

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

% **Date of decision: 7th September, 2017**

+ **CM(M) 765/2011 & CMs No.12354/2011 (for stay) & 9743/2013 (of respondent u/S 151 CPC)**

PUSHPA RATHI & ANR **Petitioners**

Through: Mr. M.L. Bhargava, Adv.

Versus

JUGNU BANSAL **Respondent**

Through: Mr. Kuber Boddh and Ms. Ashima Mandla, Advs.

AND

+ **CM(M) 1098/2011, CM No.16986/2017 (u/O XXII R-4 CPC) & CM No.16987/2017 (for condonation of 15 days delay in filing CM No.16986/2017)**

GOVERDHAN DASS BANSAL & ANR **Petitioners**

Through: Mr. Kuber Boddh & Ms. Ashima Mandal, Advs.

Versus

DINESH KUMAR RATHI & ANR **Respondents**

Through: Mr. M.L. Bhargava, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM (M) No.765/2011

1. This petition under Article 227 of the Constitution of India impugns the judgment [dated 5th March, 2011 in RCA No.35/2008 of the Court of Additional District Judge (ADJ)-03, (North-East), Karkardooma Courts, Delhi] allowing the appeal preferred by the respondent/plaintiff against the order [dated 24th July, 2008 in Suit No.77A/2007 of the Court of Sh. Vishal Gogne, Civil Judge,

CM(M) No.765/2011 & CM(M) No.1098/2011

Karkardooma Courts, Delhi] allowing the application of the petitioners/defendants under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC) and rejecting the plaint in the suit filed by the respondent/plaintiff for recovery of possession of property No.205, Gali No.4, Gurudware Wali Gali, Durgapuri Extension, Shahdara, Delhi along with *mesne* profits/damages for use and occupation and for permanent injunction restraining the petitioners/defendants from selling, alienating or parting with possession of the said property.

2. The plaint in the suit from which this petition arises was rejected by the Civil Judge on the ground of the claim therein for possession being barred by limitation prescribed in Article 65 of the Schedule to the Limitation Act, 1963. Thus, the narrative herein would be concerning the aspect of limitation only.

3. The respondent/plaintiff instituted the suit from which this petition arises, pleading (i) that the respondent/plaintiff was the owner of property No.205, Gali No.4, Gurudware Wali Gali, Durgapuri Extension, Shahdara, Delhi; (ii) that the respondent/plaintiff permitted the partnership firm M/s Parag Enterprises in which the respondent/plaintiff and the defendant / petitioner No.1 Pushpa Rathi were partners; (iii) that disputes and differences arose with respect to the said partnership and the respondent/plaintiff, vide letter dated 16th January, 1986 to the Manager of the Bank in which the partnership had an account, stopped operation of the partnership account with the said Bank; (iv) that the defendant / petitioner No.2 Dinesh Rathi being the husband of the petitioner No.1 Pushpa Rathi, on 16th January,

1986, instituted a suit against the respondent/plaintiff and her husband, averring himself to be a tenant in the aforesaid property No.205, Gali No.4, Gurudware Wali Gali, Durgapuri Extension, Shahdara, Delhi as well as in property No.206, Gali No.4, Gurudware Wali Gali, Durgapuri Extension, Shahdara, Delhi owned by the husband of the respondent/plaintiff and to restrain the respondent/plaintiff and her husband from forcibly dispossessing the defendant / petitioner No.2 Dinesh Rathi from the said properties; (v) that in the written statement to the said plaint, the respondent/plaintiff and her husband while admitted the tenancy of property No.206, Durgapuri Extension, Shahdara but denied that there was any tenancy of property No.205 Durgapuri Extension, Shahdara and pleaded that the possession of property No.205, Durgapuri Extension, Shahdara was with the respondent/plaintiff only; (vi) that the defendant / petitioner No.2 Dinesh Rathi, in or about 1987 applied for amendment of plaint in the said suit No.77/1986 pleading that the husband of the respondent/plaintiff had on 6th February, 1987, on receipt of Rs.20,000/-, had sold both the properties i.e. properties No.205-206, Durgapuri Extension, Shahdara to the defendant / petitioner No.1 and forged a receipt of Rs.20,000/- and that the petitioners/defendants had become owners of the properties by adverse possession and the husband of the respondent/plaintiff, instead of executing necessary documents of title in favour of the petitioners/defendants, was trying to forcibly dispossess them from the said properties; (vii) that the petitioners/defendants filed another suit being Suit No.25/1990 against the husband of the respondent/plaintiff, again alleging to have become

owners of properties No.205-206, Durgapuri Extension, Shahdara by adverse possession thereof since the year 1985 (when the husband of the respondent/plaintiff had received Rs.20,000/- for sale of both the properties); (viii) that the husband of the respondent/plaintiff had already filed a petition for eviction under Section 14(1)(e) of the Delhi Rent Control Act, 1958 with respect to property No.206, Durgapuri Extension, Shahdara (CM(M) No.1098/2011 arising wherefrom is being listed along with this petition and in which a separate order is being passed hereunder); (ix) that Suit No.77/1986 and Suit No.25/1990 aforesaid, both for injunction, were still pending consideration; (x) that the respondent/plaintiff vide notice dated 29th November, 1999 called upon the petitioners/defendants to deliver possession of property No.205, Durgapuri Extension, Shahdara but which had not been delivered; (xi) that the respondent/plaintiff had also filed Arbitration Application No.132/2000 in this Court for appointment of an Arbitrator but which had been dismissed vide order dated 19th December, 2005 of this Court on the ground of arbitration being barred by time; (xii) that the petitioners/defendants after termination vide notice dated 29th November, 1999 of their licence of property No.205, Durgapuri Extension, Shahdara were in unauthorised occupation therefor; (xiii) that the cause of action for filing the suit arose on issuance of notice dated 29th November, 1999 and the suit was filed in or about January, 2007.

4. The learned Civil Judge rejected the plaint in the suit aforesaid as barred by time, reasoning that the limitation for a suit for recovery

of possession on the basis of title was governed by Article 65 of the Schedule to the Limitation Act; that the limitation for such a suit did not commence from the date of the notice; that since the petitioners/defendants with effect from the amendment sought in the year 1987 in Suit No.77/1986 were claiming to be in adverse possession and the suit had been filed in the year 2007 i.e. after 12 years therefrom, the claim for possession and ancillary reliefs was thus barred by time.

5. The learned ADJ vide the impugned judgment dated 5th March, 2011 has set aside the order of rejection of plaint and has remanded the suit for trial on merits.

6. This petition was entertained and vide order dated 12th July, 2011 which continues to be in force, the operation of the impugned judgment was stayed. Resultantly, the proceedings in the suit from which this petition arises have not commenced since the order of remand vide the impugned judgment.

7. This petition has been languishing for over six years with neither counsel appearing to be interested therein. Finding the petition to be an old one, vide order dated 4th September, 2017, the petition was listed for hearing for today clarifying that no further adjournment shall be granted.

8. On going through the aforesaid facts, I have at the outset enquired from the counsel for the petitioners/defendants, as to how this petition under Article 227 of the Constitution of India is

maintainable. Order rejection of a plaint under Order VII Rule 11 of CPC as per Section 2(ii) of CPC is a decree and against which decree the appeal under Section 96 of CPC being RCA No.35/2008 was filed and against the judgment allowing which appeal, this petition has been filed. Against the judgment and decree of the First Appellate Court, a Second Appeal under Section 100 of CPC would lie and it is the settled position in law (see *Ajay Bansal Vs. Anup Mehta* (2007) 2 SCC 275) that once a remedy is provided under the CPC or any other statute, Article 227 of the Constitution cannot be invoked.

9. The counsel for the petitioners/defendants states that neither did the Registry of this Court raise this issue nor has for the last six years the said issue been raised in any of the orders and the counsel for the respondent/plaintiff has also not raised this issue and he is thus not prepared therefor and seeks adjournment.

10. The counsel for the respondent/plaintiff is also not aware in this respect.

11. Though I maintain no manner of doubt on the aforesaid position in law and this petition is liable to be dismissed as not maintainable on this ground alone but rather than allowing the matter to languish and having gone through the paper book, it is deemed appropriate to deal with the matter on merits as well.

12. I have already hereinabove noted that it was the averment in the plaint in the suit from which this petition arises, that the suits filed by the petitioners/defendants in which the petitioners/defendants had

taken the plea of “adverse possession” were pending consideration till the date of institution of the subject suit. I have thus enquired from the counsels, the fate of the two suits for injunction, being Suit No.77/1986 and Suit No.25/1990 aforesaid.

13. The counsel for the respondent/plaintiff states that both the suits were dismissed.

14. The counsel for the petitioners/defendants states that appeals against the judgment and decree of dismissal of the said suits are pending consideration before the ADJ.

15. What also emerges from the aforesaid status of the pleadings is, that the petitioners/defendants on the one hand are claiming lawful title to the subject property No.205, Durgapuri Extension, Shahdara by pleading that the husband of the respondent/plaintiff, against receipt of sale consideration of Rs.20,000/- had sold property No.205, Durgapuri Extension, Shahdara as well as property No.206, Durgapuri Extension, Shahdara to the petitioners/defendants and in the same breath are claiming to be in adverse possession thereof.

16. It was held by the Supreme Court in *Annasaheb Bapusaheb Patil Vs. Balwan alias Balasaheb Babusaheb Patil* (1995) 2 SCC 543, *Vidya Devi alia Vidya Vati Vs. Prem Prakash* (1995) 4 SCC 496 *Mohan Lal Vs. Mirza Abdul Gaffar* (1996) 1 SCC 639, *Karnataka Board of Wakf Vs. Government of India* (2004) 10 SCC 779, *T. Anjanappa Vs. Somalingappa* (2006) 7 SCC 570, *P.T. Munichikkanna Reddy Vs. Revamma* (2009) 13 SCC 229 and

Mandal Revenue Officer Vs. Goundla Venkaiah (2010) 2 SCC 461 that the plea of lawful title and of adverse possession are mutually destructive and once a plea of lawful title to the property in whatsoever manner is taken, it is not open to in the same breath take a plea of adverse possession. On the averments in the plaint at least, it cannot be said that the respondent/plaintiff had admitted the adverse possession of the petitioners/defendants since 1987, when the said plea was taken for the first time.

17. There is another aspect of the matter.

18. The proceedings in which the plea of adverse possession was taken were pending consideration till the stage of institution of the suit for recovery of possession from which this petition arises. It is not the case that the respondent/plaintiff or her husband in the said suits in which the plea of adverse possession was taken for the first time, had admitted so. The said plea was thus still under adjudication and appears to have not been accepted in Suit No.77/1986 and Suit No.25/1990 also, though appeals thereagainst are also stated to be pending. In such circumstances, it cannot be said that possession of the petitioners/defendants was without any claim or disturbance from the true owner i.e. respondent/plaintiff, inasmuch as the respondent/plaintiff was in Suit No.77/1986 and Suit No.25/1990 contesting the said plea. Once that is so, the necessary ingredients of adverse possession cannot be said to have been made out.

19. I may even otherwise state, that qua a plea in a suit for recovery of possession on the basis of title which is contested on the ground of

the suit being barred by time, it is for the defendant to establish that his possession became adverse to that of the plaintiff more than 12 years prior to the institution of the suit and ordinarily the plaint in such a suit cannot be rejected on the ground of limitation unless as per the plaint and/or any admissions in the replication to the written statement filed thereto an admission of the defendant having been in adverse possession for more than 12 years prior to the institution of the suit, is to be found

20. It is thus found that the learned ADJ in the impugned order has reached the correct conclusion and no case for rejection of the plaint is made out.

21. The counsel for the petitioners/defendants on being given an opportunity to make submissions, states that he wants to raise only one contention. It is stated that though the only question to be adjudicated was on limitation but this Court has in the order aforesaid, dictated in open Court, also returned findings on merits.

22. All the observations hereinabove are in the context of, whether the plaint in the suit from which this petition arises was liable to be rejected on the ground of the claim therein being barred by time and once the petitioners/defendants have approached this Court, this Court, to deal with the issue, has to necessarily advert to the facts.

23. Yet another argument now urged by the counsel for the petitioners/defendants is, that since the Arbitration Application

No.132/2000 was dismissed by this Court, that also amounts to holding the claim of the respondent/plaintiff being barred by time.

23. I have perused the order dated 19th December, 2005 in Arbitration No.132/2000 and do not find any reference therein to a claim for recovery of possession. Arbitration Application No.132/2000 under Section 11(4)&(6) of the Arbitration & Conciliation Act, 1996 was dismissed as barred by time on the ground of the disputes relating to partnership arising in the year 1986 and the partnership business having been shut down in 1986 and the petition being thus barred by time. The said order is of no relevance to the controversy in the suit from which this petition arises, in which the respondent/plaintiff is claiming possession on the basis of title.

24. No other argument has been raised by the counsel for the petitioners/defendants.

25. The petition is thus not only not maintainable, but also thoroughly misconceived and is dismissed.

26. The Supreme Court in *Abhimanyoo Ram Vs. State of Uttar Pradesh* (2008) 17 SCC 73, *Ramesh Chandra Sankla Vs. Vikram Cement* (2008) 14 SCC 58 and *Hindustan Associates Engineer Pvt. Ltd. Vs. K.K. Aggarwal* 2011 SCC OnLine Del 542 has held that the Court, at the time of final adjudication, has to balance the equities arising from the interim order in the proceedings. The petitioners/defendants, owing to the interim order in this petition staying proceedings in the suit, have delayed the disposal of the suit

for recovery of possession of immoveable property and for *mesne* profits by six years. The petitioners/defendants are thus burdened with costs of Rs.1 lakh payable to the respondent/plaintiff Jugnu Bansal by cheque/pay order in the name of Jugnu Bansal before the Trial Court on the next date of hearing, as a condition for further participation in the suit.

27. Costs have been ordered to be paid to the respondent/plaintiff and not to the Advocate, since the advocate for the respondent/plaintiff has not taken the pleas which he ought to have taken.

28. On enquiry, the counsels state that there is no date fixed in the suit.

29. The parties to appear before the successor Court of Civil Judge, Karkardooma Courts, Delhi on 24th October, 2017.

30. The Trial Court record, if requisitioned in this Court, be returned forthwith.

CM(M) 1098/2011

31. This petition under Article 227 of the Constitution of India impugns the order [dated 7th April, 2011 in RCT No.30/2010 (Unique Case ID No.02402C0070632010) of the Court of Additional Rent Control Tribunal, North-East District, Karkardooma Courts, Delhi] of dismissal of appeal under Section 38 of the Delhi Rent Control Act, 1958 preferred by the petitioners against the order [dated 6th February,

2010 in E-69/2009 of the Court of Additional Rent Controller (ARC), North-East District, Karkardooma Courts, Delhi] dismissing the petition filed by the petitioners under Sections 14(1)(a) and 14(1)(e) of the Act.

32. This petition was entertained and the trial court record requisitioned and has been languishing for the last six years.

33. The counsel for the legal heirs of both the respondents viz. Dinesh Kumar Rathi and Pushpa Rathi states that CM Nos.16986-87/2017 filed by the petitioners for substitution of legal representatives of both the respondents and for condonation of delay in filing thereof are pending consideration before the Joint Registrar and listed next on 16th November, 2017.

34. Considering that the petition is already six years old and is listed today for arguments, notwithstanding the date of 16th November, 2017 before the Joint Registrar, the counsels have been heard on the said applications.

35. The counsel for the legal heirs of the respondents has argued that the petitioners have pleaded that the applications have been filed within the prescribed time from the intimation of the death given to this Court when the respondents in another proceedings between the parties had applied for substitution of legal heirs of the respondents earlier and the statement in the applications is evidently false.

36. The counsel for the petitioners has no reply.

37. Considering the facts and circumstances, subject to the petitioners paying costs of Rs.5,000/- to the counsel for the legal heirs of the respondents, the delay in applying for substitution is condoned and the legal heirs of the respondents are substituted in place of the respondents.

38. Amended memo of parties is taken on record.

39. CM Nos.16986-87/2017 are disposed of.

40. The counsels have been heard on the merits of CM(M) No.1098/2011.

41. The reason which prevailed with the ARC as well as the Rent Control Tribunal for dismissal of the petition filed by the petitioner for eviction of the respondents from House No.206, Durgapuri Extension, Gali No.4, Gurudware Wali Gali, Shahdarda, Delhi-110032 was, that the petitioner failed to prove that he was the owner / landlord of the said premises.

42. I have hereinabove in the judgment in CM(M) No.765/2011 noted that the respondents, in suit No.77/1986 filed by them, claimed to be the tenant under the petitioner in the aforesaid property No.206, Durgapuri Extension, Gali No.4, Gurudware Wali Gali, Shahdarda, Delhi-110032 at the rent of Rs.150/- per month and in property No. No.205, Durgapuri Extension, Gali No.4, Gurudware Wali Gali, Shahdarda, Delhi-110032 at the rent of Rs.150/- per month. However, as also recorded above, the respondents thereafter amended the plaint in Suit No.77/1986 and took up the plea of having purchased

properties No.205 as well as 206, Durgapuri Extension, Gali No.4, Gurudware Wali Gali, Shahdarda, Delhi-110032 and of being in possession of the premises by way of adverse possession.

43. The said suit No.77/1986 has since been dismissed vide judgment dated 26th February, 2008 of Sh. Sudhanshu Kaushik, Civil Judge, Karkardooma Courts, Delhi in Suit No.349/2007; though appeals thereagainst are stated to be pending. In the said judgment, it has been held that the respondents have failed to prove adverse possession. Again, in view of the principle enunciated by me hereinabove in judgment in CM(M) No.765/2011, of the claim for adverse possession and the claim for lawful title being mutually destructive, the question of adverse possession of the respondents of property No.206, Durgapuri Extension, Gali No.4, Gurudware Wali Gali, Shahdarda, Delhi-110032 subject matter of this petition does not arise. Moreover, in the present case, the respondents having entered into possession of the premises under the lawful title, as a tenant, could not have set up a plea of adverse possession without surrendering possession as tenant.

44. The learned ARC has however, notwithstanding the aforesaid facts and law, held the ownership and relationship of landlord and tenant to have been not made out referring to the judgment of the Karnataka High Court in ***H. Muthunanjaiah Vs. C.G. Indiramma*** 2005 (1) Kar LJ 226 holding that once the amendment has been allowed, it is only the amended pleading which is to be seen and not the original pleading.

45. Undoubtedly so but the same will not wash away the admission which has been permitted to be withdrawn/amended. Though in the suit in which amended pleading is filed, the decision may be governed by the amended pleading but the pleading originally filed can always be used to show admission earlier made.

46. As per the said admission, the respondent had admitted to be a tenant of the petitioner in property No.206, Durgapuri Extension, Gali No.4, Gurudware Wali Gali, Shahdara, Delhi-110032 at a rent of Rs.150/- per month and I am afraid, the ARC and the Rent Control Tribunal have applied incorrect principles of law.

47. The counsel for the respondents has argued that in exercise of jurisdiction under Article 227 of the Constitution of India factual findings cannot be disturbed and has in this regard referred to ***Bathutmal Raichand Oswal Vs. Laxmibat R. Tarta*** AIR 1975 SC 1297 and ***Mani Nariman Daruwala & Bharucha (Deceased) through LRs Vs. Phiroz N. Bhatena*** AIR 1991 SC 1494.

48. The present is not a case of upsetting of any factual findings.

49. The facts are not in dispute, nor are the same being sought to be interfered with. It is the inference drawn from the said facts by the Courts below, which on being found to be contrary to well enunciated principles of law, is being interfered with.

50. Moreover, it is felt that not interfering with the orders impugned in this petition results in inconsistent findings. In the Civil Suits No.77/1988 and 25/1990, the claim of the respondents of adverse

possession has been disbelieved though stated to be the subject matter of appeal. The necessary corollary of holding the petitioner to be not owner / landlord in the orders impugned in this petition would be to support the said claim and which would divest the petitioner of the very title to the property. Even otherwise, it is settled principle of law (See ***Kanchan Kapoor Vs. Sarwan Kumar*** (2015) 216 DLT 136) that qua title, it is the finding of the Civil Court which prevails over the finding of the Rent Controller constituted under the Rent Act and who is not even a Court but a Tribunal of limited jurisdiction.

51. I therefore set aside the orders aforesaid of the ARC and the Rent Control Tribunal, only to the extent of holding that the petitioner is not the landlord of the premises with respect to which the petition for eviction was filed. However otherwise, I do not deem it necessary to interfere with the order of dismissal of the petition for eviction insofar as under Section 14(1)(e) of the Act on the ground of requirement of the premises by the petitioner for his own use. The reason therefor is that the Courts below, owing to having arrived at the finding of there being no relationship of landlord and tenant and the petitioner having failed to prove ownership, have not dealt with the said fact. The eviction petition from which this petition arises, was instituted on 24th April, 2000 and more than 17 years, have elapsed therefrom. In the said 17 years, requirements change and it is felt that no purpose would be served by remanding the petition for enquiry under Section 14(1)(e) of the Rent Act. The petitioner however would be entitled in law and is expressly granted liberty to, if still has

requirement for the premises, institute a fresh petition on the said ground.

52. Once the relationship of landlord and tenant is found between the petitioner and the respondent, the petition for eviction, insofar as under Section 14(1)(a) of the Rent Act, has to be allowed and is allowed. No order under Section 15(1) of the Rent Act having been passed till now, the same has to be passed.

53. The petitioner is directed to pay rent at the rate of Rs.150/- per month with effect from three years prior to the date of institution of the petition i.e. with effect from 1st May, 1997 till the end of October, 2017 to the petitioner No.1 Goverdhan Dass Bansal on or before 31st October, 2017. Though under Section 15(1) of the Rent Act one month's time only is to be given but time till 31st October, 2017 is given since correction of this order and release thereof is likely to take time.

54. If the respondents pay the said arrears of rent on or before 31st October, 2017, the petition for eviction under Section 14(1)(a) shall stand disposed of, giving benefit to the respondents of Section 14(2) of the Rent Act. However, if the respondents fail to comply with the order under Section 15(1) for payment of arrears of rent as aforesaid on or before 31st October, 2017, the petitioner shall be at liberty to take appropriate proceedings.

55. The petition is disposed of.

56. Trial Court record be returned forthwith.

57. The date of 16th November, 2017 before the Joint Registrar is cancelled.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 07, 2017

‘bs/gsr’..

(Corrected & released on 29th September, 2017)



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