

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

% **Date of decision: 14th August, 2018.**

+ **RSA 201/2017**

DALIP SINGH & ANR

..... Appellant

Through: Mr. Dilpreet Singh and Mr. Harpreet Singh, Advs. for Appellant No.1 along with appellant No.1 in person.
Mr. Nitish Negi, Adv. for Mr. Vikas Sharma, Adv. for Appellant No.2.

Versus

TULSI RAM (DECEASED) THROUGH LRS

.... Respondent

Through: Mr. Anil K. Batra and Mr. Praveen Kumar, Advs.

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 27th May, 2016 in CIS- RCA DJ -8785/2016 (CNR-DLST01-000894-2015) of the Court of District Judge-South] of dismissal of First Appeal under Section 96 of the CPC preferred by the two appellants against the judgment and decree [dated 21st January, 2015 in Suit No.621/2014 (UID No. 02401C0914682007) of the Court of Civil Judge-12 (Central)] allowing the suit filed by the respondent/plaintiff against the appellants/defendants.

2. The appeal came up before this Court first on 4th August, 2017 when, without indicating the substantial question of law if any arising in this Second Appeal, notice thereof was ordered to be issued and the operation of the impugned judgments and decrees stayed.

3. The counsel for the respondents has been appearing and the Suit Court record has been requisitioned.

4. Today, Mr. Nitish Negi, Advocate appears for appellant No.2 Sita Ram and states that he has been recently engaged and seeks adjournment.

5. Mr. Dilpreet Singh, Advocate for the appellant No.1 has been asked to argue. He has merely stated, that he had raised a question of limitation and cause of action before the First Appellate Court and which has not been dealt with by the First Appellate Court. However, on being asked as to what is the substantial question of law which arises, he seeks adjournment stating that he was under the impression that the new counsel will appear for both the appellants. However, in spite of being given an opportunity to seek discharge, he is not willing to seek discharge also on behalf of appellant No.1. It is quite obvious that dilatory tactics are being practiced to perpetuate the interim order obtained, by merely putting up a new advocate before this Court. Advocates cannot seek engagement, for the purpose of taking adjournment and once engaged, have to prepare the brief. The request for adjournment is thus denied.

6. While this order is being dictated, Mr. Dilpreet Singh, Advocate states that substantial questions of law have been proposed in the memorandum of appeal.

7. The counsel for the respondent/plaintiff states that no plea of limitation was taken in the written statement and no issue framed thereon and the argument today is a bogus one. Similarly, it is stated that cause of action pleaded in the plaint has been proved.

8. Since neither of the counsels for the appellants has chosen to argue, it

is deemed appropriate to consider whether any substantial question of law arises, by perusal of the suit record requisitioned and by hearing the counsel for the respondent plaintiff.

9. The respondent/plaintiff instituted the suit, from which this appeal arises, for recovery of possession of immovable property, for mandatory injunction and mesne profits, pleading: (i) that the respondent/plaintiff is the owner of plot No. 195, Savitri Nagar, Malviya Nagar, New Delhi which is open on two sides; (ii) that a portion ad measuring 15 ft. x 20 ft. of the said property, towards main road, Savitri Nagar, as shown in red in the site plan annexed to the plaint, had been encroached upon by the appellants/defendants by depositing iron scrap and waste, thereby obstructing the free passage of the respondent/plaintiff to the said portion of his property; (iii) that the appellants/defendants were/are working as mechanics with M/s Sharma Motor Works having its workshop in adjoining property No. 196-H; (iv) that in the month of November, 1996, the appellants/defendants started depositing iron scrap and other iron waste in the portion marked red, thereby obstructing the passage of the respondent/plaintiff to said portion of his property; (v) that the appellants/defendants failed to remove the scrap put by them on the property of the respondent/plaintiff in spite of requests; (vi) on 18th January, 1997, the respondent/plaintiff lodged a complaint with the SHO, PS Malviya Nagar in this regard but still no action was taken; (vii) on 16th March, 1997, the respondent/plaintiff himself removed the said scrap, but the police, in collusion with the appellants/ defendants, compelled the respondent/plaintiff to write that he will not remove the encroachment and the respondent/plaintiff was set free thereafter only; and, (viii) a complaint dated

15th January, 1998 to the Commissioner of Police was made in this regard and also followed by a writ petition.

10. The appellants/defendants contested the suit by filing separate written statements. It was the defence of the appellant/defendant No.1: (i) that the property No. 195 was open on one side only; (ii) that the appellant/defendant No.1 was the owner in peaceful possession of the property with respect to which the suit was filed, since 1981 and the respondent/ plaintiff had no locus to institute the suit; and, (iii) that on the contrary, it was the respondent/ plaintiff who attempted to trespass on the property of the appellant/defendant No.1 and of which police complaint was made.

11. That appellant/defendant No.2, in his written statement pleaded: (i) that the plot of the respondent/ plaintiff was situated on the back side of plot bearing No.196; and, (ii) that the appellant/defendant No.2 was in peaceful possession of the property in question since 1973 and the respondent/plaintiff had no locus to institute the suit.

12. In the aforesaid state of pleadings, the following issues were framed in the suit on 13th May, 2010:-

1. Whether the plaintiff is entitled to a decree of possession of portion shown in red in the site plan annexed with the suit which is part of the property bearing No. 195, Savitri Nagar, Malivya Nagar, New Delhi? OPP
2. Whether the plaintiff is entitled to a decree of mandatory injunction, as prayed for? OPP
3. Whether the plaintiff is entitled to mesne profits, if yes, at what rate? OPP
4. Relief.

13. The Suit Court allowed the suit of the respondent/plaintiff, finding/ observing/ holding: (i) that the respondent/plaintiff had proved electricity bill, phone bill, water bill and property tax receipts to prove his ownership of the property; (ii) that the appellant defendant No. 1 did not produce any document of ownership and merely claimed that his forefathers might have purchased property No. H-196; (iii) that the appellant/defendant No. 2, in his deposition, stated that the appellant/ defendant No.1 is the owner in peaceful possession of the property; (iv) that the appellant/defendant No. 2 did not disclose as to in what capacity he is in possession of the property; (v) that the appellant/ defendant No.2, in his cross-examination admitted that the respondent/plaintiff was the owner of property No. 195 and claimed to be a tenant in property No. H-196; (vi) that the respondent/plaintiff had also proved property tax assessment report which showed that the property of the respondent/plaintiff had an entrance on the rear side and which had been encroached by the appellants/defendants; (vii) that the counsel for the appellants/defendants did not cross-examine with respect to the said assessment report; (viii) that the respondent/plaintiff had also proved as Exhibit PW4/A the case filed by the appellant/defendant No.1 against the respondent/plaintiff where the appellant/defendant No.1 had claimed that he was carrying his business of repair of cars on the adjoining plot of the respondent/ plaintiff; (ix) it was the plea of the respondent/plaintiff in his written statement in the said suit that the appellant/defendant No.1 has encroached upon the land of the respondent/plaintiff; (x) that the appellant/defendant No.1 in his suit also had not disclosed the capacity in which he was in possession of the property with respect to which the suit was filed; (xi) that the appellant/defendant No.1 had thereafter given up the

suit filed against the respondent/ plaintiff and even not chosen to pursue the same; (xii) that from the testimony of the witness of the respondent/plaintiff it stood proved that the property as shown in red colour in the site plan which was encroached by the appellant/plaintiff was part of property No. H-195; (xiii) the report of the Commissioner appointed by the Suit Court also suggested that the red portion that is the suit property was part of plot No. 195; (xiv) that the respondent/ plaintiff, since beginning, had taken steps to protect his property; (xv) that the appellants/ defendants had not denied that they were working with Saligram and that after the demise of Saligram, they continued to carry on the said business; and, (xvi) that the witnesses examined by the appellants/ defendants also could not disclose any title of the appellants/ defendants to the subject property. Accordingly, a decree for recovery of possession, mesne profits and mandatory injunction was passed in favour of the respondent/plaintiff and against the appellants/ defendants.

14. The First Appellate Court dismissed the appeal preferred by the appellants/ defendants, reasoning: (a) that though the appellants/defendants had filed an application under Order XLI Rule 27 of the CPC to place on record some site plan which had been downloaded from the internet but there was no authenticity attached to such a site plan, on the basis of which fresh enquiry was required to be ordered; (b) there was thus no merit in the application under Order XLI Rule 27 CPC, which was dismissed; (c) that there was no dispute that the property No. 195 belonged to the respondent/ plaintiff; (d) that the argument of the counsel for the appellants/defendants was, that the red portion with respect to which the suit was filed, was not part of property No.195; (e) however it stood proved from evidence led in the suit, that is, the orders passed by the Regional Settlement Commissioner and

the Deputy Custodian General of Evacuee Properties that Har Lal, father of the respondent/ plaintiff was the owner of plot No.14 subsequently numbered as 195; (f) that though it was the argument of the counsel for the appellants/defendants that the red portion with respect to which the suit was filed was part of property No. H-196, but it also stood proved in evidence that plot No. H-196 which was at the rear of plot of the respondent/ plaintiff was owned by the brother of the respondent/ plaintiff; (g) that this fact was also corroborated from the records produced of the tax authorities; (h) that from the evidence it was clear that the portion which had been encroached, was part of property No. 195 which admittedly belonged to the respondent/ plaintiff; and, (i) that the Suit Court was thus justified in concluding that the respondent/ plaintiff was entitled to recover possession thereof.

15. It would thus be evident, that there are concurrent findings of fact of the Suit Court and the First Appellate Court.

16. The aforesaid also confirms that Mr. Nitish Negi, Advocate, who is today appearing for appellant No.2, has been put up by the appellant No.1 only. It was the stand of the appellants/defendants before the Suit Court that the appellant/ defendant No.2 has no right and it is only the appellant/defendant No. 1 who has a right. It is not understood why appellant/ defendant No. 1 if has a right, is awaiting the counsel for appellant/ defendant No. 2 or as to why the counsel for the appellant/ defendant No. 1 has to await the advocate for appellant/ defendant No. 2.

17. Though the counsel for the appellants/ defendants have not proposed any substantial questions of law but the following substantial questions of law have been proposed in the memorandum of appeal:

“1. Whether the inability of the defendant prove his defence would discharge the plaintiff to satisfy the onus of proof placed on him? Inasmuch as, the plaintiff himself has not let any evidence to prove that the portion marked red by him forms part of property no. 195 than Kenny be given benefit in case it is found that the defendants have not proved the said portion to be part of their own property, when the onus was on the plaintiff.

2. Whether the court can ignore the objection raised by the appellant with respect to the suit being beyond limitation and a wrong and fraudulent cause of action having been alleged in the suit, in spite of the fact that it finds mention in the judgment but the court has failed to deal with the same. With the record can ignore or fail to adjudicate upon the question of limitation or any other purely legal objection raised at any time.”

18. The obvious grammatical and drafting mistakes in the ‘substantial questions of law’ proposed in the Memorandum of Appeal are reflective of the casual manner, non-application of mind, with which the same are proposed.

19. I am even otherwise unable to see as to how the aforesaid two constitute substantial questions of law.

20. Supreme Court, in *Veerayee Ammal Vs. Seenii Ammal* (2002) 1 SCC 134 held that merely because on appreciation of evidence another view is also possible would not clothe the High Court to assume jurisdiction on issue of fact framed by the Trial Court by terming the question as substantial question of law. As far back as in *Sir Chunilal V. Mehta Vs. Century Spinning and Manufacturing Co. Ltd.* AIR 1962 SC 1314 reiterated in

Kashmir Singh Vs. Harnam Singh (2008) 12 SCC 796, it was held that the proper test for determining whether a question of law raised in a case is substantial, is whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is an open question in the sense it is not finally settled or is not far from difficulty or calls for discussion of alternative views; if the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles, it would not be a substantial question of law. It was further held that it is not within the domain of the High Court to investigate the grounds on which the findings were arrived at by the last Court of fact being the first Appellate Court. Mere appreciation of facts, documentary evidence was held to be not raising a question of law. Even in ***Santosh Hazari Vs. Purushottam Tiwari*** (2001) 3 SCC 179 it was held:

“To be “substantial” a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned.”

21. Mention may also be made of ***Hero Vinoth Vs. Sheshammal*** (2006) 5 SCC 545 holding as under:

“24. *The principles relating to Section 100 CPC, relevant for this case, may be summarised thus:-*

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a

principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to “decision based on no evidence”, it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.”

22. Supreme Court, in ***Damodar Lal Vs. Sohan Devi*** (2016) 3 SCC 78, referring to ***Kulwant Kaur Vs. Gurdial Singh Mann*** (2001) 4 SCC 262, ***Gurvachan Kaur Vs. Salikram*** (2010) 15 SCC 530 and ***S.R. Tewari Vs. Union of India*** (2013) 6 SCC 602 held, (a) that the First Appellate Court

under Section 96 CPC is the last Court of facts; (b) the High Court in Second Appeal under Section 100 CPC cannot interfere with findings of fact recorded by the First Appellate Court under Section 96 CPC; (c) the findings of fact of First Appellate Court can be challenged in Second Appeal on the ground that the said findings are based on no evidence or are perverse; (d) even if the finding of fact is wrong, that by itself will not constitute a question of law; the wrong finding should stem out of a complete misreading of evidence or it should be based only on conjunctures and surmises; (e) if to a reasonable man, the conclusion on the facts in evidence made by the Courts below is possible, there is no perversity; (f) inadequacy of evidence or a different reading of evidence is not perversity; (g) Code of Civil Procedure (Amendment) Act, 1976 introduced a definite restriction on the exercise of jurisdiction in a Second Appeal; (h) where it is found that findings stand vitiated on wrong test and on the basis of assumptions and conjunctures and resultantly there is an element of perversity involved therein, will the High Court be within its jurisdiction to deal with the issue; this is however only in the event such a fact is brought to light explicitly; (i) the findings of fact recorded by Court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material or if the finding is against the weight of evidence or if the finding so outrageously defies logic as to suffer from vice of irrationality; (j) however if there is some evidence on record which is acceptable and which could be relied upon, the conclusion would not be treated as perverse and the findings will not be interfered with.

itself shows that the appellants know that there is no merit therein and the appellants, after obtaining the order of stay of operation of the judgment and decree, are merely interested in perpetuating the same.

24. The aforesaid also confirms that the arguments of limitation and cause of action which alone have been urged, are nothing but a red herring, again to delay. No plea of limitation has been found in the written statement and no issue was got framed qua limitation. Limitation, in a suit for recovery of possession of immoveable property, is not a pure question of law which can be urged for first time in Second Appeal, without a foundation in the pleadings being laid. Even today, it is not argued that as per the averments in the plaint itself, the suit claim was barred by time. Limitation for a suit for recovery of possession of immovable property is governed by Articles 64 and 65 of the Schedule to the Limitation Act, 1963 and no facts which would show that the suit claim was barred by time have been pleaded in the written statement and an analysis of the plaint also does not show any admission of the plaintiff of the suit claim being barred by time.

25. The appeal does not disclose any substantial question of law and is dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

AUGUST 14, 2018
SR