

\$~2.

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

+ **Date of Decision: 14.09.2015**

% **RSA 213/2015 and C.M. No.10276/2015**

MANOJ KUMAR Appellant
Through: Mr. Naresh K. Daksh, Advocate.
versus

R K SINGH Respondent
Through: Mr. Mukesh Sharma, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. The present second appeal is directed against the judgment & decree dated 12.02.2015 passed by the learned Additional District Judge-02 (South-West), Dwarka Courts, New Delhi in RCA No.05/14/12 preferred by the appellant/ defendant No.1, in the suit filed by the respondent No.1. By the impugned judgment & decree, the first appeal preferred by the appellant has been dismissed, and the judgment & decree passed in favour of the respondent No.1/ plaintiff by the learned Civil Judge-01 (South-West), Dwarka Courts, New Delhi in C.S. No.146/2011 - decreeing possession of the suit property and for mesne profits @ Rs.5,000/- per month w.e.f. 03.10.2008 to 02.12.2008, and damages @ Rs.5,000/- per month from the date of institution of suit till the date of handing over of possession and also granting injunctive relief to the plaintiff, has been affirmed.

2. Respondent No.1/ plaintiff had filed the aforesaid suit on the premise

that he had purchased the suit property bearing No. RZ-26 measuring 40 square yards situated at Shankar Park, Gali Baba Balak Nath Mandir, West Sagar Pur, Delhi from Sh. Lallu Prasad vide a registered sale deed dated 29.08.2008. The plaintiff claimed that the two defendants in the suit, namely, the appellant (defendant No.1) and Sh. Trilok (defendant No.2) were the licensees in the suit property under Sh. Lallu Prasad. At the time of execution of the sale deed, the plaintiff claimed, that the defendants had promised to vacate the property within a period of one month. However, they had failed to do so. Consequently, after issuance of legal notice dated 18.09.2008 terminating their license and requiring the defendants to deliver peaceful vacant possession of the property, the suit was filed claiming possession with damages at the rate of Rs.5000/- per month with effect from 03.10.2008.

3. The defendants filed their written statements contesting the suit. Defendant No.1/ appellant claimed that the suit was not maintainable as a status quo order with respect to possession in respect of the suit property was in force, which had been passed in another suit being C.S No. 1009/06. Defendant No.1/ appellant further submitted that another suit, being C.S. No.84/07, filed by Sh. Lallu Prasad was also pending adjudication where the issue of ownership of the suit property was in question. The defendant/ appellant also claimed that the suit was barred under Section 10 of the Code of Civil Procedure.

4. The appellant/ defendant further stated that in the sale deed propounded by the plaintiff, it has been recorded that he had been delivered the possession of the suit property, whereas the property was, admittedly, in

the possession of the defendant. The primary defence raised by the appellant/ defendant was that the defendant/ appellant, along with his father, was in possession of the suit property since 30.05.1984 where he had been residing. It was claimed that the possession of the defendant/ appellant and his father was hostile, and the defendant claimed that he had acquired title to suit property by adverse possession. On the basis of the pleadings, the first issue framed by the Court was whether defendant No.1/ appellant had become the owner of the suit premises by adverse possession. The parties led their respective evidence. The plaintiff examined himself as PW-1 and exhibited several documents, including the sale deed in his favour being Ex.PW-1/1A. Defendant No.1 examined himself as DW-1. He also exhibited several documents. He was also cross-examined by the plaintiff.

5. At this stage, it is worthwhile to note that, undisputedly, Sh. Lallu Prasad was the registered owner of the suit property. The defendant No.1/ appellant is the grandson of the said Sh. Lallu Prasad and is the son of the eldest son of Sh. Lallu Prasad, namely Sh. Babu Lal. In his cross-examination, the appellant/ DW-1, inter alia, stated that his father Sh. Babu Lal had purchased the suit property in the name of his grandfather Sh. Lallu Prasad. He further stated that the entire family used to live together when the suit property was purchased. He stated that Sh. Lallu Prasad had five sons of which late Sh. Babu Lal – his father, was the eldest. He further stated that being the eldest son of Sh. Lallu Prasad, his father was the major earner, and whatever he used to earn, used to be passed on to Sh. Lallu Prasad till the time that he was alive, as Sh. Lallu Prasad was the Head of the Family and the family was living together. He also stated that “*At that*

time Sh. Lalu Pershad used to sit at the shop together with my father”.

6. He also stated that *“At the time of purchase of the plot, Mr. Lalu Pershad used to sit at the shop belonging to my father. The shop was jointly owned and run by my father and Sh. Lalu Pershad Ji. My paternal uncles used to study during the period prior to purchase of the property”.*

7. He also stated *“Mr. Lalu Pershad stated that my father could reside in the portion 80 Sq. Yards in the front portion of the property”.*

8. The Trial Court rejected the defence of the appellant/ defendant No.1 premised on the plea of adverse possession, by observing as follows:

“17.In the instant case, it has been submitted on behalf of the defendant no.1 that his father late Sh. Babu Lal came into possession of the suit property on 30.05.1984 and that he remained in possession till his death on 17.02.2005 and after him, the defendant no.2 has been in possession with his family till date. However, this stand of defendant no.2 (sic defendant no.1) that his possession has been hostile was demolished in his cross- examination. Defendant no.2 (sic defendant no.1) stated that his father purchased the property in Lallu Prasad's name and therefore his father late Sh. Babu Lal was the true owner of the property. Defendant no.2 (sic defendant no.1) also stated in his cross-examination that the shop at the suit property was jointly run by his father and Sh. Lallu Prasad. Further, defendant no.2 (sic defendant no.1) also volunteered that Sh. Lallu Prasad permitted the father of defendant no.2 (sic defendant no.1) that he could reside in 80 square yards of the property that included the suit property also. From above, it is clear that the possession of plaintiff was never adverse. The person claiming adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish adverse possession. As the defendant no.1 has failed

to establish the requirements as above, this issue is decided against the defendant no.1.”

9. I may observe that, according to learned counsel for the appellant, there is a typographical error inasmuch, as, the Court has recorded “defendant no.2” instead of “defendant no.1” at several places in the above extract. This error is apparent from a complete reading of the judgment and the cross examination of defendant no.1/appellant.

10. It appears that when the appellant preferred the first appeal, apart from raising the said plea of adverse possession, the appellant also sought to raise an issue with regard to the pecuniary jurisdiction of the Trial Court to deal with the suit pertaining to the suit property. This plea was premised on the valuation attached to the suit property in the sale deed produced by the plaintiff in his favour which discloses the sale consideration as Rs.6,20,000/, whereas the relief in the suit was assessed at Rs.60,000/- on the basis of occupation charges/ mesne profits @ Rs.5,000/- per month for a period of 12 months.

11. The First Appellate Court rejected both the aforesaid pleas. The plea of adverse possession is rejected in the following manner:

“18. Now, coming on the other aspect of law of adverse possession as to whether the possession of the defendant no.1 over the suit property remained hostile and adverse towards his grandfather. It is admitted fact that grandfather of the defendant no.1 was registered owner of the suit property however it is claimed by defendant no.1 that his father purchased the suit property in the name of his father Sh Lallu Prasad being head of the family. No evidence has been adduced with this effect. It is settled preposition of law that when there is

close relationship between the parties then law of adverse possession cannot be applied. For this aspect, I rely upon law laid down in case titled as Maria Margarida Sequeria Fernandes and Ors. Vs. Erasmo Jack de Sequeria (Dead) through L.Rs MANU/SC/0225/2012 SC wherein Hon'ble Supreme Court has held as under;-

“(a) No one acquire title to the property if he or she was allowed to stay in the premise gratuitously. Even by long possession of years or decades such person could not acquire any right or interest in the said property.

(b) Caretaker, watchman or servant can never acquire interest in the property irrespective of his possession. The care taker or servant has to give possession forthwith on demand.

(c) Courts are not justified in protecting the possession of a care taker, servant or any person who was allowed to live in the premises for some time either as a friend, relative caretaker or as a servant.

(d) The protection of the Court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or license agreement in his favour.

(e) The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession.”

19. In the light of law laid down in Maria's case (Supra) it is manifest that long possession of years or decades cannot be termed as adverse possession if the property is given to a close relative. In the present case defendant no.1 is a grandson of Sh Lallu Prasad who was the registered owner of the suit property.

It is also admitted fact that defendant no.1 alongwith his father have been remained in possession of the suit property for the last twenty four years but defendant no.1 cannot claim over the suit property by way of adverse possession against his grandfather Sh Lallu Prasad. With these observations I find that Learned Trial Court has correctly held that possession of the defendant no.1 over the suit property was never adverse.”

12. The plea of Trial Court not having the pecuniary jurisdiction on account of wrong valuation of the suit property, was rejected as follows:

“26. Now, coming on the seventh argument regarding under valuation the suit for the purpose of court fees and jurisdiction. Perusal of the trial court record, I find since no issue regarding under valuation of the suit was framed by Learned trial court nor it was pressed by the counsel for the defendant No.1 during the course of trial of the case, therefore, no finding can be given at this stage on the aspect of under valuation of suit.”

13. Before this Court, the submission of learned counsel for the appellant is, firstly, that the sale deed propounded by the plaintiff, i.e. Ex.PW-1/1A does not record the correct position with regard to the possession of the suit property, as it records that the possession has been delivered to the plaintiff/ vendee by the vendor/ Sh. Lallu Prasad, whereas the possession was not so delivered and that the defendants were in possession of the suit property. The submission is that in the plaint, the plaintiff changed his stand by stating that at the time of execution of the sale deed, the defendants were present and they had assured to deliver possession of the suit property to him within a month.

14. The aforesaid submission is neither here nor there. The recording of delivery of possession in the sale deed is not an essential ingredient of a sale

deed, and even if it were recorded that possession was delivered to the vendee, whereas it was not so delivered, it only means that the expression “possession” refers to “symbolic possession”, and not actual physical possession. Even if there is a wrong recording of the said fact in the sale deed, the validity of the sale deed cannot be called in question on that ground alone. Similarly, the recording in the sale deed that no litigation was pending, when the civil suit filed by Sh. Lallu Prasad against the appellant/ defendant was pending, does not invalidate the sale deed. At the highest, it could render the sale voidable at the instance of the vendee. However, the appellant cannot seek to derive any advantage from the said inconsistency.

15. The further submission of learned counsel for the appellant is that there was a status quo order operating in respect of the suit property. Pertinently, that status quo order had been passed in *inter se* litigation between the two defendants – Manoj Kumar and Trilok. Sh. Lallu Prasad was not a party to the said proceedings, and the said status quo obviously could not bind Sh. Lallu Prasad or his transferee/ assignee.

16. Thirdly, learned counsel for the appellant submits that Sh. Lallu Prasad had filed a suit for possession against the appellant/ defendant which was registered as CS 84/2007. The said suit was filed before the plaintiff claimed to have purchased the suit property from Sh. Lallu Prasad. However, after the said purchase, he did not move an application under Order XXII Rule 10 CPC to seek impleadment/ substitution in the said suit in place of Sh. Lallu Prasad, and instead preferred the suit in question.

17. I do not find any merit in this grievance of the appellant. A perusal of

Order XXII Rule 10 CPC itself shows that in the event of an assignment, creation or devolution of interest during the pendency of the suit, “*the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved*”. This only shows that the transferee/ assignee may, with the leave of the Court, seek impleadment/ substitution and it is not that the transferee must mandatorily seek impleadment in the same suit, or that he cannot prefer a suit of his own if he has a subsisting cause of action in his favour. It is not the plaintiffs case that the said suit preferred by Sh. Lallu Prasad was dismissed on merits - by returning a finding in favour of the appellant/ defendant that he was in adverse possession of the suit property. Had such a finding returned, there would have been merit in the appellant’s case. However, that is not the case in hand.

18. Learned counsel for the appellant has submitted that the appellant was in adverse possession of the suit property since 1984. Both the Courts below, in my view, have correctly appreciated the legal position in the factual matrix of the case. The appellant/ defendant No.1 is none other than grandson of Sh. Lallu Prasad, the original owner of the suit property. The First Appellate Court has placed reliance on ***Maria Margarida Sequeria Fernandes and Ors. Vs. Erasmo Jack de Sequeria (Dead) through L.Rs***, MANU/SC/0225/2012 SC. Even in the cross-examination of the appellant/ defendant No.1, he has, *inter alia*, admitted that Sh. Lallu Prasad – the recorded owner, had permitted his father to reside in the portion admeasuring 80 sq. yards in the front portion of the property.

19. The findings of fact returned by the Trial Court and the First

Appellate Court are based on appreciation of evidence and the appellant has not been able to point out any perversity in the said consistent findings recorded by the two Courts below. Consequently, this Court is not persuaded to interfere with the said finding.

20. I may also observe that the plea of the plaintiff that the property had been purchased by his father late Sh. Babu Lal in the name of his grandfather Sh. Lallu Prasad has not been established by leading any cogent evidence.

21. So far as the aspect of pecuniary jurisdiction of the Trial Court is concerned, as noticed by the First Appellate Court, the said objection was not raised by the appellant/ defendant at any stage before the Trial Court. The said objection was sought to be raised only at the first appellate stage. The Supreme Court in ***Harshad Chiman Lal Modi Vs. DLF Universal and Another***, (2005) 7 SCC 791, has, inter alia, held that:

“28. The jurisdiction of a court may be classified into several categories. The important categories are (i) Territorial or local jurisdiction; (ii) Pecuniary jurisdiction; and (iii) Jurisdiction over the subject matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage.”

22. Thus, the lack of territorial jurisdiction or pecuniary jurisdiction – unless pleaded by the defendant and raised before the Trial Court at the appropriate stage, would not be a reason for the appellate court to interfere

with the judgment and decree of the Trial Court.

23. The submission that the suit was not correctly valued inasmuch as the respondent/ plaintiff had sought a decree for possession and the valuation had been assessed on the basis of the annual letting value, however, has some merit. It was not the respondent/ plaintiff's case that the appellant was paying the license fee/ rent of Rs.5,000/-. Therefore, the valuation of the relief of possession could not have been done on the basis of the annual letting value. The suit property had been purchased by the respondent from Sh. Lallu Prasad for a disclosed consideration of Rs.6,20,000/- and, therefore, that valuation should have been adopted for the purpose of valuing the relief for possession. Even though this objection was not raised by the appellant/ defendant before the Trial Court, the said aspect impinges on the amount of Court Fees that the respondent/ plaintiff should have affixed on the plaint. It is a matter concerning the revenue of the State. According, the respondent/ plaintiff is directed to deposit the additional Court Fees by valuing the said relief of possession at Rs.6,20,000/-, which has presently been valued at Rs.60,000/-. The Court Fees on the balance amount of Rs.5,60,000/- shall be deposited by the appellant before the Executing Court and the Executing Court shall proceed with the execution upon satisfaction of the deposit of the said Court Fees.

24. With the aforesaid modification, the present appeal stands disposed of.

VIPIN SANGHI, J

SEPTEMBER 14, 2015

B.S. Rohella