

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

% **Date of decision: 1st June, 2018.**

+ **CM(M) 743/2017**

PRATAP SINGH AND ORS

..... Petitioners

Through: Mr. Abhimanyu S. Khatri, Adv.

Versus

RAMJAS FOUNDATION

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.25502/2017 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

CM(M) 743/2017 & CM No.25501/2017 (for stay)

3. This petition under Article 227 of the Constitution of India impugns the order (dated 11th May, 2017 in Case No.95639/2016 of the Court of Civil Judge, Central District, Tis Hazari Courts, Delhi), deciding against the petitioners/defendants a preliminary issue framed in the suit filed by the respondent/plaintiff against the petitioners/defendants.

4. The petition came up before this Court first on 21st July, 2017, when it was enquired from the counsel for the petitioners/defendants as to how a petition under Article 227 of the Constitution of India was maintainable and whether not the impugned order constitutes a decree within the meaning of

Section 2(2) of the Code of Civil Procedure, 1908 (CPC) and would be appealable as such.

5. The counsel for the petitioners/defendants sought to withdraw the petition with liberty to take appropriate remedy. However, since the said aspect was being considered by me in another matter pending before this Court, intending the orders to be passed in Chamber, the file was sent to the Chamber.

6. However, the orders in the other matter as well as this matter remained to be passed and the files went on a back burner. The counsel for the petitioners/defendants, on 28th August, 2017 mentioned the matter and handed over copies of judgments in *Vidyodaya Trust Vs. Mohan Prasad* (2006) 7 SCC 452 and *Murari Lal Vs. Madan Lal Moondra* MANU/DE/2223/2015 in support of maintainability of the petition.

7. I have considered the controversy.

8. The respondent/plaintiff instituted the suit, from which this petition arises, for permanent injunction restraining the petitioners/defendants from trespassing into Khasra No.366 of Village Chaukari Mobarakbad and from demolishing the boundary wall there around as shown in the site plan filed with the plaint.

9. The petitioners/defendants contested the suit *inter alia* pleading that the respondent/plaintiff have no *locus standi* to institute the suit and to seek injunction against the petitioners/defendants who were the rightful and lawful owners of the land and it was the respondent/plaintiff who was a trespasser and the respondent/plaintiff had no right to seek equitable and discretionary relief of injunction against the petitioners/defendants who are

the lawful owners. It was further pleaded that the respondent/plaintiff was party to the demarcation proceedings conducted by the Revenue Officials in the months of March/April, 1988 and wherein it was found that the respondent/plaintiff had trespassed over 3 bighas 5 biswas i.e. 3250 sq. yds. of land; the respondent/plaintiff did not file any objections to the said demarcation report and did not dispute the same and instead of surrendering the possession of the land, on which it had been found to have encroached, to the petitioners/defendants, had filed the suit. It was also the plea of the petitioners/defendants that the suit filed by the respondent/plaintiff was a counter-blast to the suit filed by the petitioners/defendants.

10. In the aforesaid state of pleadings, the following preliminary issue was framed in the suit on 19th May, 2016:

“Whether the suit for simplicitor permanent injunction is maintainable or not being barred u/s 41(h) of the Specific Relief Act? OPP”

11. The learned Civil Judge, in the impugned order has recorded (i) that it was the contention of the counsel for the petitioners/defendants that the real dispute between the parties was a boundary dispute which was required to be adjudicated by the Revenue Authorities under Section 28 of the Delhi Land Revenue Act, 1954 and the Competent Authority thereunder had got the land demarcated; (ii) that the remedy available to the respondent/plaintiff to avoid the said demarcation report was to file an appeal before the Appellate Authority in terms of Section 64 of the Delhi Land Revenue Act; (iii) that the respondent/plaintiff, instead of availing of

the said efficacious remedy, had filed the suit which was barred under Section 41(h) of the Specific Relief Act, 1963.

12. The learned Civil Judge, vide the impugned order, has decided the preliminary issue against the petitioners/defendants reasoning (a) that the petitioners/defendants in their written statement had not disputed the factum of possession of the respondent/plaintiff over the subject land and the existence of the wall qua which the relief had been claimed; (b) that according to the petitioners/defendants, the wall in question was constructed by the respondent/plaintiff five years before the filing of the suit; (c) that thus the petitioners/defendants had admitted the respondent/plaintiff to be in possession of the suit property, though claimed the said possession to be as a trespasser; (d) that even a trespasser in long settled possession of immoveable property is entitled to protect his possession against any unlawful interference, even by registered owner of the property; (e) that the relief of injunction claimed in the suit could not be granted by the Revenue Authorities, either under the provisions of Section 28 or under Section 64 of the Delhi Land Revenue Act; (f) that the suit was thus not barred by Section 41(h) of the Specific Relief Act or under Section 185 of the Delhi Land Reforms Act, 1984.

13. However, this order is concerned with the maintainability of this petition under Article 227 of the Constitution of India and not with the merits of the impugned order.

14. I have since, in *Lalit Yadav Vs. Delhi Development Authority* MANU/DE/7871/2017, qua a preliminary issue holding a suit to be not maintainable and dismissing the suit, held as under:

- (I) that Supreme Court in *Rishabh Chand Jain Vs. Ginesh Chandra Jain* (2016) 6 SCC 675 held that an order conclusively determining the rights of parties with regard to one of the issues is a decree and where order passed is a decree under law, no revision lies under Section 115 of the CPC and it is only appealable under Section 96 of the CPC; an order dismissing the suit, without trial, on the ground of *res judicata*, did not cease to be a decree on account of a procedural irregularity of non-framing of an issue and ought to be treated as a decree, as if passed after framing the issue and on adjudication thereof; it was further held that what is to be seen is the effect and not the process and even if there is a procedural irregularity in the process of passing such an order, if the order passed is a decree under the law, no revision lies under Section 115 of the CPC, in view of the specific bar in Section 115 of the CPC;
- (II) that even if the Court wrongly framed the preliminary issue or under the preliminary issue decided matters which could not have been decided without trial, the same would not make available against the order, a remedy which is otherwise not available against a decision on a preliminary issue;
- (III) that Section 2(2) of the CPC defines ‘decree’ as a formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final.

15. In my view, it matters not for the purposes of determining, whether it is a decree or not, whether the order on a preliminary issue results in dismissal of the suit or in holding the suit to be maintainable. Section 2(2) of the CPC defining the decree does not make any distinction between an order, whether of dismissal of the suit as not maintainable or holding the suit to be maintainable. All that is relevant for the purposes of Section 2(2) of the CPC is whether the order, as regards the Court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy. Just as both, an order or a judgment, allowing a suit or dismissing the suit, after full trial, are a decree, so is the position with respect to an order deciding a preliminary issue, whether holding the suit to be maintainable and putting the suit to trial or holding the suit to be not maintainable and dismissing the same.

16. However, *Vidyodaya Trust* and *Murari Lal* supra relied upon by the counsel for the petitioners/defendants remained to be considered in *Lalit Yadav* supra.

17. Supreme Court, in *Vidyodaya Trust* supra was concerned with a challenge to two orders, one in a Revision Petition under Section 115 of the CPC and one in a Writ Petition under Article 227 of the Constitution of India, both arising from the same suit. The preliminary issue decided in the suit was on the plea of non-maintainability of the suit under Section 92 of the CPC. The suit was held to be maintainable. The Revision Petition preferred by the defendants to the High Court was held to be not maintainable for the reason of the order being an interlocutory one. Thereafter, Writ Petition under Article 227 of the Constitution of India was

filed challenging the same order. Another learned Single Judge of the same High Court dismissed the said Writ Petition as not maintainable holding the proper remedy to be a Revision Petition and expressing doubt about the correctness of the order holding the Revision Petition to be not maintainable. It was in these facts that the Supreme Court, reproducing the language of Section 115 of the CPC held, albeit on a concession, that the Revision Petition was maintainable.

18. Supreme Court in ***Rishabh Chand Jain*** supra did not consider ***Vidyodaya Trust*** supra. However, as would be apparent from the above, Supreme Court in ***Vidyodaya Trust*** supra had no occasion to consider the question, whether the order on preliminary issue constituted a decree and/or whether a remedy of appeal was available thereagainst. The position before the Supreme Court in ***Vidyodaya Trust*** supra was unique, of a subsequent Coordinate Bench expressing doubt qua the view of the earlier decision holding the Revision Petition to be not maintainable. Supreme Court merely held the Revision Petition to be maintainable and that too, as aforesaid, on concession and thus it cannot be said that there is any conflict between ***Rishabh Chand Jain*** and ***Vidyodaya Trust*** supra and ***Vidyodaya Trust*** does not lead me to take any different view from that taken by me in ***Lalit Yadav*** supra.

19. That brings me to ***Murari Lal*** supra. A Coordinate Bench of this Court therein was concerned with an order of dismissal of an application under Order VII Rule 11 of the CPC and the order of dismissal, as not maintainable, of an appeal preferred thereagainst. The challenge before this Court was brought by way of a petition under Article 227 of the

Constitution of India and the question for adjudication as framed was of the maintainability of an appeal against dismissal of an application under Order VII Rule 11 of the CPC. It was held that an appeal is a statutory remedy and there being no remedy of appeal from an order of dismissal of an application under Order VII Rule 11 of the CPC, there was no error in the order of the Additional District Judge holding the appeal to be not maintainable.

20. As would be obvious from the above, the controversy in *Murari Lal* supra was also different and this Court therein was not concerned with the question as has arisen in the present case about the maintainability of this petition under Article 227 of the Constitution of India.

21. In accordance with the view taken by me in *Lalit Yadav* supra, this petition is not maintainable and is dismissed.

22. No costs.

23. Since there has been delay in passing this order, it is now being released as a judgment on 1st June, 2018 and the Court Master has telephonically informed the counsel for the petitioners/defendants.

RAJIV SAHAI ENDLAW, J.

JUNE 01, 2018

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