

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **R.S.A. No.127/2009 & C.M. Nos.14545/2009, 4686/2011**

Decided on : 21st May, 2015

SHANTI DEVI & ORS. Appellants

Through: None.

Versus

KISHAN GUPTA & ORS. Respondents

Through: Mr. J.P. Gupta, Advocate for R-4.

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (ORAL)

1. There is no appearance on behalf of the appellant despite second call. Further time is sought. The matter cannot be adjourned. I have heard the learned counsel for the respondent and have also gone through the record.

2. This is a regular second appeal which is pending since 2009 and only on 23.8.2013, the substantial question of law was formulated which reads as under :-

“Whether the judgment of the first appellate court suffers from any perversity keeping in view the applicability of Article 64 or 65 of the Limitation Act? If so, to what effect?”

3. The contention of the learned counsel for the appellant in the past had been that Article 64 of the Limitation Act, 1963 would be applicable which prescribes the period of limitation of 12 years to be reckoned from the date of dispossession while as Article 65 lays down a similar period of limitation but such period is to be reckoned from the date when the possession of the defendant becomes adverse to that of the plaintiff. But there is a rider to this that under Article 65, the suit has to be based on title.

4. The facts of the case are that the respondent No.1 herein filed a suit bearing No.455/2006 for possession and damages against seven persons, namely, Yashpal, Harish Chand Goel, Lalit Mohan Tiwari, Om Dutt Sharma, Laxmi Narain Sharma, Kamlesh Kumari and Bal Karan. It was averred in the plaint that the respondent No.1 herein (Krishan Gupta) is the owner of the property No.B-55, East Jyoti Nagar, Loni Road, Shahdara, Delhi falling within khasra No.873, Village Gokulpuri. The said suit property was purchased by the respondent No.1/plaintiff by a registered sale deed dated 2.4.1973 from M/s. Delhi Housing and Finance Corporation, Karol Bagh, New Delhi-55. After the purchase, the respondent No.1 had got the earth filled up and he got a structure erected

on the said parcel of land and was regularly paying the house-tax. The last house-tax which was paid by him at the time of filing of the suit was for the assessment year 1995-1996. The respondent No.2 herein (Yashpal) had earlier instituted a suit bearing No.352/1990 for permanent injunction against dispossession against respondent Nos.3 and 7 (Harish Chand Goel and Lalit Mohan Tiwari respectively). It was averred in the said suit that Yashpal was inducted as a tenant by respondent No.6 (Bal Karan) in the year 1987 at a monthly rent of Rs.275/- and that Lalit Mohan Tiwari and Harish Chand Goel claimed to have purchased the suit property from the previous owner on 9.1.1990 and threatened to dispossess respondent No.2 (Yashpal). There was another round of litigation at the instance of Om Dutt Sharma (defendant No.4) and the predecessor-in-interest of the appellants herein, who had filed a suit bearing No.241/1993 for permanent injunction against dispossession. In this suit, it was asserted by Om Dutt Sharma (defendant No.4) that he is in possession of the suit property for the last more than 18 years. The injunction application of Om Dutt Sharma (defendant No.4) was dismissed and thereafter, the suit was dismissed in default by the learned Sub-Judge, Hauz Khas.

5. The present respondent No.1 had filed a suit for possession and recovery of damages on the basis of title against all these seven parties wherein Om Dutt Sharma was also impleaded as defendant No.4. It was contended that Om Dutt Sharma did not permit the respondents to enter into the premises as a consequence of which they had to shift to some alternate place. It has been stated by the learned counsel for the respondents that in reply to the suit for recovery of possession and damages, Om Dutt Sharma (defendant No.4) had stated that he is in occupation of the premises since 1974. The learned counsel has further stated that the plea of the appellants being the legal heirs of Om Dutt Sharma, who was in possession of the suit property for the last 18 years at the time of filing of the written statement, was not relied upon and therefore, was factually incorrect. It was stated that it was the case of the appellants themselves that they were inducted in possession only in the year 1990 and therefore, that is the date wherefrom the limitation would be reckoned. The learned trial court, after recording of the evidence, passed a judgment and decree in favour of the respondents granting possession as well as the damages.

6. The present appellants, who are the legal heirs of Om Dutt Sharma (original defendant No.4) felt aggrieved and preferred the first appeal. The first appeal was also dismissed. Still not feeling satisfied, the present regular second appeal has been filed.

7. One of the argument which was urged by the appellants before the first appellate court was also on the similar lines that Article 64 is applicable to the facts of the case and not Article 65. It is contended by the learned counsel that as Article 65 has been made applicable to the facts of the case, therefore, the finding returned by the courts below is suffering from perversity. Articles 64 and 65 of the Limitation Act read as under :-

***“Article 64
Possession of immovable property***

Possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possess the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue record in the name of one co-sharer would not amount to ouster unless there is clear declaration that title of other co-sharers was denied.

xxxxxxxxxxxxxx

Article 65
Adverse Possession

To claim adverse possession, the possession of the claimant must be actual, open and visible, hostile to the owner (and therefore necessarily with the knowledge of the owner) and continued during the entire period necessary to create a bar under the law of limitation. In short, it should be adequate in continuity, publicity and the extent. Mere vague or doubtful assertions that the claimant has been in adverse possession will not be sufficient, unexplained stray or sporadic entries for a year or for a few years will not be sufficient and should be ignored.

8. A perusal of the aforesaid two clauses of the Schedule of Limitation Act clearly show that though in both Articles 64 and 65 the period of limitation during which a suit can be filed is 12 years but what is important is the date from which this period is to be reckoned. Under Article 64, period of 12 years is to be reckoned from the date of dispossession. Obviously meaning that under Article 64, the plaintiff or the person who invokes the remedy of the court for retrieval of possession of the suit property need not claim the title to the suit property. If he is in possession, permissive or otherwise, and has been dispossessed, he can file a suit for possession which admittedly has to be filed within 12 years from the date of his dispossession.

9. In the second case, the suit must be based on title, that is, the ownership of the plaintiff must exist qua the property and that is what must be pleaded. Thus, in such a suit where the possession is claimed, the period of limitation is to be reckoned from the date when the possession of the actual occupant becomes hostile to that of the plaintiff in the said suit. In the instant case, the learned counsel for the respondents has drawn the attention of the court to the averments made in the plaint as well as to the stand taken by the predecessor-in-interest of the appellant to contend that the appellants themselves are not able to establish adverse possession of the suit property from the year 1974. As a matter of fact, it is stated that the appellants came in possession of the suit property only in the year 1990 and not in 1974, therefore, possession prior to 1974 is totally untenable. In this regard, it has been contended that the respondent herein has purchased the suit property much later and when the suit was filed against defendant No.4, that is, predecessor-in-interest of the appellants, he had stated that he is not aware as to who is the owner and consequently, unless and until he is not aware of the owner of the suit property, his possession, even if it is there, does not become adverse to that of the actual owner. For these reasons, it has been

contended that period of limitation, in the instant case, is to be reckoned from the date of the possession of the appellant being adverse to that of plaintiff/respondent which admittedly happens in 1974.

10. I find merit in the submission of the learned counsel for the respondent. Since the suit of the respondent is based on title, therefore, *ex facie* Article 65 would be applicable and not Article 64. Accordingly, the present appeal is totally misconceived and the question which is being formulated by this court vide order dated 23.8.2013 is answered in negative to the effect that the limitation period, in the instant case, has to be governed by Article 65 and not by Article 64. There is no infirmity in the concurrent finding returned by the two courts below that Article 65 would be applicable. The appeal does not have any merit as it does not raise any substantial question of law. Accordingly, the same is dismissed.

V.K. SHALI, J.

MAY 21, 2015
‘AA’