

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

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Date of decision: 16th July, 2018

+ RSA 77/2018 & CM No.19582/2018 (u/S 151 CPC for stay)

SATYA PRAKASH & ORS

..... Appellants

Through: Mr.Achal Gupta, Ms. Deepa, Advs.

versus

NATHO DEVI (DECEASED) THR LRS & ANR. Respondents

Through: Ms. Neha Kapoor, Ms.Alka Sharma,
Advs.

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 12th February, 2018 in RCA No.117/2017 of the Court of Additional District Judge-01, Central] of dismissal of the First Appeal under Section 96 CPC preferred by the three appellants against the judgment and decree [dated 15th February, 2005 in Suit No.416/02/00 of the Court of the Civil Judge, Delhi] in a suit filed by the respondents No.1 and 2/plaintiffs against the appellants/defendants, of recovery of possession of immovable property with mesne profits from the appellants/defendants.

2. This appeal came up first for hearing on 11th May, 2018 when the counsel for the respondents/plaintiffs appeared on caveat and the hearing was adjourned to 17th May, 2018 and thereafter to today.

3. The counsel for the appellants/defendants has been heard.

4. The counsel for the appellants/defendants first contends that though the respondents/plaintiffs claim title to the immovable property under a Will of which they had taken a probate, but one of the

respondents/plaintiffs in cross-examination deposed that she as well as the other respondents/ plaintiffs, were witnesses to the Will under which they claim title; however, the respondents/plaintiffs are not witnesses to the Will of which probate was granted and which means that there was another Will.

5. I have enquired from the counsel for the appellants/defendants, that once a probate of a Will under which the respondents/plaintiffs claim title is admitted to have been granted, under which law are the appellants/ defendants entitled to now contend existence of another Will, even if so deposed by the respondents/plaintiffs in cross-examination.

6. The counsel for the appellants/defendants has then not pressed the said argument any further.

7. The counsel for the appellants/defendants next argues that it is the case of the appellants/defendants that the father of the appellants/defendants had also contributed to the consideration for purchase of the subject property by the predecessor of the respondents/plaintiffs but the property was purchased only in the name of the predecessor of the respondents/ plaintiffs.

8. I have enquired from the counsel for the appellants/defendants, whether not such an argument constitutes a plea of *benami* and how are the appellants/defendants entitled to take such a plea or to make such an argument after the coming into force of the Benami Transactions (Prohibition) Act in the year 1988 and which has been renamed in the year 2016 as the Prohibition of Benami Property Transactions Act, 1988.

9. The counsel for the appellants/defendants contends, that the plea is not “particularly” of *benami* but of the appellants/defendants “also having

title to the property” since their father had contributed to the purchase consideration.

10. Attention of the counsel for the appellants/defendants has been invited to ***K.L. Garg Vs. Rajesh Garg*** 2013 SCC OnLine Del 323 and recent judgment dated 5th July, 2018 in CS(OS) No.3/1992 titled ***Satish Kumar Gupta Vs. Shanti Swaroop Gupta*** holding that the entitlement of the person who has contributed to the purchase consideration is only to seek recovery of the money so advanced/lent and not to any title to the property in proportion to the purchase price contributed. Else, if on the basis of contribution to purchase price a proportionate title to the property is claimed, it would amount to a plea of *benami*, which is barred.

11. The counsel for the appellants/defendants has not pressed further the said aspect also and now contends that the main plank of the appellants/defendants before the courts below, was of “prescription”.

12. Attention of the counsel for the appellants/defendants is invited to ***Annasaheb Bapusaheb Patil Vs. Balwant*** (1995) 2 SCC 543, ***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*** (2007) 6 SCC 59, ***L.N. Aswathama Vs. P. Prakash*** (2009) 13 SCC 229 and ***Pushpa Rathi Vs. Jugnu Bansal*** 2017 SCC Online Del 10881 holding that the plea of lawful title and plea of adverse possession are antithetical to each other and mutually destructive and cannot co-exist. It has been enquired from the counsel for the appellants/defendants, that since the appellants/defendants earlier had been asserting lawful title to the property, whether they choose to take the plea of lawful title or of

adverse possession, even if were to be held entitled to make a choice today.

13. The counsel for the appellants/defendants states that he is aware of the judgments aforesaid and confines the claim to that of adverse possession. He however states that his argument is not in the nature of adverse possession but “prescription”.

14. The issues framed by the Suit Court on 15th January, 2002 are reproduced hereunder:

- “1. Is the value of the suit property only Rs.12,000?
2. Has this court pecuniary jurisdiction to try the suit?
3. Is the suit pre mature as an appeal from the judgment in the probate case is pending?
4. Are the plaintiffs owners of the suit property?
5. Have the defendants any right to occupy the suit property?
6. Is the plaintiff entitled to evict the defendant from the suit property?
7. Is the plaintiff entitled to any damages? If so, for what period and at what rate?
8. Is the plaintiff entitled to any relief?”

15. Upon being asked to show the issue got framed on the plea of “prescription”, the counsel for the appellants/defendants draws attention to issues No.4 and 6 supra.

16. The aforesaid issues are not found to be issues on the plea of prescription or in pursuance to which evidence of acquiring title by

prescription or adverse possession could have been led or a finding thereof could have been given. The counsel for the appellants/defendants has thus been asked to show from the written statement filed by the appellants/defendants, where the appellants/defendants have taken the plea of prescription.

17. The counsel for the appellants/defendants draws attention to the following paragraphs:

“That the defendants are in possession of the property in their own rights, because this property was purchased in the name of late Shri Chellu Ram. Father of the defendants contributed money for the purchase of the property. The defendants were not permitted to lead the evidence to bring out the facts on record in the probate case. In reality Late Shri Chellu Ram was not in good health when he was made to sign the blank papers. No independent witness was produced to identify that the will was executed by late Shri Chellu Ram.

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That the contents of para 7 of the plaint are not correct, and hence denied. The alleged Will is a forged one. It was got executed in a suspicious circumstances. Late Shri Chellu Ram was not a position to move about. No independent witness has been produced to prove the Will. The advocate who drafted the Will could not produce the papers showing that he has drafted the Will. He was never sure that it was Shri Chellu Ram who came to him to get the Will drafted.

It is all the more suspicious that no one would execute a Will in the names of his daughters-in-law when his sons are alive and have not been denied the share in the property. As regards the filing of the 706/1988 which is pending in the trial court, this suit has been filed on the basis of incorrect and wrong allegations. This has been filed in connivance with the police in an effort to evict the defendants. All the allegations in the suit are false. The suit was filed against Smt. Angoori Devi and the defendants who are living in the property since long. They had been living in the property in their own right. In case Shri Ram Singh and Smt. Angoori Devi parents of the defendants had not paid for the purchase of one-third share in the land, they could not have been allowed to live in the property. Smt. Angoori Devi had been shown as heir in the probate case. They have been living in the property in their own right and claiming ownership. Their possession has never been disturbed till the filing of the present suit. The possession of the defendants is continuous, open and hostile to the title of Shri Chellu Ram for the last more than twelve years.”

18. A perusal of the aforesaid also would show that the plea taken by the appellants/defendants is of being in possession claiming lawful title and not of adverse possession or the claim for recovery of possession being barred by time.

19. I have next asked the counsel for the appellants/defendants, that invoking which Article of the Schedule to the Limitation Act, 1963, the plea of ‘prescription’ has been taken.

20. The counsel for the appellants/defendants states that he has not looked up any Article of the Schedule to the Limitation Act but is invoking Section 27 thereof.

21. Section 27 of the Limitation Act merely provides that, at the determination of the period 'hereby limited' to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. It is thus quite evident that for invoking Section 27 also, knowledge of the Article of Schedule to the Limitation Act which is being applied, is essential.

22. The aforesaid shows that the argument of 'prescription' sought to be taken up is no argument in law and without any legs to stand on.

23. The limitation for a suit for recovery of possession of immovable property is provided by Articles 64 and 65 of the Schedule to the Limitation Act. While Article 64 provides for limitation for a suit for possession on the basis of previous possession and not on title as of 12 years from the date of dispossession, Article 65 provides limitation for a suit for possession of immovable property based on title as of 12 years commencing from the date when the possession of the defendant becomes adverse to the plaintiff.

24. From the argument of the counsel for the appellants/defendants, it is evident that the suit, from which this second appeal arises, was for recovery of possession on the basis of title and the counsel for the appellants/defendants also agrees. It was thus essential for the appellants/defendants to have pleaded the date on which their possession of the property became adverse to the plaintiff and for which the appellants/defendants as per law laid down in ***Dagadabai(Dead) by L.Rs. Vs. Abbas @ Gulab Rustum Pinjari*** (2017) 13 SCC 705, ***Annasaheb Bapusaheb Patil v. Balwant Alias Balasaheb Babusaheb Patil*** (1995) 2 SCC 543 & ***T. Anjanappa vs Somalingappa*** (2006) 7 SCC

570 were required to first admit exclusive title of the respondents/plaintiffs or their predecessor. The appellants/defendants here, as per the arguments, are not admitting the exclusive title of the respondents/plaintiffs or their predecessor to the property but are setting up title in themselves. The plea of adverse possession thus is not available to the appellants/defendants. Moreover, attention to no evidence which the appellants/defendants may have led of declaring themselves as having title in the property adversely to the respondents/plaintiffs has been drawn. Not only the paragraphs reproduced above, to which attention is drawn, but any of the other paragraphs of the written statement also, contain any plea of adverse possession. Further, without an issue having been specifically framed thereon, the appellants/defendants could not have had the suit dismissed.

25. The counsel for the appellants/defendants has then drawn attention to ***Balraj Vs. Rajbir*** 2016 SCC OnLine Delhi 3883 but the passage thereof to which attention is drawn is not a passage from the said judgment, but a passage from ***Lisamma Antony Vs. Karthiyayani*** (2015) 11 SCC 782 reproduced therein, holding that the suit subject matter thereof was barred by prescription under Section 27 of the Act because the defendants therein had established the plea with respect to their ownership of the suit property by means of purchase documents of the year 1981; the plaintiffs therein had not proved any documents of purchase of the property in their name or in the name of their predecessor and which the defendants or their predecessor were required to have cancelled or set aside or declared void within the time prescribed by the law of limitation.

26. The facts of judgment cited are entirely different from facts of the present case and merely because suit for recovery of possession of immovable property, subject matter of that suit was held to be barred by time would not mean all suits for recovery of possession of immovable property have to be held to be barred by time.

27. Else, mere possession of the property, for howsoever long, does not vest any title. It was so held by the Supreme Court in ***Sant Lal Jain Vs. Avtar Singh*** (1985) 2 SCC 332 and followed by this Court in ***Prabhu Dayal Vs. Roop Kumar*** AIR 2005 Del 144.

28. The counsel for the appellants/defendants has then contended that the appellants/defendants had filed an application under Order XLI Rule 27 of the CPC before the First Appellate Court and which was dismissed and against which dismissal, the appellants/defendants have preferred CM (Main) No.536/2017 which was disposed of on 18th July, 2017 with liberty to the appellants/defendants to challenge the order of rejection of application under Order XLI Rule 27 CPC against the final judgment in appeal. On being asked to show the additional evidence which was sought to be led, attention is drawn to Pgs.79 to 81 of the paper book, being summons dated 8th April, 1987 of the Court of Special Executive Magistrate, South Distt., to appellant No.3 and appellant No.1 under Section 113 of the Cr.P.C. and recording that “*there is an immediate danger or apprehension of breach of peace regarding dispute with Ramesh Chand and others*” and that “*Ashok Kumar S/o Ram Singh r/o Plot No.310A Chunna Bhati Mathura Road B’pur N. Delhi along with Ved Prakash Rosrani & others have an old dispute with Ramesh Chand and others on the subject of ownership of the above plot. You have picked*

up quarrel with them several times and tension is still there. You have disturbed the public peace and tranquillity”.

29. On enquiry, it is informed that Ramesh Chand and Ved Prakash Rosrani are husbands of the two appellants/defendants.

30. The counsel for the appellants/ defendants has argued, that the said documents show that there was a dispute between the parties as far back as in April, 1987 qua title to the property and thus the suit instituted in the year 2000 was barred by time.

31. The counsel however forgets that merely raising a dispute has not been made the starting point of limitation in Article 65. Article 65 makes the date, when the possession of the defendant becomes adverse to the plaintiff, the starting point of limitation. The law prescribes limitation to start specifically as and when the possession becomes adverse. Though, I have hereinabove held that since the appellants/defendants are not admitting exclusive title of the respondents/plaintiffs which is essential to claim possession adversely, but even if the same were to be ignored, merely raising a dispute resulting in a Section 145 Cr.P.C. proceeding would not amount to claiming adversely. For claiming adversely, it was incumbent on the appellants/defendants, to openly and continuously declare themselves as owners. No such plea was taken and it was not the case that the appellants/ defendants had applied to the municipal or other authorities, in which the property may have been recorded in the exclusive name of the respondents/ plaintiffs or their predecessor, for mutation thereof in their name or in any of their personal records claimed themselves to be the owner.

32. The counsel for the appellants/defendants at this stage states that

the nature of the hostility is evident from the portion of the property in the possession of the appellants/ defendants having a different municipal number.

33. However, on enquiry whether the said municipal number is in the name of the appellants/ defendants, the reply is in the negative.

34. At this stage, counsel for the appellants/defendants states that he in fact does not know about the same.

35. The same again demonstrates the casual manner in which this Second Appeal, which is maintainable only on a substantial question of law, is being pursued.

36. Else, I have gone through the records of the Suit Court, copies whereof have been filed with the memorandum of appeal and the concurrent judgments of the Suit Court and the First Appellate Court and do not find this appeal to be raising any substantial question of law for it to be entertained.

Dismissed.

No costs.

JULY 16, 2018

‘pk’..

RAJIV SAHAI ENDLAW, J.