

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

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Date of decision: 10th May, 2016

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RFA 450/2015

RAJESH KUMAR @ RAMU

..... Appellant

Through: Mr. P.S. Ranga, Adv.

Versus

SUNIL KUMAR

..... Respondent

Through: Mr. Ajit Singh, Adv.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The appeal impugns the judgment and decree dated 9th January, 2014 of the Court of Additional District Judge (ADJ)-05, West District, Tis Hazari Courts (THC), Delhi of dismissal *in limine* (though after several adjournments) of CS No.399/12/12 filed by the appellant / plaintiff under Section 5 of the Specific Relief Act, 1963 for ejectment of the respondent / defendant by way of recovery of possession of immovable property and for permanent injunction.
2. Notice of the appeal was ordered to be issued and the counsel for the respondent / defendant appears.
3. The appeal was posted for today for hearing, being of the view that since the judgment and decree under appeal is of dismissal, *in limine* without even issuance of notice to the respondent / defendant, of the suit as barred by time and in the event of appeal succeeding, the suit will have to be remanded, it should be heard at an early date.
4. Trial Court record has been perused.

5. After perusing the Trial Court record, when I asked the counsel for the respondent / defendant as to why the appeal should not be allowed, he, after making some arguments and being unable to satisfy this Court on law, states that he has received the file from the respondent / defendant yesterday only and the matter be adjourned to enable him to research on law.

6. However, adjournment has been refused finding that the respondent / defendant was served way back on 9th April, 2016 and being of the view that if adjournments are granted to counsels to answer the queries raised by the Court, the hearing would never complete.

7. The appellant / plaintiff instituted the suit from which this appeal arises, pleading:

- (i) that his late father was the owner of House No.F-485, J.J. Colony, Madipur, Delhi;
- (ii) that the mother and father of the appellant / plaintiff who were residing at the said house died while the appellant / plaintiff was in judicial custody and the house was lying vacant in a locked condition;
- (iii) that the appellant / plaintiff came to know that the respondent / defendant had broken open the lock and illegally and unauthorisedly started residing in the house;
- (iv) that the appellant / plaintiff made an application dated 28th August, 1998 from judicial custody to the Court of Additional Sessions Judge (ASJ) for necessary action against the respondent / defendant and on which application the learned ASJ directed the ACP, Anti Burglary to take necessary action;

- (v) the police found that the respondent / defendant was illegally and unauthorisedly residing in the property and had removed household goods of the appellant / plaintiff and had also forged and fabricated some documents regarding the suit property for showing his ownership of the suit property and qua which FIR No.60/99 was registered against the respondent / defendant;
- (vi) that the cause of action for the suit accrued to the appellant / plaintiff on 2nd March, 1997 when the appellant / plaintiff moved an application before the ASJ intimating that his house was lying vacant; thereafter on 28th August, 1998 when the appellant / plaintiff moved an application aforesaid and the cause of action was a continuing one.

8. The suit came up first before the learned ADJ on 27th September, 2012 when the counsel for the appellant / plaintiff was asked to satisfy as to how the suit was within time. After several adjournments, vide impugned order / judgment / decree dated 9th January, 2014, the suit has been dismissed *in limine* as time barred without even issuance of summons thereof to the respondent / defendant, observing / finding / holding:

- (i) that as per the counsel for the appellant / plaintiff the suit was within limitation, the applicable Article being Article 65 of the Schedule to the Limitation Act, 1963;
- (ii) that however the suit had been filed on 26th September, 2012 though the cause of action was stated to have first arisen on 2nd March, 1997;

- (iii) that though the counsel for the appellant / plaintiff had argued that the applicable Article was Article 65 of the Schedule to the Limitation Act but the case falls under Article 64 where the period of 12 years has been described from the date of dispossession;
- (iv) that the period prescribed in Article 65 was also of 12 years;
- (v) that if 12 years is counted from the date of dispossession which according to the appellant / plaintiff was 28th August, 1998, the suit filed on 27th September, 2012 was beyond 12 years and thus the suit was barred by time.

9. To say the least, the order / judgment / decree of the learned ADJ does not even qualify to be called a judgment / order of the Court. The same is bereft of any reasons whatsoever. Though the learned ADJ has noted the contention of the counsel for the appellant / plaintiff that the suit was governed by Article 65 of the Schedule to the Limitation Act but the learned ADJ at his whim and fancy has observed that the suit was governed by Article 64 and not by Article 65 and without even noticing or analysing as to which are two different situations / factual scenarios to which the two Articles apply. The learned ADJ also appears to believe that there was no difference between the two as both provided limitation of 12 years. The order betrays lack of understanding of the concept of limitation. A copy of the impugned judgment/order along with copy of this order be placed before the Committee of Inspecting Judges of the learned ADJ.

10. Article 64 of the Schedule to the Limitation Act prescribes the limitation of 12 years commencing from the date of dispossession for a suit

for recovery of possession of immovable property based merely on previous possession and not on title and when the plaintiff while in possession of the property had been dispossessed.

11. As distinct therefrom, Article 65 applies to a suit for possession of immovable property or any interest therein based, not on previous possession of the property but on title; though the period of limitation therefor also is of 12 years but commencing not from the date of dispossession but from the date when the possession of the defendant becomes adverse to the plaintiff. Thus, a suit for recovery of possession of immovable property based on title, say as owner of property, can be filed, even after 12 years from being dispossessed from the property, and would be within limitation if filed within 12 years from the time the defendant starts claiming adversely to the plaintiff. Thus, as long as the defendant, even after dispossessing the plaintiff, does not start claiming himself to be owner of the property, the period of limitation of 12 years will not commence. Merely because a person dispossess another from the property does not amount to that person claiming adversely to the other and there is no presumption of such adversity and it is for the defendant to establish that his possession had become adverse to the plaintiff beyond 12 years of the suit.

12. What has to be seen, to determine which of the two Articles apply, is the pleading of the plaintiff. If the plaintiff is seeking to recover possession merely on the basis of prior possession, without claiming title to the property, Article 64 would apply. However where the plaintiff is seeking to recover possession claiming title to the property, say as a owner, Article 65 would apply, even if such a plaintiff had been dispossessed by the defendant.

13. An illuminating discussion on the subject is to be found in ***Ishwar Devi Vs. Elite Electrical Industries*** 26(1984) DLT 242.

14. A reading of the plaint in the present case shows that the plaintiff pleaded a) that his father was the owner of the house i.e. had a title as owner thereto and was also residing in the house; b) that while the plaintiff was in judicial custody, his father as well as mother died and thus the house was lying locked; c) that the defendant, taking advantage of the house lying vacant and locked, had broken the lock and entered the house.

15. It would thus be seen that the plea of the appellant / plaintiff in the plaint was of the respondent / defendant having taken possession of the house taking advantage of the same lying vacant and the appellant / plaintiff being incarcerated. The appellant / plaintiff did not plead that he was in possession or had been dispossessed; he however pleaded that his father was the owner and both his parents were no more. Though the appellant / plaintiff did not plead that on the demise of the parents he had become the owner but the same can be reasonably inferred. It is sad that what was observed more than half a century ago about moffusil pleadings, that they are to be construed liberally and that only because the parties did not use the terminology which they should have, *ipso facto*, would not mean that the ingredients for satisfying the requirements of statute are absent and that the plaintiffs should not be penalized for the weak, not precise, and ambiguous pleadings of their advocates, still holds good. Supreme Court in ***Kedar Lal Seal Vs. Hari Lal Seal*** AIR 1952 SC 47 held that the Courts would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however,

clumsily or inartistically the plaint may be worded. The same sentiment was echoed in *Ganesh Trading Co. Vs. Moji Ram* (1978) 2 SCC 91. Though the genesis of the said view was, the Moffusil lawyers being not skilled in language and pleadings but I find the principle to have travelled till *Des Raj Vs. Bhagat Ram* (2007) 9 SCC 641 and *Narain Prasad Aggarwal Vs. State of M.P.* (2007) 11 SCC 736, though the Supreme Court in *Devasahayam Vs. P. Savithramma* (2005) 7 SCC 653 also observed that different considerations on construction of pleadings may arise between pleadings in the Moffusil Court and pleadings on the Original Side of the High Court. Obviously the legal education, inspite of the role of Bar Council of India therein, is still lacking.

16. I therefore hold the suit, from which this appeal arises, on a reading of the plaint therein, to be one for recovery of possession of immovable property based on title and Article 65 to be applicable thereto.

17. Under Article 65, the question of dismissal of a suit as time barred arises only when the defendant establishes that he was claiming adversely to the plaintiff for more than 12 years prior to the institution of the suit. There was no averment in the plaint in the suit from which this appeal arises from which the learned ADJ could have comprehended that the appellant / plaintiff admitted that the possession of the respondent / defendant had become adverse to that of the appellant / plaintiff for more than 12 years. On the contrary, the appellant / plaintiff had pleaded lodging of an FIR immediately upon learning of the factum of dispossession by the respondent / defendant of the appellant / plaintiff.

18. The counsel for the respondent / defendant has also argued on the same lines as the reasoning adopted by the learned ADJ but when asked to explain the difference between Articles 64 and 65 sought time to research on the law, as aforesaid.

19. The judgment / decree of dismissal of the suit thus cannot be sustained. The appeal is allowed and the judgment and decree of dismissal of the suit as time barred is set aside.

20. The suit is remanded to the Trial Court for decision in accordance with law.

21. The respondent / defendant appearing in this appeal accepts summons of the suit.

22. Written statement in accordance with law be filed within 30 days.

23. The parties to appear before the Court of ADJ-05, West District, THC, Delhi and if the said Court has been abolished before the Court of the District Judge, West, THC, Delhi on 12th July, 2016.

24. Trial Court record be returned forthwith.

25. Needless to state that this appeal being concerned with dismissal *in limine* of the suit, nothing contained herein will influence the decision after the pleadings are completed.

No costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

MAY 10, 2016

‘gsr’..