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

+ **Date of Decision: 13.07.2015**

% **RSA 240/2015 and C.M. Nos. 12071-72/2015**

MUKHTIAR SINGH Appellant
Through: Mr. Jitender Kumar Jain, Advocate.

versus

THE CHIEF ENGINEER (I&F) IRRIGATION AND FLOOD
CONTROL DEPARTMENT & ORS. Respondents
Through:

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. This regular second appeal under Section 100 CPC is directed against the judgment dated 22.04.2015 passed by Ms. Kamini Lau, ADJ-II (Central) Tis Hazari Courts, Delhi in RCA No. 136/2013, whereby the first appeal preferred by the appellant has been dismissed and the judgment passed by Senior Civil Judge-cum-Rent Controller, Delhi dated 11.10.2010 in Suit No. 354/2007 has been affirmed.
2. The brief facts are that the plaintiff-appellant along with his brothers claimed to be in possession of one 'Gitwar' (hereinafter referred to as the 'Suit Property'), measuring 2000 sq. yds. in Abadi of village Bawana, Delhi, which was bounded as under:

North: Road and then Police Station.

South: Bawana Road and then DTC Bus Depot.

East: Road and then houses of Hari, Satyen and Raghubir.

West: Rasta and then Ghar of Hari Lala.

3. The plaintiff-appellant claimed that seven *Bitoras*, *poolies*, *Kuri*, *Khuntas* and *Kikar* tress were existing on the suit property, and that he was in possession of the aforesaid property for the last 20 years continuously. It was the case of the plaintiff-appellant that the defendants were trying to grab the land, in collusion with rival partymen of the village, and were trying to raise boundary wall around the suit property.

4. The suit had been preferred by the plaintiff to seek a permanent injunction, simplicitor, in respect of the aforesaid immovable property. Initially, the suit was filed against two defendants viz. Pratap Singh and Mohinder Singh. Subsequently, the learned SCJ allowed the application of the plaintiff under Order I Rule 10 read with Order VI Rule 17 CPC, and three more defendants were added i.e. the Chief, Irrigation and Flood Control (Respondent No. 1), Union of India (Respondent No. 2), and Gaon Sabha of village Bawana (Respondent No. 3).

5. The Respondents No. 2 and 3 (Defendants No. 4 & 5 before the Learned Trial Court), were the main contesting parties in the suit. They claimed that the land in question actually falls in Khasra No. 77/21, min. (3-13) and belongs to the Gram Sabha of village Bawana. It was claimed that the plaintiff-appellant is not in possession of the property, and in the revenue

records, the Gram Sabha of Village Bawana, was recorded as Bhumidhar of the said land. They also claimed that the plaintiff-appellant deliberately did not mention the identification no. or the Khasra no. of the suit property and also did not deliberately give the names of his brothers, who are claimed to be in possession of the same along with him. It was also claimed that under the garb of an injunction, appellant was seeking declaration of *Bhumidari* rights, which jurisdiction did not vest in the Civil Court, and it vested in Revenue Court. The said defendants pleaded that the appellant has no right, title or interest in the property, and appeared to have trespassed on the plot, just before filing of the suit, and, thus, he was not entitled to any protection. The respondents also claimed that merely by tethering of his cattle, and by putting *Bitoras* and *Poolies* in an open land, the plaintiff's possession did not constitute adverse possession against the true owner i.e. the Gram Sabha.

6. In the replication, the plaintiff-appellant reaffirmed all his averments made in the plaint, and explained that he had not mentioned the Khasra no. as he was not aware of the same, and had denied that the suit land falls within Khasra No. 77/21, or that it was owned by Gaon Sabha.

7. On the basis of the pleadings of the parties, the Ld. Trial Court framed five issues as follows:

- i. Whether the plaintiff is in lawful possession of land measuring 2000 sq. yds. in the abadi of village Bawana and bounded as mentioned in para 1 of the plaint as alleged by the plaintiff or his possession is illegal as alleged by the defendant? OPP/OPD
- ii. Whether the suit is not maintainable? OPD

- iii. Whether the suit is bad for misjoinder of defendants? OPD
- iv. Whether the plaintiff has no locus standi to file the present suit? OPD-2, 4 & 5.
- v. Relief.

8. The plaintiff examined himself as PW-1 and reiterated the averments made by him in his plaint. PW-1 proved the site plan (PW-1/A). He claimed in his cross examination that the wall was constructed by him, but he claimed it was constructed only in the year 1993-94.

9. The plaintiff also examined Jai Prakash as PW-2 and the Local Commissioner, Advocate Mr. G.S. Narula as PW-3. PW-2 deposed that the plaintiff was in possession of the suit property alongwith his brothers, for the last about 40 years continuously. PW-3 proved his inspection report as a Local Commissioner dated 25.09.1993 as Ex. PW-1/2 and PW-1/3. He admitted that he did not serve any notice on any of the parties prior to his inspection on 25.09.1993. He also stated in his cross examination that he does not remember whether any official from Gram Sabha was present at the time of his inspection or not.

10. In support of their defence, the defendant nos. 4 & 5 examined DW-1A Sanjiv Kumar, who exhibited the Khasra Girdawari and Khatoni of the Khasra No. 77/21, as Exs. DW-1/1 and DW-1/2, and he deposed that the aforesaid property is outside Lal Dora. He further deposed that the land was owned by Gram Sabha as uncultivated area of 3 Bighas 13 Biswas, and the remaining 2 Bighas was private land. DW-2 Satbir Sharma and DW-3 Pati

Ram Singh also deposed on the same lines. However, all these defence witnesses admitted in their cross examination that the spot was not demarcated and also that they were not sure as to who constructed the boundary wall around the suit property.

11. The learned Senior Civil Judge examined the issue whether the appellant plaintiff was entitled to seek the relief of injunction in the facts & circumstances of the case. Reference was made to ***Krishna Ram Mahale (Dead) by his L.Rs. Vs. Mrs. Shobha Venkat Rao***, AIR 1989 SC 2097, wherein the Supreme Court has held that a person who is in settled possession of a property, even on the assumption that he had no right to remain on the property, cannot be dispossessed by the owner of the property, except by taking recourse to law. Thus, the question examined by the Trial Court was whether the plaintiff proved himself to be in settled possession of the suit property on the date of filing of the suit. The plaintiff claimed to be in settled possession of the suit property for the last 20 years. However, on appreciation of evidence, the Court found that the plaintiff could not establish his settled possession of the suit property. He admitted that he constructed the wall on the property in the year 1993-94. He could not disclose the date and month of construction of the wall. Mere tethering of animals on an open land and putting of *Bitoras*, etc. on the open land could not lead to claim towards settled possession. Reference was made to several decisions in this regard.

12. Reference was also made to ***Rame Gowda (D) by L.Rs. Vs. M. Varadappa Naidu (D) by L.Rs. and Another***, AIR 2004 SC 4609, wherein the Supreme Court laid down the tests for determining the attributes of

settled possession. These attributes as culled out in its judgment by the Trial Court are as follows:

“..... i) that the trespasser must be in actual physical possession of the property over a sufficiently long period; ii) that the possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of animus possidendi. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case; iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner.....”

13. The plaintiff had not been able to establish that he was in actual physical possession of the property for a sufficiently long period of time to the knowledge of the defendant, or without any attempt to conceal the same from the defendant, by the plaintiff. It was held that it was not clear whether the process of dispossession of the true owner by the plaintiff was complete and final, since the plaintiff had not disclosed as to in what capacity he came into possession of the suit property. He did not even claim to be in adverse possession of the suit property. The plaintiff had not been able to establish that he was the true owner of the suit property. No such case has been pleaded, or proved before the Trial Court.

14. Reference was also made to ***Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by L.Rs. & Ors.***, AIR 2008 SC 2033, wherein the Supreme Court had examined the nature of the relief that the plaintiff must plead and seek in different factual backgrounds, in a suit relating to an immovable property. Paragraphs 11 to 14 of that decision, relied upon by the Trial Court, read as follows:

“11. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.

11.1) Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

11.2) Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

11.3) Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.

12. We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent

title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title.

13. In a suit for permanent injunction to restrain the defendant from interfering with plaintiff's possession, the plaintiff will have to establish that as on the date of the suit he was in lawful possession of the suit property and defendant tried to interfere or disturb such lawful possession. Where the property is a building or building with appurtenant land, there may not be much difficulty in establishing possession. The plaintiff may prove physical or lawful possession, either of himself or by him through his family members or agents or lessees/licensees. Even in respect of a land without structures, as for example an agricultural land, possession may be established with reference to the actual use and cultivation. The question of title is not in issue in such a suit, though it may arise incidentally or collaterally.

14. But what if the property is a vacant site, which is not physically possessed, used or enjoyed? In such cases the principle is that possession follows title. If two persons claim to be in possession of a vacant site, one who is able to establish title thereto will be considered to be in possession, as against the person who is not able to establish title. This means that even though a suit relating to a vacant site is for a mere

injunction and the issue is one of possession, it will be necessary to examine and determine the title as a prelude for deciding the de jure possession. In such a situation, where the title is clear and simple, the court may venture a decision on the issue of title, so as to decide the question of de jure possession even though the suit is for a mere injunction. But where the issue of title involves complicated or complex questions of fact and law, or where court feels that parties had not proceeded on the basis that title was at issue, the court should not decide the issue of title in a suit for injunction. The proper course is to relegate the plaintiff to the remedy of a full-fledged suit for declaration and consequential reliefs.”

15. Since the plaintiff was silent with regard to the manner in which he came into possession of the suit property, and the capacity in which he was occupying the same, the Trial Court held that the plaintiff ought to have preferred a suit for declaration and injunction, and a simplicitor suit for injunction did not lie. It was also held that no specific instance had been mentioned by the plaintiff as to on which date, and in what manner, the defendant attempted to dispossess the plaintiff. Thus, issue Nos. 1 and 2, i.e.: Whether the plaintiff is in the lawful possession of the land in question, or his possession is illegal, and the issue whether the suit is maintainable, were decided against the plaintiff. Accordingly, the suit was dismissed.

16. The learned ADJ by the impugned judgment concurred with the said findings returned by the Trial Court. The First Appellate Court has held that since the assertion of the plaintiff/ appellant of his being in lawful possession has been denied by the respondent defendant, and a specific issue had been framed thereon, it was necessary for the appellant to lead his evidence to establish his ownership of the land in question, which was not done. He was completely silent on the aspect as to how the plaintiff came

into possession of the land in question and in what capacity. Nothing has been placed on record to show that the said land belongs to the appellant. On the contrary, there is a specific assertion by the defendants that the land in question belongs to the Gaon Sabha. Mere tethering of cattle in the open land, or putting some *Bitoras* does not establish possession. Admittedly, the wall had been constructed in the year 1993-94, and there was nothing on record to confirm that the respondent was in actual possession of the suit property for sufficiently long period of time to the knowledge of the owner and without concealment of the same by the plaintiff. The appellant had not established as to how the process of dispossession of the actual owner, i.e. Gaon Sabha by him was complete and final. Consequently, the first appeal was dismissed.

17. Learned counsel for the appellant submits that the respondent defendants while claiming that the Gaon Sabha was the owner of Khasra Nos. 77/21 measuring 3 Bighas and 3 Biswas, did not bring on record any demarcation report to show that the land in question fell in Khasra No.77/21. He, therefore, submits that the Courts below have wrongly proceeded on the assumption that the Gaon Sabha was the owner of the suit property. He submits that the land fell in the Village Abadi and, therefore, there was no entry in the Khasra Girdawari.

18. Having heard learned counsel for the appellant, I find absolutely no merit in the present appeal. The Trial Court dismissed the suit, and the First Appellate Court dismissed the first appeal by returning concurrent findings of fact.

19. The appellant/plaintiff was not able to establish even a semblance of title to the suit property. In what capacity the appellant came into possession, is also not established. Though the appellant claimed to be in settled possession for over 20 years, the appellant failed to produce even a shred of paper, or any other credible evidence to substantiate the same. Even according to the statement of the appellant, the boundary wall was constructed in the year 1993-94. Pertinently, the suit was instituted on 24.09.1993. Mere tethering of animals on open land and putting of Bitoras could not be said to establish possession of the appellant to the knowledge of the true owner. No doubt, the defendant/gaon sabha did not establish that the suit property fell in khasra no.77/21 of the revenue estate of village Bawana, but that failure of the defendant does not come to the aid of the plaintiff/appellant, who had to stand on his own feet and to establish his own right to claim injunction.

20. The appellant has not been able to point out any illegality in the approach of the Trial Court, or the First Appellate Court in appreciation of evidence, or any perversity in the impugned judgment or the judgment of the Trial Court. These judgments are founded upon law settled by the Supreme Court. Pertinently, the appellant did not even provide the khasra number of the suit property of which he claimed to be the owner in possession. Though, it is claimed that the suit property fell within the laldora/village abadi, no laldora certificate or any other evidence was produced by the appellant to that effect.

21. In these circumstances, I do not find any error in the impugned judgment, which confirms the findings of the Trial Court on an appreciation of evidence led by the parties. No substantial question of law arises for consideration by this Court. Dismissed.

VIPIN SANGHI, J

JULY 13, 2015