

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

+ **RSA No. 241/2015**

% **12th July, 2016**

SH. BALRAJ & ANR. Appellants

Through: Mr. Aditya Kaushik, Advocate

versus

SH. RAJBIR & ANR. Respondents

Through: Mr. Sudhir Kumar Sharma, Advocate

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellants/plaintiffs challenging the concurrent Judgments of the courts below; of the Trial Court dated 28.4.2014 and the First Appellate Court dated 9.3.2015; dismissing the suit for possession and mesne profits filed by the appellants/plaintiffs with respect to the property bearing no. D-92, Gali No.5, Sanjay Mohalla, Tanki Road, Near Pandit Yad Ram Public School, Bhajanpura, Delhi as shown in red, yellow and green colors in the site plan proved and exhibited as Ex.PW1/1.

2. The case as set up by the appellants/plaintiffs was that the plaintiffs' predecessor-in-interest, ie their father Sh. Mishri Lal, had sold a piece of land measuring 100 sq. yds to Smt. Lado Devi the mother of the defendant

no.1/respondent no.1 and the mother-in-law of the defendant no.2/respondent no.2 vide documentation dated 10.6.1981, however, the land which was sold to the mother of the defendant no.1/respondent no.1 was utilized by the government for construction of the road and hence at the request of the mother of respondent no.1/defendant no.1 made to Sh. Mishri Lal, she and her family was allowed to put their domestic articles for a few days in the suit property owned by the plaintiffs as shown in red colour in the site plan Ex.PW1/1. The case of the plaintiffs/appellants further is that on 15.10.1988 the father of the plaintiffs requested the mother of defendant no.1 to vacate the suit property but the mother of defendant no.1 refused to do so and wanted the father of the plaintiffs to sell the suit property to the mother of respondent no.1/defendant no.1 and the mother of defendant no.1 refused to vacate the suit property. The father of the appellants/plaintiffs had filed a suit for recovery of mesne profits against the mother of respondent no.1/defendant no.1 in the year 1999 which was dismissed in default in the year 2001. The subject suit for possession and mesne profits then came to be filed on 21.2.2011 against the defendant no.2 and the mother of defendant no.1.

3. Respondents/defendants have contested the suit of the plaintiffs. Respondent no.1 is the husband of respondent no.2 and the case of the defendants is that Smt. Lado Devi the mother of the respondent no.1 purchased the suit property from the father of the plaintiffs Sh. Mishri Lal, and thereafter,

by documentation of the year 2000, Smt. Lado Devi has further sold the property to her daughter-in-law the defendant no.2/respondent no.2. The defendants have taken up a specific case that the suit property was purchased in the year 1981 by means of documentation dated 10.6.1981 and thereafter the respondents/defendants have made construction on the suit property and they are therefore the owners of the suit property and not the appellants/plaintiffs. Defendants have proved and exhibited the property tax documents of this property of the year 1983 as Ex.DW-1/4 (colly) besides also the Residents Welfare Association (RWA) receipts of the years 1986 and 1987 as Ex.DW-1/6 (colly) showing that the ownership and construction of the suit property was by Smt. Lado Devi the mother of the defendant no.1/respondent no.1 and the mother-in-law of the defendant no.2/respondent no.2. The following issues were framed by the trial court:-

- i) Whether the defendant no.1 has become the owner of the suit property by way of adverse possession as stated by defendant no.1 in para 1 of the preliminary objections in the written statement? OPD
- ii) Whether the present suit is hit by Section 11 of the CPC? OPD
- iii) Whether there is no relationship of landlord and tenant in between the parties ?OPD
- iv) Whether the suit has not been valued properly for the purposes of Court Fees and jurisdiction? OPD
- v) Whether the suit of the plaintiff is barred by limitation? OPD
- vi) Whether the plaintiff is entitled for the relief of Possession as prayed for by the plaintiff in the suit? OPP

- vii) Whether the plaintiff is entitled for the damages? If so, at what rate and for what period? OPP
- viii) Relief, if any.”

4. A reading of the judgment of the first appellate court shows that essentially the first appellate court has done nothing except confirming the judgment of the trial court and holding that the appellants/plaintiffs have failed to discharge onus of proof upon them. The entire judgment of the first appellate court only basically refers to various judgments that a civil suit has to be decided on preponderance of probabilities and appellants/plaintiffs have failed to prove their case. In fact by single line observations the findings on the issues of the trial court have been upheld. This Court therefore will have to examine the judgment of the trial court and the arguments of the appellants/plaintiffs challenging the same.

5. The first issue which is argued on behalf of the appellants/plaintiffs is that the courts below have gravely erred in dismissing the suit on the ground that the property is not identified inasmuch as the suit property bears the specific number and that a site plan has been filed showing the existence of the suit property proved and exhibited as Ex.PW1/1. The suit property is identified in red colour in the site plan Ex.PW1/1 and this site plan Ex.PW1/1 is a contextual plan showing where the suit property is located including the adjacent portions to the suit property being a road and a *gali*. On this aspect I completely agree with the arguments urged on behalf of the appellants/plaintiffs

because I fail to understand as to how the courts below have arrived at a conclusion that the appellants/plaintiffs have not identified the suit property, and therefore, the suit for possession cannot be decreed. In spite of the site plan having been proved and the property being numbered, the finding of the courts below that the property is not identified for the suit for possession to be decreed is clearly a perverse conclusion and the same is set aside. However, this will not result in up-turning the judgments of the courts below, and which aspects are being discussed hereinafter.

6. The crucial issue really is issue no.6 and in which will be included the aspect as to whether plaintiff is the owner of the suit property and has or has not proved the ownership of the suit property. This issue has been decided by the trial court in the following paragraphs:

“Issue (vi) : Whether the plaintiff is entitled for the relief of Possession as prayed for by the plaintiff in the suit? OPP

22. Onus to prove this issue was upon the plaintiffs. In support of their case, the plaintiffs got examined plaintiff no. 1 as PW 1. It is the case of the plaintiffs that defendant no. 1 was allowed to remain in the suit property as a licensee. The said licence having been terminated by giving a legal notice, the plaintiffs are entitled to possession of the suit property.

23. PW 1 in his cross-examination, has stated that he has not filed any document showing ownership of Mishri Lal with respect to the suit property. He has also admitted that there is no fard in the court record showing the ownership of Mishri Lal with respect to the suit property. He has also admitted that the land was acquired by the DDA. PW 1 has admitted that his statement was recorded before the court of Sh. Parveen Singh, the then Ld. ARC on 23/11/2009 and the same is Ex. PW 1/D1. PW 1 has also stated that there are other legal heirs of Mishri Lal i.e. his wife and four daughters. The wife and four daughters are not party to the present suit. Neither any relinquishment deed or attorney has been filed by the daughters and the wife giving any right to the plaintiffs to file the present suit.

24. It is the case of the plaintiffs that their father sold 100 Sq. Yds. of the land, this portion was utilized by the Govt. for construction of road, hence, defendant no. 1 made request to let her keep her articles in his premises for a few days. Considering the request the father of the plaintiffs allowed defendant no. 1 to stay in the suit premises. It is also the case of the plaintiffs that subsequently the defendant no. 1 broke open the locks of the two shops. It has also been stated in the plaint that the portion shown in green colour in the site plan was also occupied by the defendant no. 1. Thus, as per the plaint, apart from the area given by the father of the plaintiffs to defendant no. 1 to keep her articles, defendants occupied some more portion illegally. However, no description of the area occupied by the defendants has been given for which the decree of possession is being sought. In a suit for possession, the plaintiff should specifically identify the property, and should also state the total area for which he seeks possession. The total area has not been mentioned. In fact, the plaintiffs have also not mentioned in the plaint, as to how much area was given by their father to defendant no. 1 for keeping her articles. The measurements having not been stated, to that extent, the plaint is vague. Admittedly, the property was acquired by the DDA. Though possession may not have been taken by the DDA. The plaintiffs or their father did not have any right in the suit property. No document of ownership has been filed by the plaintiffs. The initial sale of 100 Sq. Yds. by father of the plaintiffs to the defendant no. 1 is also not an identifiable property as no municipal number has been mentioned, no boundaries have been mentioned in the agreement to sell. It seems out of the khasra 100 Sq. Yds. of land has been sold. Accordingly, plaintiffs have failed to discharge their onus. Accordingly, this issue is decided against the plaintiffs and in favour of the defendants.” (underlining added)

7. Actually, in my opinion, the only relevant line of this aforesaid finding is that the appellants/plaintiffs have failed to file any documents of ownership of the property by them and hence have failed to prove their ownership. On a pointed query to the counsel for the appellants/plaintiffs as to show me from the record any document filed and proved by the plaintiffs to show the ownership of the plaintiffs of the suit property, counsel for the appellants/plaintiffs could not point out to a single document from the trial court record showing existence of ownership of the suit property in the names of the appellants/plaintiffs or their predecessor-in-interest Sh. Mishri Lal. In fact in

my opinion on the other hand the respondents/defendants have proved ownership of the suit property originally of Smt. Lado Devi and consequently of respondent no.2/defendant no.2 inasmuch as the appellants/plaintiffs admit that their father sold 100 sq. yds out of the total khasra no.414 to Smt. Lado Devi mother of defendant no.1/respondent no.1 by documentation dated 10.6.1981. In the cross-examination of PW1 (plaintiff no.1) it is admitted by him on 8.2.2012 that the documents by which Smt. Lado Devi purchased the suit property from Sh. Mishri Lal are proved and exhibited as Ex.PW1/P1(agreement to sell) and money receipt as Ex.PW1/P2. In fact, in cross-examination of this date of PW1 Sh. Balraj/plaintiff no.1, he has conceded that Smt. Lado Devi after purchase of the property from appellants/plaintiffs in the year 1981 had made a construction of one room and kept her belongings therein. In the cross examination of PW1 on 8.2.2012, PW1 Sh. Balraj has stated in the third and fourth line of his cross-examination that no document of ownership of Sh. Mishri Lal has been filed on record with respect to the suit property. In my opinion, therefore, appellants/plaintiffs have failed to prove their ownership of the suit property and once appellants/plaintiffs failed to prove their ownership or of their predecessor-in-interest Sh. Mishri Lal, issue no.6 has rightly been decided against the appellants/plaintiffs. I may note that I have given additional reasoning and which I am giving in view of Order XLI Rule 24 CPC as an appellate court read with Order XLII CPC which states that provisions of Order XLI shall apply even with respect to second appeals. I may

also note that appellate courts have been directed not to unnecessarily remand the matters once the record of the trial court is complete and once an appellate court can give its findings and conclusions on the basis of the existing record of the trial court vide the Supreme court judgment in the case of ***Lisamma Antony and Another Vs. Karthiyayani and Another (2015) 11 SCC 782***. The relevant paragraphs of this judgment dealing with this aspect are paras 14 to 17 and which paras read as under:-

“14. Rule 23 of Order 41 of Code of Civil Procedure, 1908, (for short "the Code") provides that where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject all just exceptions, be evidence during the trial after remand.

15. Rule 23A of Order 41 of the Code provides that where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the appellate court shall have the same powers as it has under Rule 23.

16. Rule 24 of Order 41 of the Code further provides that where evidence on record is sufficient, appellate court may determine case finally, instead of remanding the same to the lower court.

17. Needless to say, in the present case, the suit was not disposed of on any preliminary issue by the trial court. The second appellate court should have restrained itself from remanding a case to the trial court. Remanding a case for re-appreciation of evidence and fresh decision in the matter like the present one is nothing but harassment of the litigant. The unnecessary delay in final disposal of a lis, shakes the faith of litigants in the court.”

8(i). Learned counsel for the appellants/plaintiffs also sought to argue that defendants cannot take up a plea of adverse possession and ownership as

they are mutually destructive and with which argument I agree, however, the defence/stand of respondents/defendants is really not of adverse possession but the suit being barred by law of prescription under Section 27 of the Limitation Act, 1963. Court has to see, not the form, but the substance of the plea as discussed hereinafter. Respondents/defendants have been able to establish the plea with respect to their ownership of the suit property by means of purchase documents of the year 1981. In fact, I must note that counsels should be careful while drafting their pleadings because in a case such as the present really the plea is not a plea of adverse possession by respondents/defendants but the plea is that the suit is barred by law of prescription stated in Section 27 of the Limitation Act. The heading of the plea does not have to be seen but what is to be seen is the substance of the plea and really the substance of the plea though titled as adverse possession is really a plea of the suit being barred under the law of prescription. This aspect I have dealt with in the judgment in the case of *Sh. Mukhinder Singh (Deceased) Through L.Rs. & Ors. Vs. Sh. Gurbux Singh & Ors. 2012(4) ILR Delhi 578* and I have held that really the substance of the plea has to be seen and the courts can take the plea of adverse possession actually as one of the pleas of suit being barred under the law of prescription.

(ii). In fact, in my opinion, even if the respondents/defendants are allowed only to take a plea of adverse possession because the plea of adverse possession has destroyed the case of the respondents/defendants of ownership,

even then, the respondents/defendants are entitled to succeed inasmuch as admittedly as per the suit plaint Smt. Lado Devi was to be in possession of the suit property in 1988 and as early as 1989 as per the plaint Smt. Lado Devi refused to vacate the suit property. Limitation therefore commenced in the year 1989 and once limitation starts running, then Section 9 of the Limitation Act provides that once time has begun to run the same does not stop in spite of any disability or inability to institute a suit by the plaintiffs. The subject suit has been filed in February, 2011 ie around 22 years after 1989 ie much later than 12 years, and hence the respondents/defendants have become owners by the law of prescription contained in Section 27 of the Limitation Act.

(iii) The relevant paragraph in the judgment in the case of ***Sh. Mukhinder Singh (Deceased) Through L.Rs. (supra)*** observing that a plea of adverse possession can really be taken as a plea of ownership by law of prescription under Section 27 of the Limitation Act is para 20 and this para 20 in the case of ***Sh. Mukhinder Singh (Deceased) Through L.Rs. (supra)*** reads as under:-

“20. That finally leaves this Court for deciding the issue with regard to the claim of ownership of the suit property by the defendant no.1/respondent no.1 on the ground of adverse possession. Related to this aspect is also whether the suit of the appellants/plaintiffs is barred by time as per Article 65 of the Limitation Act, 1963.

I have already while discussing the issue of suit being barred by time for cancellation of sale deed by virtue of Article 59 held that Sardar Sohan Singh and the appellants/plaintiffs had both actual and deemed knowledge of execution of the sale deed dated 3.12.1960 in the year 1960 itself. There cannot be a more clear-cut proof of the claim of ownership of the property by the defendant no.1/respondent no.1 and the consequent challenge to the ownership rights of Sardar Sohan Singh

than by a duly registered sale deed. Of course, calling the right claimed by the defendant no.1/respondent no.1 as one of adverse possession is a misnomer, inasmuch as what is really claimed is the ownership of the defendant no.1/respondent no.1 by virtue of law of prescription contained in Section 27 of the Limitation Act, 1963 as the suit for possession on the basis of the claim of ownership rights was not filed as per Article 65 within 12 years of the knowledge that defendant no.1/respondent no.1 is claiming the ownership rights. A heading of a claim is not material but it is the substance of the claim which has to be seen. As per Section 27 of the Limitation act, 1963, once the limitation for claiming a relief/right with respect to an immovable property expires, the right in the property itself is lost. This provision of Section 27 of the Limitation Act, 1963 is a departure from the normal law of limitation, and as per which normal law of limitation on expiry of limitation, right is not lost but only the entitlement to approach the Court is lost. Merely because the defendant no.1/respondent no.1 has ill advisedly claimed ownership of the property by adverse possession, cannot have the effect of extinguishing finality to the ownership of the defendant no.1/respondent no.1 by law of prescription contained in Section 27 of the Limitation Act, 1963 read with Article 65 of the Limitation Act, 1963. Once it was clear to the plaintiffs/appellants that from the year 1960 ownership in the suit property was being claimed by the defendant no.1/respondent no.1 (and surely, there cannot be a more blatant act of claiming ownership of a property than by a sale deed), the period of 12 years for the appellants/plaintiffs to have filed a suit for possession with respect to this property under Article 65 commenced in 1960 itself. Once the limitation commenced in the year 1960, by the year 1972, the right to approach the Court by means of a suit for possession governed by Article 65 of the Limitation Act, 1963 was lost. Once the right is lost in the year 1972, the subject suit having been filed in the year 1975, the ownership of the defendant no.1/respondent no.1 becomes absolute by virtue of law of prescription contained in Section 27 of the Limitation Act, 1963. I, in view of the aforesaid, also find no weight in the submission made on behalf of the appellants/plaintiffs that defendant no.1/respondent no.1 has to fail because the claim of title and adverse possession cannot be concurrently set up.” (underlining added)

9. In my opinion, the suit filed by the appellants/plaintiffs lacks complete credibility as it is impossible to believe that if Smt. Lado Devi the mother of respondent no.1/defendant no.1 and thereafter the respondents/defendants were in illegal possession from 1989 then why would plaintiffs and their father Sh. Mishri Lal wait till 1999 to file a suit and that too only for mesne profits, and further file the subject suit for possession after no less than 22 years. An owner of the property would never allow an illegal

occupant to continue for such a long period without filing legal proceedings against the trespassers.

10. In view of the aforesaid discussions the following conclusions can be safely arrived at:-

(i) Appellants/plaintiffs have failed to prove their ownership of the suit property as there is not a single document to show the ownership of the appellants/plaintiffs, or their father Sh. Mishri Lal, of the suit property.

(ii) Once the appellants/plaintiffs are not the owners of the suit property then there does not arise any issue of respondents/defendants being licencees.

(iii) In fact, it has been proved by the respondents/defendants that Smt. Lado Devi the mother of defendant no.1 purchased the suit property by means of documents of the years 1981 and so admitted by PW1 in his cross-examination, being the agreement Ex.PW1/P1 and money receipt Ex.PW1/P2.

(iv) The respondents/defendants have also shown that Smt. Lado Devi made construction on the suit property and the house tax record of the year 1983 has been filed and proved by the respondents/defendants as Ex.DW-1/4 (colly). This document has also to be taken with the

Residents Welfare Association receipts issued in the favour of Smt. Lado Devi of the year 1986 and 1987 proved and exhibited as Ex.DW-1/6 (colly).

(v) In spite of the judgments of the courts below not being happily worded and not having given correct reasoning for arriving at the conclusion, this Court is entitled to give additional reasoning and conclusions as per the record in view of Order XLI Rule 24 CPC read with the ratio of the recent judgment of the Supreme Court in the case of *Lisamma Antony (supra)*.

(vi) Respondents/defendants have in the alternative succeeded in proving their case of the suit being barred by the law of prescription as the suit has been filed 22 years after possession of the respondents/defendants became in their own rights claiming as owners, and which ownership documents have already been adverted to above.

11. In view of the above, I do not find any merit in the second appeal and the same is therefore dismissed, leaving the parties to bear their own costs.

JULY 12, 2016
ib

VALMIKI J. MEHTA, J