

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

% **Date of decision: 22nd January, 2016.**

+ **RFA No.420/2015 & CM No.11408/2015 (for stay)**

ASHOK KUMAR

..... Appellant

Through: Mr. Anuj Jain with Mr. A.K. Awasthi,
Advts.

Versus

MOHD. RUSTAM & ANR

..... Respondents

Through: Mr. O.P. Jatav, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This appeal under Section 96 of the Code of Civil Procedure (CPC), 1908 impugns the order dated 4th April, 2015 of the Court of Sh. Devender Kumar Jangala, Additional District Judge-07/West/Delhi of dismissal *in limine* as barred by time Suit No.23/2015 filed by the appellant for the reliefs of (i) declaration of the title of the appellant/plaintiff to property no.B-425, JJ Colony, Raghubir Nagar, New Delhi; (ii) of possession of the aforesaid property; (iii) of injunction restraining the respondents/defendants from transferring alienating or creating third party rights in the property; and, (iv) for recovery of damages for use and occupation.

2. It was the averment of the appellant/plaintiff in the plaint (i) that he had purchased the said property through the medium of Agreement to Sell, Power of Attorney and Will etc. on 7th September, 1994 and was put into possession thereof; (ii) that on request of the seller Sh. Nathu Ram, the property was let out to him vide Rent Agreement/Rent Note of the same date i.e. 7th September, 1994; (iii) that the said Shri Nathu Ram died and his family continued to stay in the property; (iv) that the appellant/plaintiff renovated the first floor and constructed the second floor; (v) that the widow of Sh. Nathu Ram on 19th April, 2002 vacated the first floor and was put into possession of the second floor and the appellant/plaintiff came into possession of the ground, first and third floors of the property and had let out the first and third floors of the property; (vi) that on 19th February, 2003 the locks of the first and third floors were broken open by some miscreants and of which First Information Report (FIR) was lodged and on enquiry the respondents/defendants were found in possession; (vii) that on 9th June, 2003 the respondents/defendants also took the forceful possession of the ground floor; (viii) that the respondents/defendants instituted a suit for injunction against the appellant/plaintiff and in which suit an issue of title also was framed; (ix) however the learned Civil Judge before whom the said suit was

pending while hearing arguments in the said suit on 12th May, 2014, with the consent of the counsels and for the reason of decision on issue of title in suit for mere injunction being not necessary, deleted the issue of title and decided the said suit vide judgment dated 31st July, 2014 against the defendants; and, (x) that since the issue of title had been framed in the said suit, the appellant/plaintiff could not have filed the suit for possession earlier.

3. The learned Addl. District Judge in the impugned order has held that since as per the appellant/plaintiff also the respondents/defendants had taken forceful possession on 19th February, 2003, the cause of action for the relief of declaration arose in 2003 and the suit filed in the year 2015 was beyond the period of limitation of three years and that the pendency of the suit for permanent injunction did not extend the period of limitation.

4. Notice of this appeal was issued and the counsel for the respondents/defendants have also filed a reply to the appeal.

5. Considering that the appeal is against the dismissal of a suit in *limine* on the ground of limitation, it is deemed appropriate to hear the appeal at the after notice stage only.

6. The counsels have been heard.

7. I have enquired from the counsel for the respondents/defendants as to which Article of the Schedule to the Limitation Act would govern the limitation for filing such a suit.

8. He refers to Article 14 but which does not pertain to the reliefs of declaration or possession qua immovable property.

9. Unfortunately, the learned Addl. District Judge also in the impugned order has not decided the limitation on the anvil of any provision of the Limitation Act.

10. The suit as aforesaid was for the reliefs of declaration of title to immovable property, recovery of possession of immovable property, injunction restraining the defendants from dealing with the said immovable property and for recovery of damages for use and occupation thereof.

11. Suits relating to immovable property are dealt with in Part-V of the Schedule to the Limitation Act and the limitation prescribed vide Article 65, for a suit for recovery of possession of immovable property or any interest therein based on title, as the subject suit was, is of 12 years commencing from the date when the possession of the defendant becomes adverse to the plaintiff.

12. It is the settled position of law that for exercise of power under Order VII Rule 11 of the CPC for rejection of the plaint on the ground of claim therein being barred by any law, as the learned Additional District Judge (ADJ) has exercised, it is only the averments in the plaint which are the guiding factor.

13. The learned ADJ in the impugned order has nowhere held that it was the plea in the plaint that the possession of the respondents / defendants of the property of which possession was sought to be recovered was adverse to that of the appellant / plaintiff since 12 years prior to the institution of the suit. In this context, it may be highlighted that limitation for a suit for recovery of possession of immovable property based on title does not commence from the date on which the defendant dispossesses the appellant/plaintiff from the property but from the date when the possession of the defendant becomes adverse to the plaintiff. In the present case, it was the plea of the appellant / plaintiff that some miscreant persons had trespassed on the first and third floors of the property on 19th February, 2003 and of which FIR was lodged by the appellant / plaintiff and during the course of enquiry, the appellant / plaintiff had learnt of the respondents / defendants having forged the documents of the property and of which a

complaint was lodged on 22nd May, 2003. It was further the case of the appellant / plaintiff that the respondents / defendants encroached upon the remaining property on 9th June, 2003. The suit was instituted on 27th January, 2015 i.e. within 12 years of 19th February, 2003, even if it were to be believed that the possession of the respondents / defendants became adverse to the appellant / plaintiff from the said date. It thus cannot be understood as to how the learned ADJ has concluded that the suit for recovery of possession of immovable property was barred by time.

14. Perhaps the learned ADJ got misguided by the appellant / plaintiff having along with the plaint filed an application under Section 5 of the Limitation Act, 1963 which was also dismissed as not maintainable vide separate order dated 4th April, 2015.

15. The learned ADJ has held that since the cause of action for the relief of declaration of title claimed by the appellant / plaintiff accrued to the appellant / plaintiff in the year 2003 when the respondents / defendants forcibly dispossessed the appellant / plaintiff and the limitation provided therefor is three years, the suit filed was beyond the period of limitation. However it appears to have escaped the attention of the learned ADJ that the suit, besides for the relief of declaration, was also for the relief of recovery

of possession of immovable property and on the anvil of limitation provided wherefor the learned ADJ did not consider the question of limitation.

16. Article 58 of the Schedule to the Limitation Act, for the relief of declaration, undoubtedly provides limitation of three years from the date when the cause of action accrues. However I am of the opinion that once the plaintiff, besides suing for declaration of title also sues for recovery of possession of immovable property on the basis of title, the limitation for such a suit would be governed by the limitation provided for the relief of possession and not by limitation provided for the relief of declaration. To hold otherwise would tantamount to providing two different periods of limitation for a suit for recovery of possession of immovable property based on title i.e. of three years if the suit besides for the said relief is also for the relief of declaration of title and of twelve years as aforesaid if no relief of declaration is claimed. A relief of declaration of title to immovable property is implicit in a suit for recovery of possession of immovable property based on title inasmuch as without establishing title to property, if disputed, no decree for the relief of possession also can be passed. Thus, merely because a plaintiff in such a suit also specifically claims the relief of declaration of title, cannot be a ground to treat him differently and reduce the period of

limitation available to him from that provided of twelve years, to three years. Supreme Court in *Anathula Sudhakar Vs. P. Buchi Reddy* (2008) 4 SCC 594 held (i) where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession is the remedy; (ii) where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession; (iii) a cloud is said to arise 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.

17. I am supported in my aforesaid view by:

A. *Ghanshyamdas Vallabhadas Gujrathi Vs. Brijraman Rasiklal*

MANU/MH/0449/1984 where a Division Bench of the High Court of Bombay negated the contention as found favour with the learned Additional District Judge in the impugned order and held that the main relief being of possession, and declaration being an ancillary relief, the proper Article of the Limitation Act would be Article 65 and not Article 58 of the First Schedule;

B. *State of Maharashtra Vs. Pravin Jethalal Kamdar* (2000) 3

SCC 460 where it was held that the factum of the plaintiff besides the relief of possession having sought declaration also is of no

consequence and in such a case the governing article of the Schedule to the Limitation Act is Article 65;

C. *Mechineni Chokka Rao Vs. Sattu Sattamma*

MANU/AP/0751/2005 where the High Court of Andhra Pradesh reiterated that to a suit based on title but claiming declaration of title to the suit property with consequential relief of possession, Article 65 would apply and Article 58 would have no application; Article 58 applies only to a case where declaration simpliciter is sought i.e. without any further relief; the 89th Report of the Law Commission recommending for amendment of Article 58 by adding the words "without seeking further relief" after the word "declaration" in the first column of Article 58, so as to avoid any confusion was also noticed;

D. *Ashok Kumar Vs. Gangadhar* AIR 2007 AP 145 where the High Court of Andhra Pradesh again held that a suit for declaration of title and consequential relief of possession filed within twelve years from the date when the defendant dispossessed the plaintiff cannot be held to be barred by limitation;

E. *C. Natrajan Vs. Ashim Bai* (2007) 14 SCC 183 where it was held that if the suit has been filed for possession as a consequence of declaration of the plaintiff's title, Article 58 will have no limitation;

F. *Boya Pareshappa Vs. G. Raghavendra* Nine MANU/AP/3549/2013 where the High Court of Andhra Pradesh while reiterating the earlier view further reasoned that Part V of the Schedule to the Limitation Act specifically deals with category of suits relating to immovable property and having regard to the categorisation made in the Schedule, the limitation provided in Article 65 in Part V is to prevail over Article 58 contained in Part III; it was further reasoned that under Section 27 of the Limitation Act, the right in immovable property stands extinguished after the expiry of the period prescribed for filing of suit for possession thereof; therefore, if the period falls short of the requisite period of 12 years, the right over an immovable property will not get extinguished; thus when a person has a right over an immovable property which right is not extinguished, he can lay the suit in respect of immovable property, even praying for the relief of declaration, at any time within the period of 12 years at the end of which only his right would get extinguished; therefore declaratory

suits pertaining to immovable property are governed by Articles 64 and 65 and not by Article 58 of the Act;

G. ***Seetharaman Vs. Jayaraman*** (2014) 2 MWN (Civil) 643 where also it was held that a title over immovable property cannot extinguish unless the defendant remains in adverse possession thereof for a continuous period of 12 years or more and therefore Article 65 of the Schedule to the Limitation Act applies to a suit for declaration of title and for recovery of possession of immovable property.

18. In the present case, it was the plea of the appellant / plaintiff that the need for the appellant / plaintiff to claim the relief of declaration of title did not arise since in the suit filed by the respondents / defendants for the relief of permanent injunction, Issue qua title of the property had been framed on 13th January, 2005 and the appellant / plaintiff expected to establish his title in the said suit and the need for declaration of title arose only when the said Issue was dropped on 12th May, 2014 and the suit from which this petition arises had been filed as aforesaid on 27th January, 2015.

19. I am therefore of the opinion that no case for rejection *in limine* of the plaint on the ground of the relief claimed therein as per averments in the plaint itself being barred by time was made out.

20. The impugned order thus cannot be sustained and is set aside and the appeal is allowed.

21. I may record that I have not gone through the detailed reply filed by the respondents / defendants, being of the view that at this stage only the averments in the plaint are relevant. The respondents / defendants would be entitled to file a written statement and take all pleas and after consideration thereof the learned ADJ if feels that plaint is liable to be rejected on any ground, the learned ADJ would be entitled to do so.

No costs.

Decree sheet be drawn up.

22. The parties to appear before the Trial Court on 11th February, 2016.

23. The order of *status quo* granted in this appeal is extended till the consideration of the application for interim relief by the learned Addl. District Judge.

24. The file of trial court requisitioned in this Court be sent back forthwith.

RAJIV SAHAI ENDLAW, J

JANUARY 22, 2016

‘pp/gsr/bs’