

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

%

Date of decision: 1st October, 2018.

+ **RSA 298/2015, CM No.14646/2015 (for stay), CM No.5250/2018 (u/O XLI Rule 27 of the CPC) and CM No.5251/2018 (for exemption)**

VINOD KUMAR SOOD

..... Appellant

Through: Mr. Pramod Ahuja, Adv.

Versus

BIPIN GUJRAL & ORS

..... Respondents

Through: Mr. Samar Bansal, Mr. Devahuti Pathak, Mr. Manan Shishodia and Mr. Vinayak Mehrotra, Advs.
Ms. Anju Gupta and Mr. Roshan Lal Goel, Advs. for SDMC/R-5.

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 18th April, 2015 in RCA No.84/14 of the Court of Additional District Judge-02 (South-East)] of dismissal of First Appeal under Section 96 of the CPC filed by the appellant against the judgment and decree [dated 16th April, 2014 in Civil Suit No.590/14 (Case ID No.02406C0325332010) of the Court of Civil Judge-01 (South)] only partly allowing the suit filed by the appellant/plaintiff.

2. This appeal came up first before this Court on 11th August, 2015 when, without expressing any satisfaction that the Second Appeal entailed any substantial question of law and without framing any substantial question of law, notice thereof was ordered to be issued. The appeal thereafter has

been adjourned from time to time but in none of the subsequent orders also any substantial question of law has been framed.

3. Having gone through the judgment of the Suit Court and the judgment of the First Appellate Court, I have straightway enquired from the counsel for the appellant/plaintiff, what substantial question of law this second appeal entails.

4. The counsel for the appellant/plaintiff draws attention to the substantial questions of law as proposed in the paper book, from page 29 onwards and running into six pages and nineteen in number. For this reason alone, need to even reproduce them hereinbelow is not felt. The questions have been formulated without regard to what constitutes substantial question of law, as detailed in law noticed in *Dalip Singh Vs. Tulsi Ram (Deceased) Through LRs* 2018 SCC OnLine Del 10833.

5. Suffice it is to state that the suit, from which this Second Appeal arises, was instituted for permanent injunction restraining the respondents/defendants No.1 to 4 from (i) interfering in the peaceful possession of the appellant/plaintiff of the ground floor and the three storeyed garage block forming part of property No.D-18, Kalindi Colony, Ring Road, New Delhi as shown in red colour in the site plan filed along with the plaint; (ii) making any additions alterations, unauthorised constructions on the first and *barsati* floors of the property; and for restraining the respondent No.5 Municipal Corporation of Delhi (MCD) from sanctioning any plans of construction in the said property at the instance of the other respondents/defendants.

6. The Suit Court allowed the suit to the extent of restraining the respondents/defendants No.1 to 4 from interfering in peaceful possession of the appellant/plaintiff of the constructed portion of the ground floor and three storeyed garage block in the property and by restraining the respondent/defendants No.1 to 4 from forcibly dispossessing the appellant/plaintiff from the constructed portion of the ground floor and three storeyed garage block.

7. What transpires after hearing the counsels is, that there is a title dispute between the appellant/plaintiff on the one hand and the respondents/defendants no.1 to 4 on the other hand with respect to the property and which title dispute is subject matter of two other litigations *inter se parties*.

8. The counsel for the appellant/plaintiff has drawn attention to the site plan Ex. P1 in the Suit Court file showing the entire property. A perusal of the said site plan reveals that besides the constructed portions, the property comprises of a front lawn, rear lawn, side open space on the one side and a driveway on the other side. The appellant/plaintiff has already been granted the reliefs claimed with respect to the constructed portions. The appellant/plaintiff however wants the reliefs aforesaid, also with respect to the front lawn, rear lawn, side open space and the driveway.

9. While the counsel for the appellant/plaintiff states that the Sale Deeds in favour of the respondents/defendants No.1 to 4 with respect to upper floors are forged and fabricated, the counsel for the respondents/defendants No.1 to 4 states that under the said Sale Deeds, the respondents/defendants No.1 to 4 have 50% undivided share in the land and the appellant/plaintiff is

not entitled to exclude the respondents/defendants No.1 to 4 from use of the front lawn, rear lawn, side open space and the driveway.

10. The counsel for respondents/defendants No.1 to 4 also contends that as per the settled law, the possession of open land goes with title and since the respondents/defendants also have title, they cannot be so restrained.

11. My experience has been that injunctions, even if granted with respect to possession of such open areas, are incapable of enforcement and only result in, either repeated applications for execution and for violation of the order being filed or if the suit is pending, applications under Order XXXIX Rule 2A of the CPC being filed and the Courts having no means to determine whether respondents/defendants No.1 to 4 had stepped into such open areas, in violation of the injunction or merely accidentally or in the course of use of constructed portions of the property in their possession. It cannot be lost sight of that houses such as the subject one were meant for a single family, with members thereof living in bonhomie with each other and occupying different portions thereof as per convenience and using some portions thereof jointly. The parties to this *lis*, though members of one family, have deep fissures in their relationship and which has led to multifarious litigations aforesaid. However, prohibiting use of open areas by some of the family members also results in prejudicing use of those family members, also of constructed portions admittedly in their possession and qua which no relief also is claimed in the suit. Such injunctions also fall in the prohibited category under Section 41 (f) & (g) of the Specific Relief Act, 1963. Moreover any decision on the question of title to the property is not to

be made in this suit for permanent injunction simplicitor and especially when the parties are already at *lis* in title proceedings.

12. What prevailed with the Courts below for granting part of the relief sought in the suit and denying the remaining relief claimed in the suit was, (i) that the title deeds proved showed the respondents/defendants No.1 to 4 also to be having title to the property, though the challenge by the appellant/plaintiff to the said title deeds was pending consideration in a separate proceeding between the parties; (ii) that on the basis of the title deeds which had not been annulled till then, the respondents/defendants No.1 to 4 also had title to the property; (iii) that the Supreme Court in ***Anathula Sudhakar Vs. P. Buchi Reddy*** (2008) 4 SCC 494 has held:

“If the property is a vacant site, which is not physically possessed, used or enjoyed, in such cases the principle is that possession follows title. If two persons claim to be in possession of a vacant site, one who is able to establish title thereto will be considered to be in possession, as against the person who is not able to establish title. This means that even though a suit relating to a vacant site is for a mere injunction and the issue is one of possession, it will be necessary to examine and determine the title as a prelude for deciding the de jure possession. In such a situation, where the title is clear and simple, the court may venture a decision on the issue of title, so as to decide the question of de jure possession even though the suit is for a mere injunction. But where the issue of title involves complicated or complex questions of fact and law, or where court feels that parties had not proceeded on the basis that title was at issue, the court should not decide the issue of title in a suit for injunction. The proper course is to relegate the plaintiff to the remedy of a full-fledged suit for declaration and consequential reliefs.”;

(iv) that in view of the said position in law, the appellant/plaintiff could not be granted any injunction in respect of open areas in the property, particularly when the parties were making rival claims with respect to the said open areas and a more comprehensive suit between the parties, where the title of the parties and entitlement of the respondents/defendants No.1 to 4 to the extent of 50% of the land and interpretation of “vacant land” was to be decided, was pending before the High Court; (v) that both parties were claiming possession and use of the said open areas of the property; (vi) that the witness of the respondents/defendants No.1 to 4 also had shown use by the respondents/defendants No.1 to 4 of the open lawn in front of the property as well as of the drive way; (vii) that it was not as if the open areas were accessible only to the appellant/plaintiff and not to the respondents/defendants No.1 to 4; (viii) that there was nothing to suggest exclusive possession of the appellant/plaintiff of the said open areas; (ix) that W.P.(C) No.9591/2007 filed by the appellant/plaintiff to restrain the respondent/defendant No.5 MCD from considering plan submitted by the respondents/defendants No.1 to 4 had been disposed of vide order dated 19th December, 2007 with a direction to the respondent/defendant No.5 MCD to consider the representation made by the appellant/plaintiff and grant hearing to the appellant/plaintiff before sanctioning any building plan; the appellant/plaintiff had thus already got the relief, as sought in the suit, in this respect; and, (x) that the respondents/defendants No.1 to 4, till the title deeds in their favour with respect to the property were annulled, were also owners of the property and as owners could not be enjoined, as sought.

13. The counsel for the respondents/defendants No.1 to 4 had contended that the Courts below have decided purely on the basis of *Anathula RSA 298/2015*

Sudhakar supra and has drawn attention to pages 515 to 518 of the paper book, being the sale deed in favour of the respondents/defendants No.1 to 4 and which is also with respect to 50% share in the land of the property.

14. Per contra, the counsel for the appellant/plaintiff has contended (a) that in none of the title deeds i.e. the sale deeds relied upon by the respondents/defendants No.1 to 4, are the front lawn, rear lawn and the open areas mentioned; (b) that similarly the documents filed by the respondents/defendants No.1 to 4 with the Income Tax Department also exclude the garage block and did not include any portion of the ground floor; (c) that the respondents/defendants No.1 to 4 in the cross-examination recorded on 15th April, 2011 could not say, as to when physical possession of the property was obtained; (d) that the respondents/defendants No.1 to 4 failed to prove possession or use of any portion of the ground floor; (e) that before the Income Tax Authorities also, the respondents/defendants No.1 to 4 claimed to be in possession of first floor and *barsati* floor only; (f) that the cross-examination of the respondents/defendants No.1 to 4 recorded on 4th December, 2010 also is evasive and shows deficiencies in the title claimed by the respondents/defendants No.1 to 4; and, (g) that the respondents/defendants No.1 to 4 are thus required to be restrained from making any additions, alterations or constructions in the portions of the property in their possession.

15. I have considered the respective contentions and am unable to find the contentions of the counsel for the appellant/plaintiff to be raising any substantial question of law, for this Regular Second Appeal to be entertained. The two Courts have returned findings of fact, of the

appellant/plaintiff having not established exclusive possession of the open areas of the ground floor with respect where to injunction has been declined and this Court, in Regular Second Appeal, cannot appropriate to itself the task of re-appreciation of evidence to determine, whether the factual finding by the First Appellate Court which is the last Courts of facts, is correct. It is not the case that the finding, of the appellant/plaintiff having failed to prove exclusive possession of the open spaces on the ground floor, is based on no evidence at all. In fact, the counsel for the appellant/plaintiff has before me not drawn attention to any evidence wherefrom it can be said that the finding of the First Appellate Court qua possession of the open areas is perverse. Else, the Courts below have given valid reasons in law for non-grant of the injunctions which have been declined. The Courts below are right in holding that till the title deeds in favour of the respondents/defendants No.1 to 4 are annulled in a separate suit in this respect filed by the appellant/plaintiff, the respondents/defendants No.1 to 4 are also owners and there cannot be an injunction against use of the property by owner thereof. Similarly, the reliance by the Courts below on *Anathula Sudhakar* supra is apposite and does not require any interference.

16. The counsel for the appellant/plaintiff at this stage cites *Narayana Gramani Vs. Mariammal* 2018 SCC OnLine SC 1427. The same concerned a suit for declaration of title and permanent injunction in relation to land. The suit was allowed, the First Appeal was dismissed; however, in Second Appeal, the judgment and decree of Suit Court and First Appellate Court was set aside and the suit dismissed. The said judgment, rather than helping the counsel for the appellant/plaintiff, is against the appellant/plaintiff on, what constitutes substantial question of law and procedure to be followed by

the High Court in a Second Appeal. Otherwise also, in that case, as distinct from present case, there was a finding of fact of the plaintiff being in possession of the land. As also distinct therefrom, instant suit is for injunction simplicitor. Moreover, the High Court in that case set aside judgment and decree of two Courts, on the ground of *res judicata*; Supreme Court held that without examining issue of ownership, the judgments and decrees of two courts could not be set aside. The said judgment, to this extent, has no application to instant *lis*.

17. It is thus felt that if at all any temporary arrangement is required to be made with respect to the use of front lawn, rear lawn, side open space and driveway, the application in that regard should be made in pending title proceedings which are alive and in which the Court is seized of the matter from day to day, and not by way of permanent injunction.

18. No merit is thus found in the appeal. It does not raise any substantial question of law.

Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

OCTOBER 01, 2018

‘pp/bs’..