

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

% **Date of decision: 10th July, 2018**

+ **RSA 145/2017**

ANOOP KUMAR AGGARWAL **..... Appellant**

Through: Mr S.D.Ansari with Mr I.Ahmed,
Advocates with Appellant in person.

Versus

SHANTI SARUP CHOWHAN (DECEASED)

THROUGH LRS & ORS **..... Respondents**

Through: Mr Parvinder Chauhan, Advocate.

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 06th March, 2017 in RCA No.61359/2016 of the Court of Additional District & Sessions Judge, Central, Tis Hazari, Delhi] of dismissal of first appeal under Section 96 of the CPC preferred by the appellant against the judgment and decree dated [14th February, 2014 in CS No.596/10/97 (Unique Case ID No.02401C0093482002)] of dismissal of the suit filed by the appellant/plaintiff against the predecessor of the respondents/defendants for recovery of possession of immovable property with *mesne* profits.

2. This appeal came up before this Court first on 22.05.2017, when notice thereof was ordered to be issued and Trial Court Record requisitioned.

3. The order dated 10.10.2017 records that the respondents No.3 & 5 namely Shri Virender Kumar Chowhan and Smt Meenakshi Chowhan had expired. The appellant filed CM No.5492/2018 for a direction to the remaining respondents to furnish the particulars of the heirs of the deceased respondents No.3 & 5. Vide order dated 20.02.2018, the said application was allowed and the remaining respondents were directed to furnish the particulars.

4. The counsel for the remaining respondents states that the remaining respondents are the only natural heirs of the deceased respondents No.3 & 5 and there are no other heirs of the deceased respondents No.3 & 5.

5. On an oral request of the counsel for the appellant, the respondents No.1, 2, 4 & 6 are also recorded as the heirs of respondents No.3 & 5.

6. Neither while issuing notice nor in any of the subsequent orders, any substantial question of law which arises, was framed or indicated.

7. I have asked the counsel for the respondents/defendants, whether the appeal can be taken up for final hearing and during which, it will also be determined, whether any substantial question of law arises. Counsel for the respondents/defendants has fairly agreed.

8. The counsels have been heard and the impugned judgment and the Trial Court Record perused.

9. The appellant/plaintiff instituted the suit, from which this appeal arises, for recovery of possession of one room on the first floor of property No.2036, H.C.Sen Road Fountain Gali, pleading (i) that the appellant/plaintiff is the owner of the property No.2036, H.C.Sen Road Fountain Gali; (ii) that the respondent/defendant Shri Shanti Sarup Chowhan, Advocate (whose legal heirs the present respondents/defendants are) had trespassed into the said room in collusion with the other tenants in the property and the respondent/defendant had no right, title or interest in the room in question; iii) that the respondent/defendant, inspite of being called upon, had failed to handover peaceful vacant possession to the appellant/plaintiff.

10. The respondent/defendant contested the suit by filing a written statement, pleading (i) that he was in possession of one room measuring 17 ft.x14 ft. with two doors on the first floor of the property, since before 1967, without paying any rent to Shri Nirender Kumar Brij-Rattan Mahta of Bombay, owner of the property; ii) the owner of the property did not raise any objection to the possession of the respondent/defendant of the said room; iii) that in 1984 riots, the entire building was destroyed and the respondent/defendant, being an Advocate, was paid compensation of Rs.22,500/-; iv) that all the occupants of the building reconstructed their portions and the respondent/defendant also re-constructed the portion in his occupation

at his own cost; v) thereafter, the father of the appellant/plaintiff contacted the respondent/defendant, to get the consent of the respondent/defendant to have the room in his possession transferred in his name as a tenant; (vi) that in 1985, the father of the appellant/plaintiff also exchanged the room earlier in the occupation of the respondent/defendant with another room, which was then in possession of the father of the appellant/plaintiff; (vii) that the appellant/plaintiff, after purchase of the property, had stepped into the shoes of the previous owner and the respondent/defendant had retained adverse possession of the said room, as earlier.

11. In the aforesaid state of pleadings, the following issues were framed in the suit :-

“1. Whether the suit has been properly valued for the purpose of court fees and jurisdiction? OPP

2. Whether the description of the property is correct? OPP

3. Whether the site plan of the property is correct as per spot? OPP

4. Whether the plaintiff is the owner of the property in suit? OPP

5. Whether the plaintiff is entitled to possession? OPP

6. Whether the decree for damages of Rs. 25,000/- for mesne profits can be passed in favour of the plaintiff? OPP

7. Whether the defendant is in possession even before alleged date of unauthorised occupation of the defendant, if so its effect? OPD

8. Relief, if any. ”

12. The suit court decided issues No.1 to 4 in favour of the appellant/plaintiff and against the respondent/defendant; however, issues 5 & 6 were decided against the appellant/plaintiff, reasoning (i) that the case of the appellant/plaintiff was that the respondent/defendant had trespassed into the room in his possession; (ii) however, there was no certainty as to the date of the trespass and different dates had been at different places; (iii) that the appellant/plaintiff ought to have examined the earlier owner of the property, who could have led best evidence in this regard and which was not led; (iv) that the evidence led by the appellant/plaintiff did not prove that the respondent/defendant had trespassed into the room qua which the suit was filed in the year 1995; v) that on the contrary, it appeared that the respondent/defendant had been in peaceful possession of the said room.

13. The respondent/defendant did not prefer any appeal against the findings of the suit court, to the extent against him. The appellant/plaintiff preferred the Appeal which was dismissed, giving the same reasons as given by the Suit Court.

14. It is thus found that issue of title of the appellant/plaintiff to the property i.e. one room on the first floor, of which the respondent/defendant was/is in possession, has been decided in favour

of the appellant/plaintiff but the decree for possession thereof sought by the appellant/plaintiff has been denied for the reason of the appellant/plaintiff having failed to prove the date of unauthorized occupation of the said room by the respondent/ defendant or the act of trespass by the respondent/defendant of occupation of the said room.

15. It is also worth highlighting, that the respondent/defendant, in the written statement, did not claim any title to the property and merely claimed to be in possession thereof.

16. The substantial question of law which thus arises for consideration is :

“Whether a decree for recovery of possession of immovable property on the basis of the title can be denied inspite of finding the plaintiff to have title and merely for the reason of the unauthorized trespass by the defendant over the property having not been proved.”

17. The counsels have been heard on the aforesaid question.

18. Counsel for the respondent/defendant contends that the respondent/defendant claimed title to the property and has in this regard drawn attention to the following paragraphs of the written statement :-

“3. That the plaintiff has suppressed material facts in the plaint and has not come with clean hands before this Hon’ble Court and the plaintiff is not entitled to the relief claimed in the suit. The suit merits dismissal with costs. The material fact suppressed in the plaint is that the defendant is in occupation of an office accommodation

consisting of one room measuring 17 ft. x 14 ft. with two gates one opening in the gali and other in the main common passage of all the tenants on the first floor with an open roof of this room, since before 1967 regularly, continuously, openly, without paying any rent to the owner Shri Nirender Kumar Brij-Rattan Mahta of Bombay. One Shri Bakshi was the Rent Collector of the owner of this building and without any objection from Shri Bakshi and the owner in this connection.

In 1984, roits, the whole of this building was collapsed due to heavy and devastating fire and the office of the defendant with thirty years' library was burnt in it. The defendant was paid a sum of Rs. 22500/- as the compensation of this office from the office of the Deputy Commissioner, Delhi.

All the occupants of this building got their own respective portions constructed at their own costs. The defendant and Shri Bhatnagar also got their respective portions completed at their own costs and it was ready for use for the defendant and Shri Bhatnagar in 1985. Thereafter Shri Sukhbir Saran Agarwal father of the plaintiff contacted the defendant Through Shri BIjay Singh and got this defendant's consent to get this portion transferred in his name as a tenant and both this defendant and Shri Sukhbir Saran Agarwal started using their respective portions independently with a common passage.

That in 1985, Shri Sukhbir Saran exchanged the old portion of the defendant with his new portion on the back side opening towards the Main Stairs of this building, which is the room in dispute.

4. That after the alleged purchased of this building by the plaintiff, the plaintiff has come in foot steps of the original owner and acquired no new rights with respect to the office of the defendant in question and for this reason, the defendant retained in adverse possession of the office room in the suit as before till date.”

19. Counsel for the respondent/defendant also draws attention to the following paragraph in the judgment of the suit court:-

“Further, in legal notice dated 14.07.1997, Ex.PW1/2 plaintiff has stated that the room in question was in possession of previous owner of the property. In Sale deed Ex.PW1/8 on page no. 4 it is mentioned that the property in question which includes the suit property is fully occupied by the tenants. Thus the previous owner of suit property was the best person to depose about the possession of the suit property in question prior to and at the time of execution of the sale deed. Plaintiff has failed to bring the earlier owner and other tenants in the vicinity of suit property as witness to depose in present case about the possession of the suit property.”

20. Counsel for the respondent/defendant has argued, that the Suit Court, from the recital in the sale deed of the property in favour of the appellant/plaintiff that the entire property is fully occupied by tenants, has held that the status of the respondent/defendant in the property is as a tenant. It is further contended that the respondent/defendant's tenancy is protected by the Delhi Rent Control Act, 1958 and the jurisdiction of the civil court is barred under Section 50 thereof, to grant a decree for recovery of possession.

21. No plea of tenancy can be deciphered from the paragraphs of the written statement reproduced above. Rather, the respondent/defendant unequivocally pleaded that he occupied the room without paying any rent to the then owner of the property.

22. Rather, the respondent/defendant vaguely pleaded to have remained in adverse possession.

23. However, neither any issue was pressed on the plea of tenancy or on the plea of adverse possession and no evidence in that regard led and no findings have been returned either by the Suit Court or by the First Appellate Court thereon.

24. The respondent/defendant is not in Appeal and has allowed the findings of the courts below in so far as against the respondent/defendant, to attain finality. It is not open to the counsel for the respondent/defendant to today, in Second Appeal argue without any basis in pleadings, evidence or findings of the Courts below, that the respondent/defendant is a tenant in the property or in adverse possession.

25. As far as the argument with respect to the Sale Deed is concerned, though no evidence contrary to the pleadings can be read but even if it were to be believed that the respondent/defendant was also a tenant in the property as stated by the erstwhile owner of the property, in the Sale deed, and the appellant/plaintiff as successor-in-interest is bound thereby, it is quite evident that the respondent/defendant, by taking a plea in the written statement of not

being a tenant and/or being in adverse possession, has abandoned/surrendered the tenancy right and now, faced with the decree of possession, cannot claim to be a tenant in the subject room.

26. As far as the question of law framed as above is concerned, recently in *Manmohan Bedi Vs. Ramesh Kumar Guria* 2018 SCC OnLine Del 9948 concerned with an identical question, it was held as under.

“36. A suit for possession of immovable property is governed by Articles 64 & 65 of the Schedule to the Limitation Act, 1963. The subject suit is a suit for possession based on title and is governed by Article 65, which though provides the limitation for filing thereof of 12 years but commencing from the date when the possession of the defendant becomes adverse to that of the plaintiff. It has been held in *Dagadabai v. Abbas*, (2017) 13 SCC 705, *Annasaheb Bapusaheb Patil v. Balwant*, (1995) 2 SCC 543 & *T. Anjanappa v. Somalinagappa*, (2006) 7 SCC 570, that for possession of the defendant to become adverse to the plaintiff, the defendant has to admit the ownership of the plaintiff. The respondent/defendant did not admit ownership of the appellant/plaintiff and thus the plea of adverse possession is not open. Even otherwise, no plea of adverse possession has been taken in the written statement of the respondent/defendant. Rather, the plea of the respondent/defendant was of being in possession in his own right and which is a plea of lawful possession of the premises. It has been held in *Mohan Lal v. Mirza Abdul Gaffar*, (1996) 1 SCC 639, *PT Munichikanna Reddy v. Revamma*, (2007) 6 SCC 59, *LN Aswathama v. P. Prakash*, (2009) 13 SCC 229, *Pushpa Rathi v. Jugnu Bansal*, 2017 SCC OnLine Del 10881 & *Karnataka Board of Wakf v. Government of India*, (2004) 10 SCC 779 that the plea of lawful possession cannot coexist with a plea of adverse possession. For this reason also, the plea of adverse possession is not available to the respondent/defendant.”

27. I may add:

- A. Suit for recovery of possession of immovable property, under the provisions of the Specific Relief Act, 1963, can be filed either under Section 5 or under Section 6 thereof;
- B. The suit was admittedly not filed as a suit under Section 6 of the Specific Relief Act and which was to be filed within six months of the date of dispossession.
- C. Suit for recovery of possession of immovable property, under Section 5, can be filed either on the basis of prior possession or on the basis of title.
- D. Suit for recovery of possession on the basis of prior possession, vide Article 64 of the Schedule to the Limitation Act, is to be filed within twelve years of the date of dispossession.
- E. Suit for recovery of possession on the basis of title, vide Article 65, is to be filed within twelve years of the date on which the possession of the defendant becomes adverse to that of the plaintiff.

27A. Supreme Court, in *Maria Margarida Sequeria Fernandes Vs. Erasmo Jack de Sequeria* (2012) 5 SCC 370, also held that

- “66. A title suit for possession has two parts - first, adjudication of title, and second, adjudication of possession. If the title dispute is removed and the title is established in one or the other, then, in effect, it becomes a suit for ejectment where the defendant must plead and prove why he must not be ejected.
- 67. In an action for recovery of possession of immovable property, or for protecting possession thereof, upon the legal title to the property being established, the possession or occupation of the property by a person other than the holder of the legal title will be presumed to have been under and in

subordination to the legal title, and it will be for the person resisting a claim for recovery of possession or claiming a right to continue in possession, to establish that he has such a right. To put it differently, wherever pleadings and documents establish title to a particular property and possession is in question, it will be for the person in possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue in possession.”

28. The subject suit, as is clear from the pleadings thereof and the way it was understood by the parties and the parties have led evidence, was a suit for possession under Section 5 on the basis of title.

29. The appellant/plaintiff has proved his title to the property and the said finding has not been challenged by the respondents/defendants and has attained finality. Rather, there are admissions in the written statement, of the title of the appellant/plaintiff to the property.

30. Once it is established that the appellant/plaintiff has title to the property, it was for the respondent/defendant to plead and prove the right, if any to remain in occupation of the property. The respondent/defendant utterly failed to do so. The pleas in the written statement, neither constitute the plea of tenancy nor of adverse possession. No issues also on the said pleas were got framed and no evidence was led thereon and no findings were sought thereon. Without the respondents/defendants pleading any right to continue in occupation in the property, a decree for possession ought to have followed on the appellant/plaintiff proving his title and the Courts below have erred in holding that it was for the appellant/plaintiff to

prove the factum of trespass by the respondent/defendant into the property. Once the title of the plaintiff seeking possession is proved and the respondent has not disclosed title to remain in occupation, a decree for possession has to follow, more so, when it is also not the plea that the claim for recovery of possession was time barred.

31. The judgments of the Courts below are accordingly set aside.

32. A decree is passed, in favour of the appellant/plaintiff and against the respondents/defendants, of recovery of possession of one room, as shown in red colour of the site plan (Ex.PW-1/1) as proved before the Trial Court, on the first floor of property No. 2036, H.C.Sen Road Fountain Gali.

33. Counsel for the respondents/defendants, on enquiry, states that the claim of the appellant/plaintiff is for *mesne* profits at the rate of Rs.1,000/- per month only.

34. Keeping in view the prevalent rates in the locality where the property is situated, the claim for *mesne* profits at the rate of Rs.1,000/- per month is found to be reasonable.

35. A decree is accordingly also passed, in favour of the appellant/plaintiff and jointly and severally against the respondents/defendants, of *mesne* profits at the rate of Rs.1,000/- per month, with effect from 27th August, 1995 till the date of delivery of possession of the room aforesaid or dispossession of the respondent/defendants therefrom.

36. The respondents/defendants are also directed to clear upto date charges of electricity consumption in the said room and which if not done, shall again be recoverable by the appellant/plaintiff jointly and severally from the respondents/defendants.

No costs.

37. Decree sheet be prepared.

38. The decree for mesne profits be executed on the appellant/plaintiff depositing the deficit stamp duty before the Trial Court.

RAJIV SAHAI ENDLAW, J.

JULY 10, 2018

‘n’..