

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

+ **RFA No. 113/2018**

% **5th February, 2018**

PHOOL SINGH Appellant

Through: Mr. D.S.Patial, Advocate.

versus

SULTAN Respondent

Through:

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No. 4433/2018(Exemption)

Exemption allowed subject to just exceptions.

CM stands disposed of.

CM No. 4434/2018(Delay in re-filing)

For the reasons stated in the application, delay in re-filing is
condoned.

CM stands disposed of.

RFA No. 113/2018 & CM No. 4432/2018 (stay)

1. This Regular First Appeal is filed under Section 96 of the
Code of Civil Procedure, 1908 (CPC) by the defendant in the suit

impugning the judgment of the trial court dated 30.3.2017 by which the trial court has decreed the suit for possession in favour of the respondent/plaintiff and against the appellant/defendant with respect to the suit property admeasuring 62 sq. yds situated in Khasra No.230, in the Revenue Estate of Village Shikar Pur, Delhi as shown in the site plan Ex.PW1/3.

2. The subject suit was filed by the respondent/plaintiff for possession and injunction against the appellant/defendant with respect to the suit property pleading that he was allotted the suit property by the Gaon Sabha inasmuch as respondent/plaintiff was a landless person. The land was allotted in consolidation proceedings in the year 1971-72. Appellant/defendant is pleaded to be a land grabber of the village and it was pleaded that he had forcibly grabbed 5-6 plots of the people of the village. Respondent/plaintiff had constructed 3 rooms in the suit property and was using the same as a dwelling house when on account of the heavy rains, one room was ruined and one room became in dilapidated condition. Due to paucity of funds, the respondent/plaintiff could not construct the boundary wall around the whole property except constructing the front wall. Out of the adjacent

plots some plots were of the appellant/defendant and the appellant/defendant had falsely started claiming rights in the suit plot of the respondent/plaintiff. Appellant/defendant tried to grab the suit property on 16.7.2010 and in which attempt he could not succeed. Respondent/plaintiff had even applied for demarcation to the Revenue Authorities but demarcation was not carried out on account of the influence of the appellant/defendant. Respondent/plaintiff thereafter filed a suit for mandatory and permanent injunction being suit no. 62/11 titled as **Sultan Vs. Phool Singh** and during pendency of which the appellant/defendant forcibly encroached on the suit property. Since in the earlier suit no relief for claim of possession was claimed therefore as per the legal advice respondent/plaintiff withdrew the suit as it had become *infructuous* and consequently thereafter the subject suit came to be filed on 2.12.2014 seeking the reliefs of possession and injunction.

3. Appellant/defendant contested the suit. It was pleaded that the present suit was liable to be dismissed on account of bar under Order II Rule 2 read with Order XXIII Rule 1 CPC as no permission was taken of the Court in which the earlier suit filed for injunction was

pending and withdrawn for filing of a fresh suit on the same cause of action. It was also pleaded that appellant/defendant has become the owner of the suit property by adverse possession. It was also pleaded in the written statement that no objection was ever raised by the respondent/plaintiff during the lifetime of the father of the appellant/defendant or subsequently with regard to occupation of the suit property. The suit was therefore prayed to be dismissed.

4. After pleadings were complete the trial court framed the following issues:-

- “(i) *Whether the suit is barred under Order II rule 2 CPC, in view of the preliminary objection no.1 of the written statement? OPD*
- (ii) *Whether the suit has not been filed within the period of limitation?OPD*
- (iii) *Whether the plaintiff is entitled to decree of possession, as prayed for in prayer(i)? OPP*
- (iv) *Whether the plaintiff is entitled to decree of permanent injunction, as prayed for in prayer (ii)?*
- (v) *Relief.”*

5. Parties led evidence and these aspects are recorded in paras 7 and 8 of the impugned judgment and which paras read as under:-

“7. The plaintiff in order to prove his case, led plaintiff evidence and got examined himself as PW-1, Sh. Maman as PW-2, Sh. Giri Raj Singh, Halka Patwari, Village Shikarpur, Tehsil Kapashera, South-West District, Delhi as PW-3, Sh. Naresh Kumar, JJA Record Room (Civil), Dwarka Courts, Delhi as PW-4 and Sh. Ranbir Singh, Field Kanoongo/Girdawar as PW-5.

PW-1 and PW-2 have filed their evidence by way of affidavits wherein they reiterated and reaffirmed the contents of the plaint. PW-1 and PW-2 were cross-examined by counsel for the defendant.

PW-1 in his testimony has relied upon the documents i.e Khatauni for the year 2002-03 Mark-A (also exhibited as Ex.PW-3/1 in the testimony of PW-3), Aks-Sizra Mark-B (also Ex.Pw1/3, photocopy of plaint of suit bearing no.62/11 Mark-C (colly.) (also exhibited as Ex.PW-4/1 (colly.) in the testimony of PW-4), Demarcation Report dated 26/04/2011 Ex.PW-1/5(colly.) (also exhibited as Ex.PW-5/1 in the testimony of PW-5), certified copy of the amended plaint of suit bearing no.62/11 Ex.PW1/6 (colly.) and certified copy of order dated 07/08/2014 passed in civil suit no.62/11 Ex.PW-1/7 (colly).

PW-3, who was summoned witness, brought the summoned record i.e. Khata Khatauni, Aks-Sizra and Khata Khatauni of Khasra no.230 Ex.PW3/1, Ex.PW-3/2 and Ex.PW-3/3 respectively.

PW-4, who was also summoned witness, brought the summoned record i.e. judicial file of suit bearing no.62/11 titled as Sultan Vs. Phool Singh & Ors.

PW-5, who was also summoned witness, brought the summoned record i.e. demarcation report of the suit property Ex.PW-5/1.

8. The defendant has led defendant evidence and got examined himself as DW-1 and Sh. Ranjeet as DW-2.

DW-1 and DW-2 have filed their evidence by way of affidavits wherein they reiterated and reaffirmed the contents of the written statement. DW-1 and DW-2 were cross-examined by counsel for the plaintiff.

DW-1 in his testimony has relied upon the document i.e., certified copy of written statement of suit bearing no.62/11 Ex.DW-1/1.

6. As regards adverse possession, trial court has rightly observed that adverse possession must be proved *nec vi, nec clam, and nec precario* i.e. open/peaceful, hostile and continuous. Trial court has held that except self-serving statements no documentary evidence at all has been filed by the appellant/defendant to prove adverse possession. Trial court has relied upon judgments of the Supreme Court as also this Court that adverse possession commences in a wrong and is maintained against a right and that courts do not easily accept pleas of adverse possession. Relying on the ratios of the judgments of the Supreme Court as also this Court, with the fact that appellant/defendant had failed to prove adverse possession by leading

documentary evidence, accordingly issues with respect to ownership of the suit property of the respondent/plaintiff and the appellant/defendant not being in adverse possession, being subject matter of issue nos.(ii) and (iii), have been decided in favour of the respondent/plaintiff. Since discussion of the trial court in the impugned judgment on these issues is in detail, I need not add any further reason and it will be suffice to reproduce the relevant discussion contained in issue no. (iii) as under:-

ISSUE NO.(iii):-Whether the plaintiff is entitled to decree of possession, as prayed for in prayer (i)?

The onus of proving this issue was on the plaintiff. The defendant is claiming himself to be the owner of the suit property on the basis of adverse possession. On the other hand, the plaintiff is claiming himself to be the owner of the suit property/whole property on the basis of documents Ex.PW-3/1, Ex.PW-3/2 and Ex.PW-3/3. Before proceeding further, it is relevant to discuss the law relating to adverse possession.

It was held by Hon'ble Supreme Court of India in case titled as ***Karnataka Board of Wakf v. Government of India and others {(2004) 10 Supreme Court Cases 779}*** that,

“...Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show:(a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading

adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession....”

It was also held by the Hon’ble High Court of Delhi in case titled as ***Chattar Singh Matharoo V. Ashwani Mudgil & Ors. {CS(OS) No. 576/2006 decided on 16/09/2015}*** that,

“13. At this stage, let us note the law with respect to a person becoming the owner by adverse possession and law of prescription. This law is well settled and which is that a person who claims ownership by adverse possession, must lead evidence before the Court so as to show nec vi, nec clam, nec precario ie possession which is open/peaceful, hostile and continuous of the suit property for 12 years as against the true owner. It may also be stated that courts frown upon the claim of adverse possession, and which is required to be proved strictly, in as much as, the claim of adverse possession commences in a wrong act and continues against a right ie the action of adverse possession commences in a wrongful act of taking possession of the property of another person and such wrongful possession is maintained against a right being the ownership right of the owner of the property.....

15. The requirement of law is that not only possession has to be proved to be hostile by specifically claiming ownership rights of the suit property but also that the possession has to be shown to be continuous without any break for a continuous period of 12 years. Unless the aforesaid aspects exist simultaneously, courts will not accept the claim of ownership by adverse possession and law of prescription, and which claim as stated above is not easily accepted by courts.”

It was also held by the Hon’ble High Court of Delhi in case titled as ***Daulat Ram & Anr. V. Keshav Smarak Samithi & Anr. (RFA No. 170/2009) decided on 20/10/2011*** that,

“..... I may further add that if a person claims possession on the basis of ownership and which is claimed by the appellants/defendants in these proceedings, then such person will have to first allege as to who was the owner of the property and against whom adverse possession is claimed for a period of around 50 years. This assertion of a particular owner is necessary because the claim of title of such an owner can be established from a judgment in a litigation

which may have arisen between the said owner and any other person. In this case, the owner was plaintiff No.2 and “any other person” was the DDA. In the case pleaded by the appellants/defendants in the trial Court there is conspicuous silence of any assertion as to who was actually the owner of the property and against whom adverse possession was claimed. I may only add that though there was an assertion of ownership, in addition to the owner by adverse possession, but admittedly no document was filed at all to establish the so called alleged ownership of the appellants/defendants. Obviously, by a simple assertion of ownership, no one can become an owner of a property.”

In the present suit, the plaintiff has prayed for the possession of the suit property in the capacity of owner of the suit property. The plaintiff is claiming himself to be owner of the suit property on the basis of Ex.PW-3/1 to Ex.PW-3/3.

On the one hand, the defendant is claiming himself to be the owner of the suit property on the basis of adverse possession. On the other hand, defendant/dW-1 in his cross-examination had deposed that suit property was allotted to his father. DW-2 in his cross-examination has also deposed that suit property was allotted to Sh. Hari Singh i.e father of the defendant. Defendant/DW-1 in his cross-examination has deposed that in the revenue record, the owner of the suit property is Sh. Sultan Singh. The defendant has taken the contradictory stand in the written statement and his cross-examination. No explanation has been adduced on record by the defendant for the same.

It is the contention of the defendant that he was in possession of the suit property since the time of his father and in view of the same, he became the owner of the suit property by virtue of adverse possession. No evidence has been led by the defendant as to how and when he or his father came into possession of the suit property. The defendant has also failed to prove as to what was the nature of his possession of his father. The defendant has also failed to prove that his possession was opened and undisturbed. The written statement of the defendant is silent as to who was the owner of the suit property and against whom adverse possession is claimed. Defendant in his cross-examination has deposed that he is in possession of the suit property for the last 40-45 years. No

documentary evidence has been proved on record by the defendant for the same.

PW-3, PW-4 and PW-5 have not been cross-examined by the defendant despite opportunity. Hence, their testimonies have gone un-rebutted, un-challenged and un-controverted.

The defendant has failed to prove the necessary requirements of adverse possession, as prescribed in *Karnataka Board of Wakf Chattar Singh Matharoo and Daulat Ram cases (supra)*.

The plaintiff has been successful to prove his case, duly corroborated by his testimony as well as testimony of other plaintiff's witnesses and documentary evidence. There are some minor contradictions in the evidence by way of affidavit and cross-examination of PW-1, however, same are not fatal to the case of the plaintiff. The defendant has failed to disprove the case of the plaintiff. In view of the aforesaid discussion, this Court is held that plaintiff is entitled for the possession of the suit property in his favour and against the defendant. The plaintiff has been successful to discharge the onus on this issue.

Accordingly, this issue is decided in favour of the plaintiff and against the defendant.” (underlining added)

7. In my opinion, therefore the judgment of the trial court does not call for interference whereby it is held that appellant/defendant has failed to prove his claim of adverse possession.

8(i). Learned counsel for the appellant/defendant then argued that the trial court has committed an error in deciding issue no. 1 and the trial court should have held that the present suit was barred under

Order II Rule 2 CPC as the relief of possession claimed in the present suit was available to the respondent/plaintiff when the earlier suit was filed in the year 2011 and which suit was thereafter withdrawn without seeking permission to file a fresh suit.

(ii). I cannot agree with this argument urged on behalf of the appellant/defendant because entitlement to take possession by an owner against an encroacher/trespasser is a continuous cause of action and arises for a period of 12 years from the date on which adverse possession is pleaded and proved by the encroacher with the ingredients of *nec vi, nec clam, nec precario*. Entitlement to possession or *mesne* profits is with respect to every day of illegal possession and therefore every day of illegal possession confers a fresh cause of action on the owner to seek possession and *mesne* profits from a person in illegal possession till the expiry of 12 years of adverse possession to be proved. The bar under Order II Rule 2 CPC only applies if on the same cause of action another suit is filed but once the cause of action itself is different and continuous of arising on account of every day of illegal encroachment/tress pass there does not arise the issue of applicability of bar of Order II Rule 2 CPC,

accordingly, even the bar under Order XXXIII Rule 1 CPC would not apply. This argument of the appellant/defendant is also therefore rejected.

8. It is therefore seen that the appellant/defendant is a land grabber. Such type of persons must necessarily be discouraged. Person such as the appellant/defendant who set up pleas of adverse possession and seek to grab valuable properties of the others, more so of the people who are very poor such as the respondent/plaintiff in the present case, must be proceeded against very strictly by the courts. Accordingly, this appeal is dismissed with costs of Rs.1,00,000/- against the appellant/defendant. I may note that the trial court has only granted costs being the court fees in the suit and therefore in the facts of the present case, the appellant/defendant has to be appropriately castigated by imposing costs of Rs. 1,00,000/- in favour of the respondent/plaintiff. Costs shall be paid within a period of six weeks.

FEBRUARY 05, 2018
ib/Ak

VALMIKI J. MEHTA, J