

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

% **Date of decision: 4th October, 2018**

+ **RSA 118/2018**

EJAZ AHMED ASLAM

..... Appellant

Through: Mr. Sachin Datta, Sr. Adv. with Mr. Abhishek Kumar, Ms. Rijuta Mohanty and Ms. Prity Sharma, Advs.

Versus

MOHAMMAD AZIM AHMED

..... Respondent

Through: Mr. S.D. Singh, Mr. Rahul Kumar Singh, Mr. Dhiraj Kumar & Mr. Jitender Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 20th March, 2018 in RCA No.61419/2016 of the Court of Additional District Judge-06 (Central)] of dismissal of First Appeal under Section 96 of the CPC preferred by the appellant against the judgment and decree [dated 21st December, 2011 in Suit No.546/2003 of the Court of Civil Judge-02 (Central)] of dismissal of suit filed by the appellant/plaintiff for recovery of possession of “premises at Khasra No.223 min. measuring 185 sq. mtrs. Situated at Abul Fazal Enclave, Okhla, Jamia Nagar, New Delhi” and for recovery of damages/*mesne* profits for the period prior to institution of the suit as well as for future i.e. till the date of delivery of possession.

2. The appeal came up first before this Court on 27th August, 2018, when finding that the respondent/defendant in the suit had made a counter-claim, of declaration of ownership of the immovable property for which the suit for recovery of possession and *mesne* profits was filed and the Suit Court,

while dismissing the suit of the appellant/plaintiff had allowed the said counter-claim and passed a decree of declaration declaring the respondent/defendant as owner of the subject property and further finding that the appellant/plaintiff had preferred a First Appeal only against the judgment and decree of dismissal of suit and not against the judgment and decree allowing the counter-claim of the respondent/defendant, it was enquired from the senior counsel for the appellant/plaintiff, whether not the claim of the appellant/plaintiff in this Regular Second Appeal against the judgment and decree of dismissal of First Appeal impugning only the judgment and decree of dismissal of suit, was barred by *res judicata*, in view of the decree in the counter-claim declaring the respondent/defendant as owner of the property having attained finality. Attention of the senior counsel for the appellant/plaintiff on 27th August, 2018 was also drawn to pages 346 and 363 of the paper book, being the title and prayer clause in the memorandum of the First Appeal preferred by the appellant/plaintiff, and which clearly showed the challenge therein to be only of the decree of dismissal of suit and not to the decree allowing the counter-claim of the respondent/defendant.

3. On request of the senior counsel for the appellant/plaintiff, the hearing was adjourned to today.

4. Today, the senior counsel for the appellant/plaintiff has drawn attention to page 347 of the paper book being the memorandum of the First Appeal and in which in the very first paragraph, it was stated that the Suit Court in its judgment completely disregarded the evidence and misread the relevant clause, while decreeing the counter-claim and dismissing the suit.

5. The same also, in my view, does not constitute a challenge to the decree in the counter-claim. I reiterate that in the title of the First Appeal, it was stated that it was against the judgment and decree of dismissal of suit and in the prayer clause, only setting aside of the judgment and decree of dismissal of suit, was sought. Paragraph 1 of the memorandum of First Appeal to which attention is drawn is only by way of narrative and otherwise attention is not drawn to any of the grounds of the memorandum of the First Appeal in which the decree of declaration in the counter-claim in favour of the respondent/defendant may have been impugned.

6. The senior counsel for the appellant/plaintiff in this regard has also drawn attention to ***Cholapilakkal Abdul Nazer Vs. Kuttanparambath K. Laxmana*** MANU/KE/1209/2016 where a Division Bench of the High Court of Kerala held (a) that per Order XX Rule 19(1) of the CPC, there is homogeneity in the decree in the suit and in the counter-claim and which is to be a composite decree; (b) that under Section 96 of the CPC, only one appeal is envisaged against every decree; (c) that there is also no form prescribed in Appendix G to the CPC, for a memorandum of appeal against a decree in a counter-claim; (d) that there is no wisdom in insistence of two separate appeals to be filed against a composite decree; (e) that Order VIII Rule 6A of the CPC also enjoins only one decree in the suit as well as counter-claim; and, (f) that the aspect in any case is procedural.

7. The senior counsel for the appellant/plaintiff has also contended that no separate number was assigned to the counter-claim in the present case and no separate issues framed by the Suit Court in the suit and in the counter-claim.

8. The counsel for the respondent/defendant has not made any arguments in this regard.

9. I have attempted to see, whether the appellant/plaintiff paid the requisite court fee on a counter-claim in the memorandum of First Appeal. However, it is found that the respondent/defendant, while making the counter-claim at the foot of the written statement, did not value the same for the purpose of court fee and jurisdiction. The decree of the Suit Court also does not show any court fee to have been paid on the counter-claim. The counsel for the respondent/defendant also has no idea, whether counter-claim was valued for the purpose of court fee and jurisdiction and whether any court fee was paid thereon.

10. The counsel for the respondent/defendant, at this stage, states that it is mentioned in the counter-claim that *ad valorem* court fee was being paid on the counter-claim but he does not know, whether any *ad valorem* court fee paid or not.

11. I am, with respect, unable to agree with the dicta of the Division Bench of the High Court of Kerala in view of the language of Order XX Rule 19, which is as under:

“19. Decree when set-off [or counter-claim] is allowed.—(1)

Where the defendant has been allowed a set-off or counter-claim against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

(2) Appeal from decree relating to set-off [or counter-claim].—Any decree passed in a suit in which a set-off or counter-claim is claimed shall be subject to the same provisions

in respect of appeal to which it would have been subject if no set-off or counter-claim had been claimed.

(3) The provisions of this rule shall apply whether the set-off is admissible under rule 6 of Order VIII or otherwise.”

I am of the opinion that a separate appeal was required to be filed against the decree allowing the counter-claim and am supported in this view by ***Rajni Rani Vs. Khairati Lal*** (2015) 2 SCC 682 holding, (i) a counter-claim preferred by the defendant in a suit is in the nature of a cross-suit and has an independent status; and, (ii) the Court is required to pronounce a final judgment in the same suit, both on the original claim and also on the counter-claim. Reference may also be made to ***Deepak Mitra Vs. United Bank of India*** 2012 SCC OnLine All 2255, ***Yellappa Vs. Hussainsab Fakrusab Angadi*** 2014 SCC OnLine Kar 12546, ***Satnam Singh Vs. Mohan Singh*** 2016 SCC OnLine HP 2813, ***Jethu Singh Vs. Board of Revenue*** MANU/RH/0275/2017 and ***Darayas Bamanshah Medhora Vs. Nariman Bamansha Medhora*** AIR 2002 Guj. 166.

12. However, since the counsel for the respondent/defendant also did not oppose the First Appeal at the time of final arguments therein on the ground of the decree in the counter-claim having not been appealed and having attained finality, it is not deemed appropriate to reject this Regular Second Appeal on the said ground only and the senior counsel for the appellant/plaintiff has been heard also on the merits of this Regular Second Appeal and copies of the Trial Court record annexed to the memorandum of appeal perused.

13. The appellant/plaintiff instituted the suit, from which this appeal arises, pleading (I) that the appellant/plaintiff was the owner of the land

under the subject property and which property was looked after, on behalf of the appellant/plaintiff, by his attorney; (II) that the said attorney of the appellant/plaintiff constructed one room, kitchen, latrine and bathroom on the said land in or about the year 1981; (III) that the respondent/defendant came in contact with the attorney of the appellant/plaintiff and the attorney of the appellant/plaintiff sometime in 1986 allowed the respondent/defendant to temporarily reside in the subject property; (IV) that on the respondent/defendant failing to vacate the property, the licence of the respondent/defendant was terminated. Hence, the suit for possession and *mesne* profits.

14. The respondent/defendant contested the suit pleading, (A) that the appellant/plaintiff, on 9th July, 1981 had gifted the property to the respondent/defendant as per the provisions of Mohammedan Law and since then the respondent/defendant was in possession of the subject property; (B) that detailed particulars of the persons present at the time of making of the gift and the ceremony at the time of making of the gift were pleaded; (C) that the possession of the gifted property was delivered by the appellant/plaintiff to the respondent/defendant and the respondent/defendant started residing in the property; (D) that particulars of other documents prior to 1986 showing the residence of the respondent/defendant and his family members in the subject property were given; (E) that earlier, the number of the property was 219, Abul Fazal Enclave, Okhla, New Delhi but then the number of the property was 122, Abul Fazal Enclave, New Delhi; (F) that the property was situated in an unauthorised colony and the numbers of the houses therein were frequently changed; and, (G) that the respondent/defendant was in

possession of the property as owner thereof under the gift from the appellant/plaintiff.

15. The respondent/defendant, in addition to filing the written statement to the plaint in the suit, also filed a counter-claim for declaration of his ownership of the subject property.

16. On the basis of pleadings of the parties, the following issues were framed in the suit on 1st March, 1999:

“1. Whether the plaintiff had gifted the suit property to the defendant on 09.07.81 as claimed by the defendant? OPD

2. Whether the defendant is entitled to relief of declaration as owner of the suit property as is being claimed by the defendant in the counter claim? OPD

3. Whether the plaintiff is entitled to decree of possession as claimed? OPP

4. Whether the plaintiff is entitled to decree for recovery of damages for use and occupation charges/mesne profit as claimed at Rs.18000/- or any other amount? OPP

5. Whether plaintiff is entitled to mesne profit @ 500/- p.m. as claimed by plaintiff? OPP

6. Relief.”

17. The Suit Court, on the basis of evidence of two witnesses examined by the appellant/plaintiff and six witnesses examined by the respondent/defendant, has found/observed/reasoned/held (i) that essentials to the validity of gift as per principles of Mohammedan Law by Mulla 19th Edition and as per ***Mahboob Sahab Vs. Syed Ismail*** AIR 1995 SC 1205 are, (a) declaration of gift by the donor, (b) acceptance of the gift, express or implied by or on behalf of the donee, and, (c) delivery of possession of the subject matter of the gift by the donor to the donee; (ii) that in the present

case, the appellant/plaintiff had admitted that the respondent/defendant is in possession of the property; (iii) however, while the appellant/plaintiff claimed to have inducted the respondent/defendant as a licensee in the property in the year 1986, the respondent/defendant claimed to have been gifted the property and having been put into possession thereof on 9th July, 1981; (iv) that the testimony of PW2, witness of the appellant/plaintiff was self-contradictory; (v) that DW1 to DW6, in their testimony have categorically stated that respondent/defendant was converted to Islam in their presence and the appellant/plaintiff declared gift of the suit property in favour of the respondent/defendant and which was duly accepted by the respondent/defendant and possession of the property was delivered by the appellant/plaintiff to the respondent/defendant; (vi) that the appellant/plaintiff failed to rebut the testimony of DW1 to DW6; (vii) that the appellant/plaintiff also failed to examine the attorney to prove the plea of having licenced the property to the respondent/defendant in 1986; (viii) that the appellant/plaintiff had thus not been able to prove the licence; (ix) that though the appellant/plaintiff claimed that the respondent/defendant had made unauthorised construction on the property immediately after being inducted as a licensee in the year 1986 but the first notice was issued only on 9th June, 1989 and there was no explanation as to why the appellant/plaintiff maintained silence for nearly three years; (x) that on the contrary, the respondent/defendant had proved documents of possession of the property since prior to 1986; (xi) that it was the admitted position that the colony in which the property is situated is not regularised and no property numbers have been allocated by Municipal Corporation of Delhi; (xii) that the appellant/plaintiff had failed to lead any evidence to show that the

respondent/defendant, prior to 1986 was living in any other property; (xiii) that in fact the appellant/plaintiff in the plaint did not even give any number of the property and when first appeared as a witness stated that he was also not aware of the earlier number of the property, though admitted the then number of the property to be 122; (xiv) that while the appellant/plaintiff failed to prove grant of licence to the respondent/defendant, the respondent/defendant had proved gift.

18. The First Appellate Court, while agreeing with the findings of the Suit Court, in addition, reasoned (a) that though the appellant/plaintiff argued that the attorney could not be examined as he had expired on 18th August, 1995 but had not proved that the attorney of the appellant/plaintiff had so expired; (b) that in fact the appellant/plaintiff in his cross-examination stated that he could not tell the date and month when the respondent/defendant was inducted as a licensee.

19. The senior counsel for the appellant/plaintiff has raised only one argument. It is contended that since the respondent/defendant had proved documents of residence of himself and his family members since prior to the year 1986, in property No.219, it was incumbent upon the respondent/defendant to prove that the earlier number of the property was 219 and which the respondent/defendant had failed to prove.

20. I have enquired from the senior counsel for the appellant/plaintiff, whether there is any dispute as to the property in occupation of the respondent/defendant or as to the number thereof today.

21. The senior counsel for the appellant/plaintiff states that the appellant/plaintiff, though in the plaint had not given any number of the property and had described the property only by Khasra Number in which

the property is situated, but admits that at the time of institution of the suit as well as now the number of the property is 122.

22. I have further enquired from the counsel for the respondent/defendant, whether the respondent/defendant has led any evidence of possession of the property prior to 1986.

23. The counsel for respondent/defendant has drawn attention to Ration Card, Passport and some postal letters, all of which are at the address of property No.219.

24. I have further enquired from the senior counsel for the appellant/plaintiff, whether the appellant/plaintiff has led any evidence of any other property bearing No.219.

25. While the answer is in the negative, the senior counsel for the appellant/plaintiff states that the appellant/plaintiff, in his evidence has denied that the earlier number of the property was 219.

26. I have yet further enquired, whether any issue was sought by the appellant/plaintiff in this respect.

27. The answer is in the negative.

28. I have next enquired, whether the appellant/plaintiff cross-examined the respondent/defendant on the said aspect.

29. Attention has been drawn to the cross-examination of the respondent/defendant appearing as DW3 between pages 236 to 241 of the paper book.

30. However before referring to the same, I may record that the appellant/plaintiff, in replication to the written statement of the respondent/defendant though admitted the property to be then bearing No.122 but in para 10 of the reply to preliminary objections pleaded "House

No.219 is a quite different house and is very far away from the property in dispute”. The aforesaid would show that it was the plea of the appellant/plaintiff that house No.219 was a different property from house No.122. With the said statement in the replication, the contention of the senior counsel for the appellant/plaintiff that it was for the respondent/defendant to prove the positive i.e. that the number of the property earlier was 219 is a desperate one. The appellant/plaintiff in the replication having pleaded that property bearing No.219 was a different property from property No.122 and was very far from property No.122, it was incumbent on the appellant/plaintiff to prove that property No.219 at which address, the documents prior to 1986 of the respondent/defendant and his family members were, was another property and that the respondent/defendant before 1986 was residing therein. The appellant/plaintiff has failed to do so.

31. A perusal of the cross-examination by the appellant/plaintiff of the respondent/defendant appearing as DW3 also only shows the appellant/plaintiff to have merely given a suggestion that the respondent/defendant was earlier residing in house No.219, without even putting to the respondent/defendant, which was that house No.219.

32. The appellant/plaintiff having not sought specific issue qua the number of the property and having not also led any evidence, cannot raise a substantial question of law which is the *sine qua non* for entertaining a Regular Second Appeal as held by the Supreme Court recently in **Surat Singh Vs. Siri Bhagwan** (2018) 4 SCC 562 and **Damodar Lal Vs. Sohan Devi** (2016) 3 SCC 78, with respect thereto.

33. No other argument has been urged.

34. Else, the finding of the respondent/defendant having proved the gift is a finding of fact and it is not the argument that the same is based on no evidence and no substantial question of law arises in this Regular Second Appeal.

35. Dismissed.

RAJIV SAHAI ENDLAW, J.

OCTOBER 04, 2018

‘bs’..

