

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment Reserved On : January 19, 2017

Judgment Delivered On : February 06, 2017

+

RFA (OS) No.26/2014

KIRTI PRADEEP SOOD AND ORS

..... Appellants

Represented by: Mr.Ravi Gupta, Sr Advocate
instructed by Mr.Tanmay Mehta,
Mr.S.Anand, & Ms.Swati Gupta,
Advocates.

versus

KESHAV SOOD

..... Respondent

Represented by: Mr.Mukesh Kumar Verma,
Advocate.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The appellant lays a challenge to the order dated November 19, 2013 allowing IA No.8034/2011. The plaint has been rejected holding that the issue raised in the plaint operates as a res-judicata.

2. Admitted facts are that Late Hari Chand and Dr.Chiranji Lal (brothers) were the owners of 1/3rd share with possession separated in property bearing Municipal No.4, Hailey Road, New Delhi.

3. During his life time Hari Dass sought partition of the property held in his name and his brother, in which suit he claimed possession. Registered as CS (OS) 314/1967, on August 10, 1972 a preliminary decree was passed declaring Hari Dass as 1/3rd share holder and the remainder 2/3rd in Dr.Chiranji Lal. A final decree for partition was passed on August 07, 1981 in which the shares of the two brothers was separated.
4. Execution of the decree sought in the year 1994 terminated in a decision rendered by the Supreme Court holding that the execution petition, being filed beyond 12 years of the decree, was barred by limitation and the result therefore was Hari Dass not being able to obtain possession of the separated share in the property assigned to him.
5. The appellants are the legal heirs of late Hari Dass. They instituted a suit seeking possession of the portion assigned to their father in the final decree passed on August 07, 1981. The defendant is the grandson of late Dr.Chiranji Lal. It is the case of the appellants that they sue on title and claim possession on the plea that the defendant is in unauthorized occupation of the property in respect whereof possession is claimed.
6. In the written statement filed the plea of the defendant is that possession cannot be regained on account of the earlier verdict in Execution Petition No.72/1994 that the execution of the decree is barred by limitation. As per the defendant the earlier verdict operates as res-judicata. IA No.8304/2011 was filed by the defendant invoking Order 7 Rule 11 of the Code of Civil Procedure.

7. The learned Single Judge has accepted the plea of the defendant.
8. The short questions thus arose are - a) if this suit is filed merely to execute the decree dated August 07, 1981 which otherwise had become barred by time; and b) if the plaint in CS(OS) No.2363/2008 discloses a separate and a continuous cause of action as alleged.
9. Admittedly, a suit to execute a decree in a former suit does not lie because of Section 47 of the Code of Civil Procedure. If the decree is not executed within the limitation prescribed, the law of limitation comes into play. As was held in the decision report as AIR 1921 Allahabad 369 Ramanand v. Jai Ram & Ors where a decree for preemption could not be executed within limitation, a suit for redemption on the basis of the decree was held to be not maintainable, a view which was reaffirmed in the decision reported as AIR 1922 Pat 407 Sovani Jena V. Bhima Ray where a decree passed in a suit for possession was not executed and to recover the possession of the subject property a second suit was filed by the plaintiff on the strength of the earlier decree. Similarly in the decision reported as AIR 1970 P&H 509 Mal Singh & Ors. V. Mohinder Singh, where a decree for preemption was passed requiring the plaintiff to pay to the defendant ₹10,000/- resulting in the plaintiff paying the money but not executing the decree within the period of limitation. Second suit based on the earlier decree was held to be not maintainable.
10. In the decision reported as ILR (1900) 23 Mad 629 Kutti Ali V. Chindan & Anr a suit for possession was decreed but the plaintiff did not execute the decree within limitation. The possession in the suit was sought on the

relationship of landlord and tenant. A second suit was held maintainable wherein possession was sought because the suit was not enforcing the earlier decree. The status of the defendant continued to be that of a tenant and if a ground was available to gain possession, the Court held that the second suit was maintainable.

11. In the decision reported as ILR (1902) 25 Mad 300 Vedapuratti & Ors. V. Vallabha Valiya Raja & Ors where a suit for redemption of mortgage filed by the plaintiff was decreed, but he failed to execute the decree. It was held that the second suit for redemption of mortgage could not be filed as the right though subsisted but the remedy was barred by the rule of law. It was held that the legislature has laid down what is ‘matter-in-issue’ in redemption suit. In order to succeed, the mortgagor need to show that he is entitled to decree ordering that if he pays off mortgage debt in pursuance to the order of the Court, the mortgagee shall transfer the property and if necessary put him in possession. It was held that matter was res-judicata, not because decree under Section 92 of the Transfer of Property Act became final at the expiry of the time fixed for payment thereof, although no order has been made under Section 93 of the Transfer of Property Act, but because the ‘matter-in-issue’ became res-judicata between the parties from the time the mortgagee’s right to redeem was adjudicated on by a decree made under Section 92 of the Transfer of Property Act.

12. In the decision reported as AIR 1934 PC 205 Raghunath Singh & Ors. V. Hansraj Kunwar & Ors where a decree was passed in the year 1986 holding

that plaintiff could redeem the property on paying an amount by a specific date and if he fails, his suit shall be dismissed. No payment of mortgage amount was made and even the execution became time barred. In 1924, the legal heirs of the plaintiff filed yet another suit for possession on the ground that mortgage money stood paid. The issue was if the second redemption suit is maintainable. The Privy Council held that res-judicata could be applied only if the right to redeem is extinguished either by the act(s) of the parties or by an order of the Court specifying that if the payment is not made then plaintiff shall be debarred from all rights to redeem the property and the property be sold or if the defendant files an application claiming that the plaintiff has failed to pay and thus they be declared debarred from his right to redeem the property and the court passed an order thereof. The Court interpreted Section 60, Section 92 and Section 93 of the Transfer of Property Act and was of the view that if the right to redeem is conferred by an enactment it needs to be extinguished only in the manner as provided in the enactment. So, it was held that a mere dismissal of the suit simplicitor would not be an extinguishment of the right to redeem and only if the right to redeem is extinguished in any of the modes contemplated by the statute, Section 11 Code of Civil Procedure would apply.

13. Similarly, in the decision reported as AIR 1949 Mad 815 Amina alias Beepathumma & Anr. V. B. Ahmed Bin Chayabba in an ejectment suit bearing No.198/1930 a compromise decree was passed directing the landlord to pay ₹175 for improvements and the defendant was to surrender the possession of property by December 31, 1931. The plaintiff did not pay or deposit ₹175/- in the Court and the defendant continued in possession. The execution was barred

by limitation. In the second suit for possession it was held that the earlier suit being based on tenancy and tenancy alone, the second suit based on title would be maintainable. It was observed that the suit based on tenancy is narrower in its scope and it is unnecessary very often for the plaintiff / landlord to plead his title and it is only sufficient to prove the lease, a tenancy and that it is validly terminated.

14. Further in the decision reported as (2000) 1 SCC 114 Ajit Chopra V Sadhu Ram & Ors the erstwhile owner had filed an eviction suit in the year 1995 against the tenant. It was decreed. The tenant was directed to vacate the premises by December 19, 1958. However, during the proceedings aforesaid, the appellant purchased the suit property, subject to decision in appeal. He also filed an eviction petition, but withdrew it as the respondent had alleged adverse possession. Hence the purchaser filed a possession suit based on title. One of the contentions of the respondent was that second suit was barred under Section 11 Code of Civil Procedure and Section 47 Code of Civil Procedure as it was only a mode to execute the earlier decree of which execution had become barred by limitation. The question which arose for consideration was if the second suit would lie for possession or would it be barred by Section 47 of the Code of Civil Procedure. The Supreme Court held as under:-

“35. The result is that a judgment and decree, which was passed in a previous suit under the Rent Control Act by which it was held that the respondent was a tenant and that he was required to vacate the premises on or before 19-12-1958, would not bar a fresh suit for recovery of possession from a tenant. Reason being that the tenant has not acquired title over the property by adverse possession. It is true that the appellant could have executed the decree passed in the said suit. He had not executed the same on the alleged ground that

there was a fresh agreement of tenancy. Whatever may be the position, after a lapse of three years it was not open to the appellant to file an application for executing the said decree under the Limitation Act, 1908. Still there is no bar under the Rent Act or under the Code of Civil Procedure for filing a suit for recovery of possession from the tenant, who had failed to deliver the possession on the basis of a decree passed against him. Unless the defendant tenant establishes that he has become owner of the suit property by adverse possession, the suit filed by the a owner on the basis of his title cannot be dismissed despite the fact that application for the execution of the decree passed under the Rent Act was barred after a lapse of three years. The title of the plaintiff over the suit property was not extinguished (i) by the act of the parties including adverse possession, (ii) by the decree of the Court, or (iii) by not executing the decree which was passed in a previous suit. If there is any agreement between the parties after passing of the decree, permitting the tenant to continue in the premises, he may either be a tenant, licensee or a trespasser. Presuming that no fresh tenancy was created or licence was granted then also the respondent has failed to acquire title by adverse possession on the date of the suit i.e. 5-8-1970, because as per the decree he was entitled to occupy the premises up to 19-12-1958 as a tenant. By lapse of time, the plaintiff has lost the right to execute the previous decree as it became time-barred but has not lost the title. Unless the title is extinguished, the second suit by the owner if filed within the period of limitation is not barred.”

15. The legal position therefore would be that a second suit would not lie to enforce a decree passed in an earlier suit where in execution of the decree passed in earlier proceedings, it is held that the execution petition is barred by limitation. But if a subsisting right continues to vest in the plaintiff to sue and the suit is not for an enforcement of a decree passed in earlier suit, the second suit would be maintainable.

16. The plaint reveals that CS (OS) No.2363/2008 was not filed on the basis of the judgment and decree dated August 07, 1981 in Civil Suit No.314/1967

but rather is based on title of the appellants. The former suit was a suit for partition wherein Hari Dass Sood, being a co-owner asserted his right over the suit property to get it demarcated and to put in possession of their respective shares. The said suit was settled and disposed of on a special oath taken by Hari Dass. The decree dated August 07, 1981 though separated the portion of two co-owners but admittedly till the death of Hari Dass and Dr.Chiraniji Lal neither of their children raised any dispute qua separate possession of their respective portions. It rather goes sync with the facts alleged in the plaint that possession of Dr.Chiranji Lal on the disputed portion after the demarcation was rather permissive and as the respondent did not vacate it after notice dated November 03, 2011 such possession became unauthorized. Thus the present suit being a suit against an unauthorized occupant who sets his claim over such disputed portion by the law of adverse possession, is certainly not a suit amongst the co-owners. The appellants are within their right as owners to claim possession from a stranger.

17. Moreover, both the suits were filed in different capacities, the first being as a co-owner, the second being as an owner against an unauthorized occupant hence had separate a cause of action. A second suit if filed by the plaintiff in different capacity is maintainable as was held in decision reported as AIR 1951 Mad 285 Cheria Veetil Madhavan Variar (Died) & Ors. V. Chathu Nambiar of Memenda Amsom Kizhal Desam & Ors where the former suit was based on the title to the property vested in Tarwad and the second suit being based on the personal right given to the plaintiff under the Kanam document Ex.P2, it was

held that both the suits since based on different titles give rise to different cause of action(s).

18. The dismissal of execution petition in civil suit No.314/1967 extinguished only the remedy of the appellants to seek execution of decree dated August 07, 1981 but the rights of the appellants flowing out to be an owner of the suit portion of the property No.4, Hailey Road, New Delhi are not extinguished and hence the present suit cannot be held to be barred by the rule of res-judicata.

19. The respondent herein seeks to extinguish the title of the appellant through his plea of adverse possession. It is a plea of fact and requires a trial where the respondent needs to prove wrongful disposition of the rightful owner and that he been in actual, visible, hostile and continued possession.

20. Learned counsel for respondent though has relied upon the decisions reported in (2008) 8 SCC 13 Faqrudin V. Tajuddin; 2014 (142) DRJ 656 Parminder Singh & Anr. V. Virender Pal Singh Jolly; (1999) 5 SCC 590 Hope Plantations Ltd. V. Taluk Land Board, Peermade & Ors.; and (2005) 7 SCC 190 Ishwar Dutt V. Land Acquisition Collector & Anr etc.; the judgments so referred to by the learned counsel for the respondent only reiterate the law on res-judicata. None of the judgments referred to above are relevant to the issue involved.

21. Consequently, we set aside the impugned order and restore CS (OS) No.2363/2008.

22. Parties to appear before the Roster Bench for directions on February 28, 2017.

23. No costs.

(YOGESH KHANNA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

FEBRUARY 06, 2017

M/VLD