

(2018) 05 DEL CK 0003
In the Delhi High Court
Case No : RFA No. 345 of 2018

LAXMI NARAYAN SONI

APPELLANT

Vs

SUDHA GUPTA & ORS

RESPONDENT

Date of Decision : 01-05-2018

Acts Referred:

Code of Civil Procedure, 1908 — Section 96, Order 9 Rule 8, Order 9 Rule 9
Limitation Act, 1963 — Section 27 , Article 65, 2(1)

Citation : (2018) 05 DEL CK 0003

Hon'ble Judges : VALMIKI J.MEHTA

Bench : Single Bench

Advocate : Amarjit Singh, R.K. Sharma, Dezy Gaur

Final Decision : Dismissed

Judgement

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,,,,

VALMIKI J. MEHTA, J",

Caveat No. 358/2018,,,

1.Counsel for the caveator enters appearance.,,,,

Caveat stands discharged.,,,,

CM No. 16333/2018 (Exemption),,,,

2.Exemption allowed subject to just exceptions.,,,,

CM stands disposed of.,,,,

CM No. 16334/2018 (delay in re-filing),,,,

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

CM stands disposed of.,,,,

RFA No. 345/2018 & CM No. 16332/2018 (stay),,,,

4.This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the judgment of",,,,

the trial court dated 23.12.2017 by which the trial court has dismissed the suit for possession, damages and injunction filed by the appellant/plaintiff",,,,

against the respondents/defendants. Respondent nos. 1 and 2/defendant nos. 1 and 2 are the contesting defendants and respondent no.3/defendant.,,,,

no.3 is the Municipal Corporation of Delhi. The suit property is a plot of land admeasuring 200 sq. yards bearing private number A-27, West Vinod",,,,

Nagar, Narwana Road, Delhi-110092 forming part of Khasra No. 822 admeasuring 3 bighas and 12 biswas situated in Village Mandawali, Fazalpur",,,,

Delhi. Out of the original 3 bighas and 12 biswas of land, the original owner Sh. Prem Singh, son of Sh. Shiv Charan, had constructed a house on 1",,,,

bigha and 16 biswas, and the other part of the land was acquired by the Government.",,,,

5.The facts as appellant/plaintiff purchased the suit property from one Sh. Sanjay Kohli by a registered Sale Deed dated 23.12.1998. It was pleaded.,,,,

that Sh. Sanjay Kohli had purchased the suit property by a registered Sale Deed dated 21.4.1993 from the original owner Sh. Prem Singh. It was.,,,,

pleaded in the plaint that respondent nos. 1 and 2/defendant nos. 1 and 2 had no right, title and interest in the suit property and they had illegally",,,,

occupied the same. A legal notice dated 12.7.2000 was served upon the respondent nos. 1 and 2/defendant nos. 1 and 2 which was neither replied to.,,,,

nor complied with. Appellant/plaintiff had earlier filed a suit for possession and recovery of damages with respect to the same property and against the.,,,,

same respondent nos. 1 and 2/defendant nos. 1 and 2 on 29.9.2000 but the said suit was dismissed in default on 26.8.2003 and even an application filed.,,,,

for restoration of the suit was dismissed. It was further pleaded in the plaint that in March 2009 respondent nos. 1 and 2/defendant nos. 1 and 2.,,,,

started illegal and unauthorized construction on the suit property, and on no action being taken by the respondent no.3/defendant no.3/MCD, the",,,,

subject suit was filed seeking possession, mesne profits and injunction.",,,,

6.Respondent nos. 1 and 2/defendant nos. 1 and 2 contested the suit by filing written statement. Respondent nos. 1 and 2/defendant nos. 1 and 2,,,,

pleaded that they had no concern with the suit property which is a part of Khasra No. 822 whereas the respondent nos. 1 and 2/defendant nos. 1 and,,,,

2 are owners of land admeasuring 280 sq. yards forming part of Khasra No. 824 and which bears Property No. C-23, Old No. 23, West Vinod Nagar,",,,

Delhi. Respondent nos. 1 and 2/defendant nos. 1 and 2 claimed that they had purchased their property bearing no. C-23 from Sh. Kartar Singh on,,,,

24.9.1985. Respondent nos. 1 and 2/defendant nos. 1 and 2 also referred to the earlier suit filed by the appellant/plaintiff which was dismissed in,,,,

default and not restored. Suit was accordingly prayed for being dismissed.,,,,

7.After pleadings were completed trial court framed the following issues:-,,,,

â??1.Whether the suit of the plaintiff is bad on account of non-joinder and mis-joinder of necessary parties? OPD,,,,

2.Whether the plaintiff has no right, title or interest in the suit property and as such the plaintiff has no locus standi to file the present suit against the",,,,

defendants? OPD,,,,

3.Whether the suit of the plaintiff has not been properly framed by not giving the number of adjoining properties and proper description of the,,,,

properties and if so, to what effect? OPD",,,,

4.Whether the plaintiff has no cause of action to file the present suit in view of the dismissal of the previous suit on the same cause of action?,,,,

OPD,,,,

5.Whether the plaintiff is entitled to relief of possession? OPP,,,,

6.Whether the plaintiff is entitled to damages, if so, at what rate and for what period? OPP",,,,

7.Whether the plaintiff is entitled to discretionary relief of injunction? OPP,,,,

8.Relief.â??,,,,

8.Appellant/plaintiff stepped into the witness box as PW-1. Respondent no.1/defendant no.1 examined herself as DW-1 and legal heir of the,,,,

respondent no.2/defendant no.2 Sh. Rajiv Gupta (respondent no. 2(a)) deposed

as DW-2.,,,,

9. With respect to issue no.4 of the appellant/plaintiff not having a cause of action to file the present suit on account of dismissal of the previous suit,",,,

the trial court has held that dismissal of the previous suit did not bar filing of a fresh suit as for each day of illegal dispossession a fresh cause of action,,,,

arises for claiming possession, but the period of dispossession if exceeds 12 years, then by virtue of Article 65 of the Limitation Act, 1963 read with",,,,

Section 27 of the Limitation Act the title of the property would stand extinguished. Therefore, it was held that whereas dismissal of the earlier suit in",,,,

default did not bar filing of a fresh suit for possession because the fresh suit for possession is based on a cause of action which arises everyday on,,,,

account of illegal possession of respondent nos. 1 and 2/defendant nos. 1 and 2, but since in the present case the illegal dispossession was more than",,,,

12 years prior to filing of the subject suit on 13.7.2009, the subject suit was held to be barred and lacking cause of action in view of Article 65 of the",,,,

Limitation Act read with Section 27 thereof. The period of dispossession of the appellant/plaintiff was held to be more than 12 years because in para,,,,

4 of the plaint the appellant/plaintiff had clearly pleaded that the respondent nos. 1 and 2/defendant nos. 1 and 2 on 24.11.1996 had criminally,,,,

trespassed into the suit property and unauthorizedly occupied the same without the consent and permission of the owner of the suit property whereas,,,,

the suit was filed on 13.7.2009 after 12 years from 24.11.1996. The relevant observations of the trial court, and which I accept and adopt as being",,,,

correct, read as under:-",,,,

â??8.6 Before proceeding further, it is pertinent to mention that the previous suit was dismissed in default on 26.08.2003 under Order IX Rule 8 of",,,,

CPC as on that day defendant No.1 was present in person with counsel, but none had appeared on behalf of the plaintiff.",,,,

8.7 Thus, the issue which arises for consideration is whether the instant suit is barred under Order IX Rule 9 CPC. Order IX Rule 9 CPC precludes",,,,

the plaintiff from bringing a fresh suit in respect of the same cause of action. Order IX Rule 9 CPC reads as under:-,,,,

â??9. Decree against plaintiff by default bars fresh suit.-(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded",,,,

from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court",,,,,

that there was sufficient cause for his nonappearance when the suit was called on for hearing, the Court shall make an order setting aside the",,,,,

dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.",,,,,

(2)No order shall be made under this rule unless notice of the application has been served on the opposite party."",,,,,

8.8 The operation of this rule is confined to case where the second suit is brought for the same subject matter and on the same cause of action. In,,,,

Khalil Khan Vs. Mahbub Ali AIR 1949 PC 78 it was observed that as to identity of cause of action, one workable test, though not conclusive, is",,,,,

whether the same evidence would support the claim in both the suits. If the reply is in affirmative, a fresh suit will be barred. If it is the negative, a",,,,,

fresh suit will lie.,,,,,

8.9.Keeping in mind the said basic principle the court would discuss each ground taken by plaintiff in written submissions (as reproduced above);,,,,

a)..... ,,,,,

b)The second ground as stated in para (b) reproduced above is that the plaintiff is owner of the suit property and defendant No.1 and 2 are in,,,,

unauthorized and illegal possession of the same, hence, the cause of action is recurring.",,,,,

Though plaintiff filed judgments in support of the said ground, with due respect, it is submitted that the said judgments are not applicable to the issue in",,,,,

hand. His contentions do find strength from judgment titled as Mahesh Chand Vs. Sumesh Kumar Chaturvedi dated 18.11.2014 in CM (M) No.,,,,,

455/2014 of Honâ??ble Delhi High Court, wherein while dealing with scope of Order IX Rule 9 CPC in a suit filed by owner against alleged",,,,,

trespasser, Honâ??ble High Court observed as under:-",,,,,

â??5.Actually the trial court has wrongly referred to the provision of Order IX Rule 8 CPC because it is the provision of Order IX Rule 9 CPC which,,,,

bars the filing of a fresh suit, however even this provision of Order IX Rule 9 CPC does not apply because a fresh suit is barred only on the same",,,,,

cause of action and not on a different cause of action. In a suit for possession on the basis of title the owner/plaintiff has a continuous and a fresh,,,,

cause of action every moment/second/day till 12 years from when the defendant claims adverse possession, and only on the expiry of 12 years (vide",,,,,

Article 65 of the Limitation Act, 1963), the right/title of the plaintiff will stand extinguished in terms of Section 27 of the Limitation Act. Even the",,,,,

period of 12 years only commences if defendant sets up a plea of adverse possession and till the plea of adverse possession is set up the period of 12",,,,,

years does not even begin for a suit for possession to be filed by the owner with respect to the property owned by him. Once entitlement to claim",,,,,

possession on the basis of title is at least 12 years and definitely till the period of adverse possession claimed by the defendant expires, it cannot be",,,,,

said that the subject suit for possession is filed on the basis of same cause of action of the earlier suit for possession filed by the mother of the",,,,,

defendant because each second of illegal possession by a defendant gives rise to a fresh cause of action for filing of a suit for possession of course till",,,,,

after the expiry of a period of 12 years as per Article 65 of the Limitation Act read with Section 27 of the said Act. Every day of trespass gives right",,,,,

to file a fresh suit every day i.e every day of illegal trespass gives a fresh cause of action. To complete the discussion, it also needs to be noted that a",,,,,

dismissal in default for nonprosecution does not amount to res judicata vide Sheodan Singh Vs. Smt. Daryao Kunwar, AIR 1966 SC 1332.â??",,,,,

Thus, as per the said judgment every day of trespasser gives right to file a fresh suit every day i.e. every day of illegal trespass gives a fresh cause of",,,,,

action, of course till after expiry of a period of 12 years as per Article 65 of the Limitation Act read with Section 27 of the said Act. The said",,,,,

judgment supports the arguments of plaintiff that the cause of action is recurring, but, it is recurring subject to law of limitation i.e. Article 65 &"",,,,,

Section 27 of Limitation Act.",,,,,

At this stage the court would like to reproduce second part of Para 4 of the plaint as under:-",,,,,

â??However, the defendant Nos. 1 and 2 on 24.11.1996 criminally trespassed and unauthorizedly occupied the same without the consent or",,,,,

permission of the owner of the said property. Shri Dhoom Singh one of the Attorneys of Shri Sanjay Kohli filed a complaint with the police and with",,,,,

the SDM Concerned of the area, in respect of the illegal act done by defendant Nos. 1 and 2.â??",,,,,

The plaintiff's own case is that defendant No.1 and 2 criminally trespassed and unauthorizedly occupied the suit property on 24.11.1996 without,,,,

the consent or permission of owner Sh. Sanjay Kohli (or attorney Dhoom Singh) from whom the plaintiff purchased property on 23.12.1998.,,,,

As per Article 65 of Limitation Act, suit for possession can be filed within 12 years from the date when the possession of defendant becomes adverse",,,,

to the plaintiff. In case of criminal trespass, the starting point for limitation would be the day on which the trespass took place. In the present case the",,,,

said period of 12 years as per the plaint itself, commenced from 24.11.1996, thus the limitation to file suit for possession expired on 23.11.2008",,,,

whereas the present suit has been filed on 13.07.2009. Therefore, as per plaint itself the suit is time barred and by virtue of Section 27 of the",,,,

Site Plan,North,East,South,West

Ex. PW1/1,60,12,6,-,48

Ex.PW1/1A,83,9,87,55

Now coming to the municipal number of the property. The onus to prove the municipal number of the property is upon the plaintiff as it is he who has,,,,

approached the court for relief of possession of a particular property bearing No. A-27.,,,,

9.7.The plaintiff, in order to prove the number of the suit property, relied upon title documents of property Mark A to H and Ex.PW1/10 to",,,,

Ex.PW1/15. In the documents Mark A to Mark H there is no mention of the number of property. It is interesting to note that in document Mark F,,,,

and Mark G i.e. GPA and Agreement dated 06.07.1984 executed by R.C. Kohli in favour of Trilok Singh, the address of Trilok Singh is mentioned as",,,,

A-43/2, West Vinod Nagar, Delhi, which means that numbers were already allotted in A block West Vinod Nagar at least up to number 43/2",,,,

but the same documents do not bear property number as A-27, West Vinod Nagar. The reason for the same remains unexplained. The number of",,,,

the property for the first time finds mention in document Ex.PW1/11 to 1/15 dated 30.10.1996 without any mention of the fact that as to how and,,,,

when municipal number was assigned to the property.,,,,

It is again interesting to note that the property number for the first time finds mention in title documents dated 30.10.1996 and in less than a month, it is",,,,

alleged that defendant no. 1 and defendant no. 2 criminally trespassed into the

suit property on 24.11.1996, but no suit was filed for recovery of" ,,,,

possession, rather, the property was sold to plaintiff in December 1998. Thus, the title documents filed by plaintiff are of no value to prove that the" ,,,,

number of the suit property is A-27. ,,,,

9.8 The plaintiff in his cross examination was questioned about possession of property and he testified "the person from whom I had purchased the" ,,,,

suit property was in possession of the suit property. It is wrong to suggest that neither I nor my predecessor in interest was having any physical" ,,,,

possession of the suit property". The said testimony is contrary to the contents of plaint as in the plaint and affidavit, the plaintiff stated that" ,,,,

defendant No. 1 and defendant No. 2 trespassed into suit property in 1996 whereas he purchased the property in 1998. ,,,,

9.9. Thus not only the plaintiff failed to prove the number of the property, but he also failed to explain as to why he purchased a property which was" ,,,,

occupied by trespassers and why the said fact was not recorded in the title documents. ,,,,

9.10. The best way to prove the number of a property is by summoning the record with respect to the number of the houses in a society from the" ,,,,

concerned authority or in case of a private colonized society from such colonizer or RWA/Panchayat, if the colonizer is not available." ,,,,

9.11. The plaintiff made no such efforts to summon relevant record of municipal number of suit property from any of the concerned persons/bodies and" ,,,,

he himself also failed to produce relevant documents to prove the municipal number of suit property. ,,,,

9.12. Now coming to the argument of the plaintiff on issue No. 2, the plaintiff has argued that he has proved that he is the owner of property number" ,,,,

A-27 by producing the relevant title deeds. However, it has been observed earlier these title deeds do not prove that the property with respect to" ,,,,

which the suit has been filed bears municipal number A-27. It is one thing to prove that a person is owner of a particular property and it is another to" ,,,,

prove that the suit has been filed with respect to the said property only. In the present case the defendants have not challenged the ownership of the" ,,,,

plaintiff qua property number A-27, as in paragraph No. 2 on page 5 of the written statement defendants No. 1 & 2 have categorically stated that they" ,,,,

have no concern with property bearing number A-27. ,,,,

9.13.As per the defendants the property with respect to which the suit has been filed is situated in Khasra No. 824 and bears municipal number C-23," ,,,,

whereas according to plaintiff the suit property is situated in Khasra No. 822 and bears municipal number A-27. The plaintiff could have easily proved,,,

that the suit property falls in Khasra No. 824 and not in Khasra No. 822, by getting the property demarcated and by proving demarcation report before" ,,,,

the court, but no such steps were taken by the plaintiff. The plaintiff instead of standing on his own feet, is trying to rely upon the testimony of the" ,,,,

defendants to prove that the suit property falls in Khasra no. 822 and that it bears municipal number A-27. However, even from the testimony of the" ,,,,

defendants, the plaintiff is unable to extract an admission that he suit property falls in Khasra no. 822 and that it bears municipal number A-27." ,,,,

Though, DW-1 Sudha Gupta, in her cross examination, admitted that the adjoining property bears municipal number A-24, but she clarified that it was" ,,,,

block A and now it is block C. She also testified that property bearing number A-27 is located in front of the gali opposite to her property and that the,,,

same is constructed upto 3-4 stories. The said witness also relied upon several documents like water bills, ration card, voter ID cards etc in order to" ,,,,

prove that defendants No. 1 & 2 are in possession of property number C-23 and not in possession of property number A-27.â??, ,,,,

13.(i) I completely agree with the aforesaid findings because if the appellant/plaintiff claimed the suit property to be numbered A-27 falling in Khasra,,,

No. 822 and not C-23 falling in Khasra No. 824 as contended by respondent nos. 1 and 2/defendant nos. 1 and 2 then it was very simple and easy for,,,

the appellant/plaintiff to get the property demarcated from the revenue authorities, but this the appellant/plaintiff failed to do. Equally, it is important to" ,,,,

note that the number of the property of the appellant/plaintiff as A-27 is shown only for the first time in the title documents of the appellant/plaintiff but,,,

in prior documents of alleged ownership of the suit property there is no mention of the property by its number as A-27 and the trial court has in this,,,

regard also rightly observed that in fact in an earlier title document/sale deed the property number of the property of which the appellant/plaintiff,,,

claims ownership is shown a totally different number of A-43/2, West Vinod Nagar, Delhi." ,,,,

(ii) Also, in my opinion, trial court has rightly relied upon the vast differences in

the measurements of two site plans filed by the appellant/plaintiff and",,,, as detailed in paras 9.3 and 9.4 of the impugned judgment which have been reproduced above.,,,,

14. In view of the above, there is no merit in the appeal. The appeal as also the interim application is dismissed, leaving the parties to bear their own",,,, costs.,,,,