trial court has fallen into a clear cut illegality in dismissing the suit under Order IX Rule 8 CPC. The provisions of Order IX Rule 8 and IX Rule 9 CPC read as under:-

“Order IX Rule 8. Procedure where defendant only appears- Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.”

“Order IX Rule 9. Decree against plaintiff by default bars fresh suit.- (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.”

5. Actually the trial court has wrongly referred to the provision of Order IX Rule 8 CPC because it is the provision of Order IX Rule 9 CPC which bars the filing of a fresh suit, however even this provision of Order IX Rule 9 CPC does not apply because a fresh suit is barred only on the same cause of action and not on a different cause of action. In a suit for possession on the basis of title the owner/plaintiff has a continuous and a

fresh cause of action every moment/second/day till 12 years from when the defendant claims adverse possession, and only on the expiry of 12 years (vide Article 65 of the Limitation Act, 1963), the right/title of the plaintiff will stand extinguished in terms of Section 27 of the Limitation Act. Even the period of 12 years only commences if defendant sets up a plea of adverse possession and till the plea of adverse possession is set up the period of 12 years does not even begin for a suit for possession to be filed by the owner with respect to the property owned by him. Once entitlement to claim possession on the basis of title is at least 12 years and definitely till the period of adverse possession claimed by the defendant expires, it cannot be said that the subject suit for possession is filed on the basis of same cause of action of the earlier suit for possession filed by the mother of the defendant because each second of illegal possession by a defendant gives rise to a fresh cause of action for filing of a suit for possession of course till after the expiry of a period of 12 years as per Article 65 of the Limitation Act read with Section 27 of the said Act. Every day of trespass gives right to file a fresh suit every day i.e every day of illegal trespass gives a fresh cause of action. To complete the discussion, it also needs to be noted that a dismissal in default for non-prosecution does not amount to *res judicata* vide ***Sheodan Singh Vs. Smt. Daryao Kunwar, AIR 1966 SC 1332.***

6. The judgment of the Supreme Court in the case of *M/s Parasram Harnand Rao (supra)* relied upon by the trial court did not pertain to a suit for possession and therefore the general observations made by the Supreme Court as per the provision of Order IX Rule 9 CPC will not apply to those suits which are for possession on the basis of title.

7. In view of the above, the impugned judgment dated 22.2.2014 is set aside. Suit for possession of the petitioner/plaintiff as originally filed will stand revived with respect to all the reliefs which are claimed. Observations made in the present judgment are only for the purpose of holding that there is a fresh cause of action to file a suit and the suit is not barred under Order IX Rule 9 CPC, however, all aspects of merits as per the stands of the parties will be decided by the trial court in the suit in accordance with law.

NOVEMBER 18, 2014
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VALMIKI J. MEHTA, J.