

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

+ **CS(OS) No. 2537/2015**

% **25th August, 2015**

ABDUL RASHID Plaintiff

Through: Mr. Ratan K. Singh, Advocate with
Mr. J.K. Chaudhary, Advocate, Mr.
Vipul Agrawal, Advocate, Ms. Swati
Surbhi, Advocate and Mr. Udit
Chauhan, Advocate.

Versus

DELHI WAQF BOARD Defendant

Through:

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

I.A. No.17653/2015 (exemption)

1. Exemption allowed subject to just exceptions.

I.A. stands disposed of.

+ CS(OS) No.2537/2015 and I.A. No.17654/2015 (stay)

2. This is a suit filed by the plaintiff/Mr. Abdul Rashid, claiming himself to be a Mutawali, seeking the relief of permanent injunction effectively by which plaintiff wants that it should be held that he is in

possession of the suit property being Dargah/Mazar Biwi Fatima, Kaka Nagar, New Delhi-110003 and that the sole defendant/Delhi Waqf Board be restrained from interfering with the possession of the plaintiff.

3. The suit is predicated on the averments that injunction should be granted because plaintiff is in possession of the suit property which is a Dargah/Mazar. The case of the plaintiff as per the plaint is that the plaintiff is in open and settled possession for the past 60 years and which is so stated in para 17 of the plaint. Plaintiff claims that plaintiff's possession is being threatened by the sole defendant/Delhi Waqf Board and therefore plaintiff is entitled to injunction against the Delhi Waqf Board from dis-possessing the plaintiff.

4. At the time of arguments, counsel for the plaintiff did not press the issue that plaintiff is in possession for 60 years but argued that since the plaintiff is in settled possession at least from the year 2007, plaintiff's possession be protected by the relief of injunction which is prayed in the suit and the interim application.

5. On behalf of the plaintiff, reliance is placed upon the following to seek the relief of injunction and issuing of summons in the suit and for *ex*

parte interim orders:-
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- (i) The property in question appears in the letter attached to the Notice of the Government of India dated 27.3.1984 at serial no.56 whereby the title in this property was to vest with the government, but, the government was to create a lease of the property in favour of the defendant.
- (ii) Order dated 12.1.2011 passed by the Division Bench of this Court disposing of W.P.(C) No.1512/1984.
- (iii) Order dated 20.8.2014 of a Division Bench of this Court disposing of W.P.(C) No.2901/2014.
- (iv) Documents which are filed from running page 105 of the paper book till page 141 that plaintiff is in settled possession of the property in question since 2007.

In addition to the aforesaid factual aspects, reliance is placed upon the judgment of the Supreme Court in the case of ***Rame Gowda (Dead) by LRs. Vs. M. Varadappa Naidu (Dead) by LRs. and Another (2004) 1 SCC 769.***

6. In my opinion, the suit is a clear cut abuse of the process of the law and the plaintiff cannot be said to be in settled possession, but which aspect I am not observing finally, because the suit is in fact liable to and is

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being dismissed on account of non-joinder of the necessary party being Union of India and as required by Order I Rule 9 of the Code of Civil Procedure, 1908 (CPC) which states that in the absence of a necessary party the suit is not maintainable. Counsel for the plaintiff states that Union of India is not a necessary party because plaintiff only has disputes with the defendant i.e the Delhi Waqf Board and which is seeking to dispossess the plaintiff and the suit lies without Union of India being a defendant and thus Union of India is not liable to be made a defendant in the present suit.

7. In my opinion, before the suit is maintainable not only by showing plaintiff in settled possession, plaintiff will also have to show that the possession of the suit property was in fact given by the government to the Delhi Waqf Board and thus the plaintiff has a claim to possession as a Matawali. Also, the Union of India being interested on the issue of possession of the suit property, the following aspects are relevant in this regard:-

(i) The Notice of the Government of India dated 27.3.1984 relied upon by the plaintiff itself states in so many terms that a lease will be executed in favour of the Delhi Waqf Board, but, no lease executed by the government in favour of the Delhi Waqf Board is placed on record that this land has been

handed over to the Delhi Waqf Board in terms of a lease executed pursuant to the Notice of the Government of India dated 27.3.1984.

(ii) The Order of the Division Bench of this Court dated 12.1.2011 makes it completely clear that it is the Government of India which is in possession of the suit land including the other waqf lands. This Order dated 12.1.2011 was passed by the Division Bench in W.P.(C) No.1512/1984 being the writ petition filed by the Indraprastha Vishwa Hindu Perishad and Ors. against the Union of India and Ors. In this Order dated 12.1.2011, a Division Bench of this Court has clearly referred to the earlier Orders passed by the Division Bench on 1.6.1984 referring to the aspect that possession has to be retained by the government, and which interim Order dated 1.6.1984 was made absolute on 7.1.1985 and also confirmed at the time of disposal of the writ by the Order dated 12.1.2011. This Order dated 12.1.2011 being material is reproduced as under:-

“By this writ petition, report under Article 226 of the Constitution of India, the petitioners have made the following prayers:-

“In view of the aforesaid facts and in the interest of justice, it is most respectfully prayed that this Hon’ble Court be graciously pleased to issue a write(sic) of prohibition prohibiting the respondents 1 to 3 from implementing or giving effect to the office order/letter/notification No.J.20011/4/74. 1-11 Govt. of India, Ministry of Works and Housing dated 27.3.1984 marked as annexure I and/or implementing or giving effect to the recommendations of the

Burney Committee and a writ of certiorari quashing the said office order/letter/notification and directions contained in annexure I and a writ of mandamus directing the respondents 1 to 3 not to transfer or dispose off the properties mentioned in Annexure-I to the respondent No.4 in any manner whatsoever and any other writ, order or direction which this Hon'ble Court deems just and fit in the circumstances of the case. The cost of the writ petition be also allowed."

2. When this matter was listed on 1st June, 1984, a Division Bench of this Court passed the following order:-

"CW 1512/84

Rule

CM 2045/84

Notice in C.M. for 18.7.1984. In the meantime, status quo regarding the property should be maintained and possession should be retained by the Government. If lease deeds have not yet been executed these should not be executed. Dasti."

3. Thereafter, the said order continued and eventually it was made absolute on 7th January, 1985. It is agreed at the Bar that the said order has not been vacated. It is also accepted at the Bar that no lease deed has been executed.

4. This Court on 26th August, 2010 had passed the following order:-

"Mr. Parag P. Tripathi, learned Additional Solicitor General has submitted that Union of India is likely to take a policy decision within a period of four weeks. It is submitted by him that if a policy decision comes then there would be possibility that the controversy may be put to rest.

Be that as it may, if a policy comes into existence, there can be debate in that regard on the next date of hearing.

List on 6th October, 2010."

5. On 6th October, 2010, the following order came to be passed:-

"It is submitted by learned ASG that parties concerned are looking into the matter.

In view of the aforesaid, as prayed, matter be listed on 19.1.2011. Counsel for the petitioner has no objection.”

6. On perusal of the orders passed and the stand taken, we are of the considered opinion that the Union of India is required to consider the matter. Let the Union of India re-look at the matter and take a decision within six months from today. Till then, the interim order passed by this Court on 1st June, 1984 shall remain in force. Needless to say when we have directed that the Union of India shall have a fresh look into the matter, it shall keep in view the law in praesenti and the factual position. All other issues and contentions are left open.

With the aforesaid directions, the writ petition stands disposed of.”
(emphasis is mine)

(iii) Clearly therefore in view of the Order dated 12.1.2011, possession is neither with the plaintiff nor with the Delhi Waqf Board but with the government whose possession has been ordered to be retained by the government in terms of the said Order dated 12.1.2011. Possession would be of the plaintiff or of the Delhi Waqf Board only if the possession is shown to have been transferred by the Union of India either to the plaintiff or to the Delhi Waqf Board but that is not even the case of the plaintiff because plaintiff only claims the cause of action of being in ‘settled possession’ from the year 2007 as per the arguments before me, and as per the plaint from the last 60 years and which cause of action is not pressed at the time of hearing.

(iv) The next relevant document is the Order dated 20.8.2014 passed in a writ petition of the year 2014 again filed by Indraprastha Vishva Hindu Parishad and Ors. against Union of India and Ors., being W.P.(C) No. 2901/2014, and this Order dated 20.8.2014 did not change the position as prevailing in terms of the final Order dated 12.1.2011 in W.P.(C) No.1512/1984. This Order dated 20.8.2014 in W.P.(C) No.2901/2014 is reproduced as under:-

“Shri Sanjay Jain, the learned ASG who appeared on advance notice represented on instructions that the issue involved in this writ petition has already been taken note of by the Respondent No.1 and 2 and the same is under active consideration. It is also represented that the present writ petition will be treated as a representation and the grievance of the petitioners will also be considered and appropriate decision will be taken at the earliest.

The statement of the learned ASG is placed on record and the writ petition is accordingly disposed of leaving it open to the respondents No.1 and 2 to take an appropriate decision after giving an opportunity of hearing to all the stakeholders, particularly the respondent No.4/Delhi Waqf Board. Till such time, status quo obtaining as on today with regard to the possession of the land in question shall be maintained.”

The aforesaid order therefore reiterates the position of the Order dated 12.1.2011 in WP(C) No. 1512/1984 i.e effectively the possession has to be of the government/Union of India and not of the Delhi Waqf Board, and thus much less of the plaintiff.

8(i) Order I Rule 9 CPC reads as under:-

“ Order I Rule 9. Mis-joinder and non-joinder.- No suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

Provided that nothing in this rule shall apply to non-joinder of a necessary party.” (underlining added)

(ii) The provision of Order I Rule 9 CPC makes it clear that the suit is not maintainable in the absence of a necessary party and surely Union of India is a necessary party in the present case because Union of India is the owner of the suit land and possession of Union of India has to be taken as of Union of India in view of the Order dated 12.1.2011 of a Division Bench of this Court in W.P.(C) No.1512/1984. In any case Union of India is surely an interested party on the aspect of possession and Union of India has the right/claim/entitlement to possession of the suit land.

9(i) Now, let us examine the aspect as to whether the plaintiff if not in possession for 60 years, is in settled possession since 2007 in view of the documents which are filed from pages 105 to 114 of the paper book. This aspect will be taken with the applicability of the judgment of the Supreme Court in the case of ***Rame Gowda (Dead) by LRs.(supra)***. This aspect is only being examined on the aspect of *bona fides* of the plaintiff and as an
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aspect that on the issue of possession Union of India will be vitally interested. Lack of *bona fides* of the plaintiff is also clear from the fact that the plaintiff has deliberately not given the area of the property with respect to which relief is sought, noting that the plaintiff therefore can claim relief with respect to an area at his own convenience.

(ii) If we see the documents which are relied upon by the plaintiff to show the alleged 'settled possession' it is seen that these documents are either self-serving letters written to the police or any public authority with respect to claim for security or an electricity connection. In my opinion, electricity connection or self-serving letters cannot show settled possession and nor can the convenient photographs which are filed by the plaintiff from pages 136 to 139 of the paper book inasmuch as the judgment of the Supreme Court in the case of ***Rame Gowda (Dead) by LRs.(supra)*** in fact does not support the plaintiff but goes against the plaintiff in view of paragraphs 8 and 9 of this judgment and which read as under:-

“8. It is thus clear that so far as the Indian law is concerned the person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the

rightful owner, the rightful owner shall have to take recourse to law; he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injuncting even a rightful owner from using force or taking law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force. In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes the possession to go with the title unless rebutted. The owner of any property may prevent even by using reasonable force a trespasser from an attempted trespass, when it is in the process of being committed, or is of a flimsy character, or recurring, intermittent, stray or casual in nature, or has just been committed, while the rightful owner did not have enough time to have recourse to law. In the last of the cases, the possession of the trespasser, just entered into would not be called as one acquiesced to by the true owner.

9. It is the settled possession or effective possession of a person without title which would entitle him to protect his possession even as against the true owner. The concept of settled possession and the right of the possessor to protect his possession against the owner has come to be settled by a catena of decisions. Illustratively, we may refer to *Munshi Ram v. Delhi Admn:* AIR 1968 SC 702, *Puran Singh. v. State of Punjab:*(1975) 4 SCC 518 and *Ram Rattan. v. State of Uttar Pradesh:*(1977) 1 SCC 188. The authorities need not be multiplied. In *Munshi Ram case(supra)*, it was held that no one, including the true owner, has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and in such a case unless he is evicted in the due course of law, he is, entitled to defend his possession even against the rightful owner. But merely stray or even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be settled possession, extending over a sufficiently long period of time and acquiesced to by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and re-instate

himself provided he does not use more force than is necessary. Such entry will be viewed only as resistance to an intrusion upon his possession which has never been lost. A stray act of trespass, or a possession which has not matured into settled possession, can be obstructed or removed by the true owner even by using necessary force. In *Puran Singh case (supra)*, the Court clarified that it is difficult to lay down any hard and fast rule as to when the possession of a trespasser can mature into settled possession. The 'settled possession' must be (i) effective, (ii) undisturbed, and (iii) to the knowledge of the owner or without any attempt at concealment by the trespasser. The phrase settled possession does not carry any special charm or magic in it nor is it a ritualistic formula which can be confined in a strait-jacket. An occupation of the property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical possession. The court laid down the following tests which may be adopted as a working rule for determining the attributes of 'settled possession' (SCC p. 527, para 12):

- 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; and
- iv) that one of the usual tests to determine the quality of settled possession, in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession.” (emphasis is mine)

10. A reference to the aforesaid paras 8 and 9 of the judgment in the case of ***Rame Gowda (Dead) by LRs.(supra)*** shows that intermittent trespass or possession of a stray or casual in nature, is not settled possession. The Supreme Court has categorically observed that intermittent trespass or stray do not give any rights to a trespasser against the true owner and before the possession is a settled possession, the possession must be with the consent of the true owner. In the last line of para 8 of the judgment of the Supreme Court in the case of ***Rame Gowda (Dead) by LRs.(supra)***, the Supreme Court has clarified that if there is no acquiescence of the true owner, act of trespass cannot amount to settled possession. The same issue of acquiescence of the owner has also been mentioned in the middle of para 9 of the judgment in the case of ***Rame Gowda (Dead) by LRs.(supra)*** where the Supreme Court states that possession which the trespasser is entitled to defend against the original owner must be settled possession which extends for a sufficiently long period of time and acquiesced to by the true owner. Therefore, consent of the true owner is a *sine qua non* before there is a settled possession and in the present case consent of settled possession can only be the stand and interest, not of the sole defendant in the suit which is the Delhi Waqf Board, but of the Union of India which in the opinion of this Court has deliberately not been made as a defendant to the suit. If there is

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any doubt that Union of India is not the owner of the land and therefore would not be in deemed possession of the land by virtue of the observations in the judgment in the case of ***Rame Gowda (Dead) by LRs.(supra)***, Union of India in any case had to be made a necessary party because the Order dated 12.1.2011 in W.P.(C) No.1512/1984 clearly states that possession is of the government/Union of India.

11. The Supreme Court in the judgment in the case of ***Premji Ratansey Shah and Others Vs. Union of India and Others (1994) 5 SCC 547*** has held that injunction is a relief in equity and courts should not exercise equitable jurisdiction in favour of a trespasser. The relevant observations are contained in paras 4 and 5 of this judgment and which paras 4 and 5 read as under:-

“4. It is seen that a suit as originally framed, they sought for a declaration that the award made in respect of the land was void, inoperative and does not bind the petitioners. But that relief had been given up. Thereby, the title of the land of the railways have not been questioned. With the award made under Section 30, the vendors of the petitioners got themselves bound by the above award under Section 12 of the Act. It is also seen that the two awards had become final and possession was delivered to the railways by the Land Acquisition officer on 24-2-1960. Thus Defendant Nos. 3 and 4 had no ghost of right, title or interest in the lands acquired from the original owner Maibai. The said sale is a void sale and the petitioners, therefore, cannot derive any interest under the agreement of sale to resist the possession of the lawful owner nor could the declaration sought for be given. The question, therefore, is whether an injunction can be issued

against the true owner. Issuance of an order of injunction is absolutely a discretionary and equitable relief. In a given set of facts, injunction may be given to protect the possession of the owner or person in lawful possession. It is not mandatory that for mere asking such relief should be given. Injunction is a personal right under Section 41(j) of the Specific Relief Act, 1963; the plaintiff must have personal interest in the matter. The interest or right not shown to be in existence, cannot be protected by injunction.

5. It is equally settled law that injunction would not be issued against the true owner. therefore, the Courts below have rightly rejected the relief of declaration and injunction in favour of the petitioners who have no interest in the property. Even assuming that they had any possession, their possession is wholly unlawful possession of a trespasser and an injunction cannot be issued in favour of a trespasser or a person who gained unlawful possession, as against the owner, pretext of dispute of identity of the land should not be an excuse to claim injunction against true owner.” (underlining added)

Reference to the ratio of the judgment in the case of ***Premji Ratansey Shah and Others (supra)*** is made because the same is relevant because injunction cannot be granted to a trespasser against a true owner and therefore the true owner being the Union of India was a necessary party in this case, and more so because by the Order dated 12.1.2011, ownership and possession is of Union of India with possession to be maintained by the Union of India. In any case Union of India is an interested party on the issue of possession and hence issue of possession cannot be determined in the present suit for injunction in the absence of Union of India which is a necessary party in the suit.

12. In view of the aforesaid facts; the provision of Order I Rule 9 CPC; and the fact that Union of India has deliberately not been made a party to the suit by the plaintiff, in my opinion, in the absence of Union of India the suit is not maintainable.

13. The suit is therefore dismissed. Since the suit is dismissed, the interim application is also dismissed.

AUGUST 25, 2015
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VALMIKI J. MEHTA, J.