

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

% **Date of decision: 25th July, 2018**

+ **RSA 140/2017 & CM No.29522/2018 (of the respondent for condonation of delay of 41 days in filing reply to the appeal).**

GAYATRI GUPTA **Appellant**

Through: Mr. S.C. Singhal, Adv.

versus

BIMLA DEVI **Respondent**

Through: Mr. Vivek B.Saharya, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 10th February, 2017 in RCA No.10/14 (60731/16) of the Court of the Additional District Judge (West)-01] of dismissal of First Appeal under Section 96 of the CPC preferred by the appellant against the judgment and decree [dated 29th January, 2013 in Suit No.129/03/09 (Unique ID No.02401C547872003) of the Court of the Civil Judge (Central-02)] of dismissal of suit filed by the appellant/plaintiff against the respondent/defendant.

2. This appeal came up first before this Court on 16th May, 2017, when the following order was passed:-

“RSA 140/2017

1. This Regular Second Appeal is filed under Section 100 CPC impugning the concurrent judgments of the courts below; of the trial court dated 29.1.2013 and the first appellate court dated 10.2.2017; by which the suit for possession and damages filed by the appellant/plaintiff has been dismissed.

2. The case put up by the appellant/plaintiff was that the respondent/defendant was inducted as a tenant under a rent agreement and that the defendant did not pay even a single month's rent. The rent agreement was filed in Court, but the same was dis-believed especially because the appellant/plaintiff filed no documents whatsoever to prove the ownership of the suit property. In fact, it is stated before this Court that the suit property was purchased by the appellant/plaintiff from the respondent/defendant.

3. Not only no documents were filed to prove the ownership, the appellant/plaintiff has also not filed documents to show acting upon the ownership of the suit property by showing mutation in the municipal record. There is however a ground 'M' which is urged in this regular second appeal of mutation having been done vide receipt dated 7.6.2009 but this receipt has also not been filed and proved in the trial court by the appellant/plaintiff. In fact, it is stated that the appellant/plaintiff thereafter has continuously paid property tax and he has the original receipts with him.

4. The facts of this case are peculiar because if the judgments of the courts below are allowed to stand it will result in a very undesirable position that the property will have no owner because appellant/plaintiff failed to prove the ownership and defendant/respondent also claimed ownership also failed to prove the same. In law, ownership of a property cannot be in vacuum and therefore this Court exercises its power under Order 41 Rule 27 CPC read with Section 165 of the Evidence Act, 1872 to permit the appellant/plaintiff, on oral prayer of the appellant/plaintiff, to lead additional evidence before the court below as regards not only the ownership documents but also the factum with respect to mutation having been carried out in the name of the appellant/plaintiff and also that the appellant/plaintiff has thereafter being regularly paying property tax

with respect to the suit property every year.

*5. I have also held so in the case of **Surjit Singh Vs. Kishori Lal** in RSA No. 277/2007 decided on 8th May, 2014 and which judgment has been upheld by the Supreme Court vide its judgment dated 22.2.2016 in SLP No. 21573/2014.*

6. Accordingly, in terms of the aforesaid observations let notice be issued to the respondent on filing of process fee, both in the ordinary method as well as by registered AD post, returnable on 25th September, 2017.

7. Trial court record be requisitioned.”

3. The counsel for the respondent/defendant has filed reply to the appeal along with CM No.29522/2018 for condonation of delay of 41 days in filing thereof. For the reasons stated, the delay is condoned. CM No.29522/2018 is disposed of. The reply in any case is misconceived as there is no reply to an appeal.

4. A perusal of the Trial Court record shows that the appellant/plaintiff instituted the suit from which this Second Appeal arises, for ejectment of the respondent/defendant from the premises no.A-53, Sis Ram Park, Uttam Nagar, New Delhi – 110 059 and for recovery of *mesne* profits, pleading that the respondent/defendant was a tenant under the appellant/plaintiff in the said premises at a rent of Rs.4,000/- per month and which tenancy stood determined.

5. The respondent/defendant contested the suit denying relationship of landlord and tenant and claiming to be in possession of the property aforesaid as owner thereof.

6. Though in a suit between landlord and tenant, the title claimed by

the respondent to the tenancy premises is not to be investigated and is not relevant but the following issues were framed in the suit on 13th November, 2003:-

- “1 Whether plaintiff is entitled for the relief of possession? *OPP*
- 2 Whether plaintiff is entitled for mesne profit, if yes at what rate? *OPP*
3. Whether plaintiff is the owner and Landlord of the suit premises? *OPP*
4. Whether any alleged agreement was executed between the plaintiff and the defendant? *OPP*
5. Whether there is no cause of action in favour of plaintiff and against the defendant? *OPD*
6. Whether defendant is in the exclusive owner of the suit premises as of today? *OPD*
7. Whether suit is not properly valued for the purpose of Court fee and Jurisdiction? *OPD*
8. Relief.”

and the parties proceeded to lead evidence thereon.

7. The Suit Court dismissed the suit, *inter alia* reasoning that though the onus to prove the issue no.3 aforesaid was on the appellant/plaintiff but the appellant/plaintiff had not placed on record any title documents to prove that the appellant/plaintiff was the owner of the property and had merely deposed that the appellant/plaintiff had purchased the property from the respondent/defendant. Though the appellant/plaintiff proved the Rent Agreement as Ex.DW-1/P3 by putting the same to the respondent/defendant during the cross-examination, however, it was held

that the respondent/defendant, in cross-examination had only admitted her signatures on the said document and denied the contents and therefore the contents of the document could not be read into evidence. It was further reasoned that the witness to the Rent Agreement also was not examined by the respondent/plaintiff. Accordingly, issues no.3&4 were decided against the appellant/plaintiff and the suit dismissed. With respect to issue no.6, it was held that the respondent/defendant also had been unable to prove her ownership of the property.

8. The respondent/defendant did not prefer any appeal or cross-objections against the judgment of the Suit Court, finding of title claimed by the respondent/defendant wherein was against the respondent/defendant. The First Appeal preferred by the appellant/plaintiff was however dismissed, affirming the reasoning of the Suit Court and additionally observing that since the appellant/ plaintiff claimed to have purchased the property from the respondent/defendant, the ownership of the respondent/defendant stood admitted by the appellant/ plaintiff.

9. It was in the aforesaid state of orders that this Court on 16th May, 2017 passed the order as aforesaid.

10. The counsel for the respondent/defendant has contended that **Surjit Singh** supra is not applicable to the facts of the present case.

11. I have however enquired from the counsels as to how, in a suit filed as landlord for ejectment of a tenant, the question of title was being adjudicated. A perusal of the plaint also shows the appellant/ plaintiff to have not made any averments of ownership of the property and having

merely sued as landlord. It was not the plea in the plaint, that the appellant/ plaintiff had purchased the property from the respondent/defendant, though it may have been deposed by the appellant/ plaintiff while appearing as a witness.

12. It thus appears that the finding of title returned in the judgment of the First Appellate Court and the Suit Court, in a suit in which the same was not required to be decided, is without jurisdiction.

13. The counsel for the appellant/ plaintiff states that subject to it being clarified that the appellant/ plaintiff will be entitled to sue for recovery of possession of the premises from the respondent/defendant on the basis of prior possession (within the meaning of Article 64 of the Schedule to the Limitation Act, 1963) and / or on the basis of title (within the meaning of Article 65 of the Limitation Act), the appellant/ plaintiff will give up her claim for ejectment of the respondent/defendant as a tenant, though would use the Rent Agreement to also show prior possession and title as landlord to the premises.

14. The counsel for the respondent/defendant contends that the question of title has already been gone into in the proceedings from which this Second Appeal arises.

15. Certainly so, but as aforesaid, the title of the appellant/plaintiff to the property was not in issue and any finding with respect thereto cannot constitute *res judicata* or bind the parties.

16. Section 11 of the CPC, codifying the principle and law of *res judicata*, bars the court from trying any suit or issue in which the matter “directly and substantially in issue” has been “directly and substantially

in issue” in a former suit in a court competent to try such subsequent suits or the suit in which such issue has been substantially raised and has been heard and finally decided by such court.

17. As far as back in ***Abdul Sobhan Vs Benimadhab Kshettri*** AIR 1934 Cal 430, a Division Bench of that High Court held that any finding which was not required cannot have the effect of operating as *res judicata*; to operate as *res judicata*, the finding must be material and necessary.

18. Supreme Court, in ***Sajjadanashin Sayed MD. B.E. EDR. (D) Vs. Musa Dadabhai Ummer*** (2000) 3 SCC 350, has analysed at length on what are matters “directly and substantially in issue” as distinct from matters which are “collaterally and incidentally in issue” and held that decision on matters “collaterally or incidentally in issue” in previous proceedings would not ordinarily operate as *res judicata* in subsequent proceeding where that matter is directly and substantially in issue. It was explained that (i) it is not to be assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue; (ii) nor is there any special significance to be attached to the fact that a particular issue is first in the list of issues; (iii) the test for determining whether the matter was directly and substantially in issue in the previous proceeding is, whether the issue was necessary to be decided for adjudicating the relief in the previous matter; (iv) ***Run Bahadur Singh Vs. Lucho Koer*** ILR (1885) 11 Cal 301, in which it was held that the finding in a suit by a widow against the tenant for recovery of rent, that the husband of the widow alone received the rent from the

tenant and not along with his brother who was also impleaded as a defendant in the suit, was not *res judicata* in a subsequent suit by the said brother for declaration that he and the husband of the widow were joint owners of the property, was cited with approval; it was reasoned that the first suit for recovery of rent did not cover the question of title to the property.

19. In fact it is found that the entire trial was misdirected and which led to the proceedings having come to this Court after fifteen years of the institution of the suit. A suit by landlord for ejectment of a tenant is not to be tried like a title suit. Reference in this regard may be made to ***Precision Steels Vs. Reeta Salwan*** (2013) 205 DLT 695 [SLP(C) No.39453/2013 preferred whereagainst was dismissed on 31st March, 2014], ***Sanjay Singh Vs. Corporate Warranties Pvt. Ltd.*** (2013) 204 DLT 12 and ***Ram Kumar Vs. S.K. Gulati*** (2013) 203 DLT 588.

20. The Courts below have erred in keeping the matter pending without regard to the aforesaid fact.

21. I may also mention that the First Appellate Court also has not held that the respondent/defendant has proved her title to the property. The First Appellate Court has not even set aside the finding of the Suit Court on issue no.6. All that the Appellate Court held is, that the appellant/plaintiff claimed to have purchased the property from the respondent/defendant.

22. Thus, instead of remanding the suit as observed in the first order, the appeal is dismissed as not pressed, with the clarification aforesaid and with liberty to the appellant/plaintiff to sue the respondent/defendant

for recovery of possession on the basis of prior possession and/or on the basis of title and to for the purpose of the said suit also rely on the Rent Agreement proved in the proceedings, from which this Second Appeal arises, as Ex.DW1/P3. It is further clarified that the findings if any of the Suit Court and the Appellate Court with respect to title of the property will not come in the way of both the parties in the fresh proceedings if any instituted by the appellant/plaintiff for recovery of possession, proving their respective title to the property.

23. The counsel for the appellant/plaintiff states that the limitation provided in Article 64 supra to sue for recovery of possession on the basis of prior possession be waived under Section 14 of the Limitation Act.

24. In the aforesaid facts, it is ordered that in the event of the suit for recovery of possession being filed on or before 30th September, 2018, the same shall not be dismissed as barred by time.

25. It is not deemed necessary to clarify so qua Article 65 of the Limitation Act inasmuch as the respondent/defendant does not claim adversely to the appellant/plaintiff but sets up a lawful title and it is settled law that the plea of adverse possession is antithetical to a claim for lawful title. Reference if any, in this regard, may be made to (i) **Mohan Lal Vs. Mirza Abdul Gaffar** (1996) 1 SCC 639; (ii) **Karnataka Board of Wakf Vs. Government of India** (2004) 10 SCC 779; (iii) **T. Anjanappa Vs. Somalingappa** (2006) 7 SCC 570; (iv) **P.T. Munichikkanna Reddy Vs. Revamma** (2007) 6 SCC 59; (v) **L.N. Aswathama Vs. P. Prakash** (2009) 13 SCC 229; and, (vi) **Pushpa Rani**

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26. No costs

27. The date of 11th September, 2018 before the Court is cancelled.

RAJIV SAHAI ENDLAW, J

JULY 25, 2018
'pp'..

