

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

% **Date of decision: 24th September, 2018.**

+ **RSA 12/2012 & CM No.1645/2012 (for stay)**

ZILE SINGH **Appellant**

Through: Mr. Sunil Chauhan, Adv.

Versus

BHIM SINGH & ORS **Respondents**

Through: Mr. Ankit Jain with Mr. Sarvesh Rai
and Mr. Siddhant Nath, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 25th November, 2011 in RCA No.210/00 of the Court of Senior Civil Judge (Central)] partly allowing the First Appeal preferred by the respondents/plaintiffs against the judgment and decree [dated 30th May, 2000 in Suit No.M-41/90 of the Court of Civil Judge, Delhi] of dismissal of the suit filed by the respondents/plaintiffs.

2. The appeal came up first before this Court on 27th January, 2012 when albeit without expressing satisfaction that the same entails any substantial question of law and without framing any substantial question of law, notice thereof was ordered to be issued and parties directed to maintain *status quo* with respect to the property subject matter of the suit from which this appeal arises. The said interim order has continued till now and the appeal has been pending since then. Vide order dated 26th September, 2014, the appeal was

dismissed in default of appearance of the appellant/defendant but on application of the appellant/defendant on 24th October, 2016 was restored to its original position and since then is again being adjourned. Resultantly, notwithstanding this Second Appeal pending for the last six years, the substantial question of law if any entailed in this appeal has not been framed as yet.

3. The counsel for the respondents/plaintiffs, on enquiry fairly states that substantial question of law does indeed arise in this appeal.

4. I have proposed to the counsels that since the appeal is already six years old and since for framing substantial question of law also, the counsels will have to be heard and the records perused, whether, in the event of this Court also finding the appeal to be entailing any substantial question of law, the said substantial question of law can be framed and the counsels be heard thereon also and the appeal disposed of today itself.

5. Both the counsels have fairly agreed.

6. The counsels have been heard and the Suit court record and the First Appellate Court record requisitioned in this Court perused.

7. The suit, from which this second appeal arises, was filed by the respondents/plaintiffs against the appellant/defendant, claiming to be owner in possession of 1½ *bighas* of land situated in village Qutabgarh, Delhi within the old *lal dora* and seeking to restrain the appellant/defendant by a decree of permanent injunction, from taking forcible illegal possession of the said land as shown in the site plan filed along with the plaint.

8. The appellant/defendant contested the suit disputing the title and possession of the respondents/plaintiffs to the subject land and claiming himself to be the owner in possession of the land.

9. During the pendency of the suit, a commission was issued to determine the possession with respect to the land and to also report on the then position of construction on the land.

10. The Court Commissioner reported as under:-

“2. That I was told by Sh. Ram Swaroop that a portion near door (x) as shown in the site plan attached, shown as (A) (B) and (C), were, according to Sh. Ram Swaroop the goods of the plaintiff were lying. Belonged to the plaintiff, however the plaintiff and his son of Bhim Singh, who was found present in the suit premises told me that they had been dispossessed of the said plot by the defendant with force.

3. That Sh. Perhlad Singh and Sh. Reme told me that the said plot is in possession of the defendant, however, they could not cleanly tell me regarding the goods lying at part (A) (B) and (C) but they told me that everything belonged to the defendant.

4. That the son of the plaintiff told me that they remove their cattle from the said plot in the evening and get them to their house, however the cattle of the defendant were there on the plot.

5. That there is one old boundary wall in the existence, about 4 to 5 feet in height and one room at the corner which is in possession of the defendant.”

11. The Suit Court, on the basis of the report of the Court Commissioner and on the basis of the evidence adduced, held the appellant/defendant to be in possession of the property aforesaid and thus held the respondents/plaintiffs to be not entitled to the injunction against dispossession sought.

12. However the First Appellate Court, on the basis of the same report of the Court Commissioner and evidence, though found the appellant/defendant to be in possession of the room in the corner of the land and land adjoining the said room but held the respondents/plaintiffs to have proved to be in possession of an area measuring 27ft. and 70 ft. of the remaining open land in the property and accordingly enjoined the appellant/defendant from dispossessing the respondents/plaintiffs from the said 27 ft. x 70 ft. portion of the property save by due process of law.

13. Contending that the finding of the First Appellate Court, of the respondents/plaintiffs being in possession of 27 ft. x 70 ft. of the property is based on no evidence, this Second Appeal has been preferred.

14. The following substantial question of law is framed in this Second Appeal:-

Whether the finding of the First Appellate Court, of the respondents/plaintiffs being in possession of part of the property with respect to which suit for permanent injunction against dispossession was filed, is based on no evidence and thus perverse.

15. It has been held in *Damodar Lal Vs. Sohan Devi* (2016) 3 SCC 78 and *Hero Vinoth Vs. Seshammal* (2006) 5 SCC 545 that when the finding even of fact, is based on no evidence, the Second Appellate Court is entitled to interfere.

16. A perusal of the site plan submitted by the Court Commissioner aforesaid and to which report of the Court Commissioner no objection was filed by either of the parties, shows the property, to be comprised of land (stated to be about 1500 sq. yds.), bounded by a wall, more in length than in width, with a gate at one end of the length, and construction only of one room in a corner at the other length of the plot. The Court Commissioner, in the site plan aforesaid, has shown three points marked as A, B & C, closer to the gate of entry to the plot and has in the report, with respect thereto stated that at those points, according to one Ram Swaroop the goods of the respondents/plaintiffs “were lying”.

17. The First Appellate Court in its judgment has held that the respondents/plaintiffs were in possession of portion *ad measuring* 27 ft. x 70 ft. towards the entry gate of the plot, reasoning (i) that the Local Commissioner had reported that at points A,B & C aforesaid on the site plan drawn up by the Local Commissioner, the goods of the plaintiff “are lying” ; (ii) that though as per evidence led, the respondents/plaintiffs may be or may not be in possession of whole of the property but it was proved that the respondents/plaintiffs had been dispossessed from some portion of the properties; the report of the Local Commissioner is clinching evidence in this regard; and, (iii) if the site plan filed by the respondents/plaintiffs and the site plan prepared by the Local Commissioner are tallied, the portion shown

in the site plan drawn up by the Local Commissioner where the entry gate to the plot exists and points A, B & C are marked, is in possession of the respondents/plaintiffs; and, (iv) that considering the length of the plot on one side to be 70 ft. and on the other side to be 45 ft., as shown in the site plan of the respondents/plaintiffs, the portion in possession of the respondents/plaintiffs could be computed as 27 ft. x 70 ft. Thus it was held that the respondents/plaintiffs are in possession of 27 ft. x 70 ft.

18. I may at the outset state that in the site plan prepared by the Court Commissioner, length and breadth of the boundary wall on either side has not been indicated. The counsels also fairly admit that the dimensions given by the First Appellate Court in its judgment are on conjunctures.

19. The First Appellate Court also has held the appellant/defendant to be in possession of the room at the other end from the gate and the adjoining land.

20. The counsels, on enquiry state that the area found by the First Appellate Court to be in possession of the respondents/plaintiffs of 27 ft. x 70 ft., would translate into 210 sq. yds. out of 1500 sq. yds. size of the plot. According to the First Appellate Court also, the remaining area is in possession of the appellants/defendants. The respondents/plaintiffs have not preferred any appeal against the said finding, not even by preferring cross-objections in this appeal.

21. In my view, the finding of the First Appellate Court, of the respondents/plaintiffs being in possession of 27 ft. x 70 ft. of property, cannot be sustained, only for the reason that once the room and the land in

the property beyond an area of 27 ft. x 70 ft. has been found to be in possession of the appellant/defendant, it is comprehensible that the front portion of the same property would be in possession of the respondents/plaintiffs and the rear portion which cannot be accessed save through the said front portion, would be in possession of the appellants/defendants. Even otherwise, the First Appellate Court has erred in reading the report of the Court Commissioner. The Court Commissioner did not report that any goods of the respondents/plaintiffs, at the time of visit by the Court Commissioner were lying at points A, B & C. What was reported on the basis of oral statement was that the goods 'were lying'. Merely because the goods were stated to be earlier lying did not mean that the respondents/plaintiffs at the time of visit by the Court Commissioner were reported to be in possession of the plot of land aforesaid.

22. I have enquired from the counsels, whether there was any interim order in the suit restraining the appellants/defendants from dispossessing the respondents/plaintiffs.

23. The answer is in the negative.

24. I have further enquired, whether the respondents/plaintiffs at any time during the pendency of the suit, complained of dispossession.

25. The answer is again in the negative.

26. I have yet further enquired, whether the respondents/plaintiffs, in their evidence in the suit deposed that though they were in possession at the time of institution of the suit, had been dispossessed.

27. The answer is again in the negative.

28. In the aforesaid scenario, the finding of the First Appellate Court of the respondents/plaintiffs being in possession of 27ft. x 70 ft. portion of the property is clearly based on no evidence and perverse.

29. The substantial question of law is thus answered in favour of the appellants/defendants and resultantly the impugned judgment and decree of the First Appellate Court cannot be sustained and has to be interfered with.

30. The counsel for the respondents/plaintiffs has however contended that since the respondents/plaintiffs have been dispossessed during the pendency of the suit, Section 52 of the Transfer of Property Act, 1881 read with Section 141 of the CPC providing for restitution would also be attracted. However on second thoughts, the counsel for the respondents/plaintiffs himself admits that Section 52 applicable in the cases of transfer of property *pendente lite*, would not apply.

31. The same is the position with respect to Section 141 of the CPC. The same is attracted only when the decree or order is modified or verified. In the present case there was no decree or order during the pendency of the suit restraining the appellant/defendant from dispossessing the respondents/plaintiffs and there was no complaint of respondents/plaintiffs during the pendency of the suit, of dispossession during the pendency of the suit. The question of restitution thus does not arise.

32. No other argument has been urged.

33. The appeal accordingly succeeds and is allowed.

34. The judgment and decree of the First Appellate Court, to the extent holding the respondents/plaintiffs to be in possession of part of the property,

is set aside and the judgment and decree of the Suit Court, of dismissal of the suit, restored. However no costs.

35. Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 24, 2018

‘pp’

