

(1993) 08 DEL CK 0011

In the Delhi High Court

Case No : Regular Second Appeal No. 89 of 1989

Liaq Mohammad

APPELLANT

Vs

Delhi Development Authority and Others

RESPONDENT

Date of Decision : 05-08-1993

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 46
Limitation Act, 1963 — Article 142

Citation : (1993) RLR 557

Hon'ble Judges : P.K. Bahri, J

Bench : Single Bench

Advocate : R. Sethi and E.X. Joseph, for the Appellant;

Judgement

P.K. Bahri, J.

(1) This Regular Second Appeal is directed against the judgment and decree of Additional District Judge dated May 5, 1989 by which he had dismissed the appeal of the appellant and has affirmed the judgment and decree dated February 2, 1983 of Sub Judge by which suit of the plaintiff seeking possession of the property in question was dismissed.

(2) Undisputed facts of the case are that the land underneath the super structure bearing municipal No 7766-7771/XIV, Kasab Pura, Sadar Bazar, Delhi measuring approximately 50 sq. yards. was ancestral property of Ch. Harphool Singh, predecessor in interest of the appellant and Hari Singh. A partition decree dated 10.5.56 in Suit No. 255 of 1955 was passed and this particular property fell to the share of Hari Singh. Hari Singh had vide Sale Deed dated 4.12.73 transferred this property in favor of the appellant.

(3) Prior to the partition of this property, the owners had let out the open plot in question to one Sh. Habib Ahmed vide Rent Deed dated 28.2.45. Habib Ahmed had, on partition of the country in 1947, migrated to Pakistan. The Custodian, under the Administration of Evacuee of Property Act, had declared the whole of

the said property i.e. plot as well as the super structure constructed by Habib Ahmed over the said plot as evacuee property.

(4) The tenancy of Habib Ahmed was stated to have been terminated by the predecessor in interest of the appellant. A suit for eviction was instituted on 27.5.50 in which an order of eviction and decree for Rs. 210.00 as mesne profits was passed. The Custodian was also joined as one of the defendants in that suit as one issue was whether the property in dispute is an evacuee property.

(5) On 22.6.54, Assistant Custodian (Judicial) had declared that the plot was owned by non-evacuees, predecessor in interest of the appellant, and he declared the same as non- evacuee property. The civil suit for eviction was decreed on 31.3.55 with the finding that as the plot had been declared to be non- evacuee property, so the Civil Court has jurisdiction to try the suit. However, the said decree was not executed within the period of limitation.

(6) The appellant, after purchasing this property from Hari Singh, instituted the present suit for possession on 18.3.75. He had impleaded Chairman D.D.A, Mcd and Secretary, Govt of India as defendants. Surprisingly, the Custodian was not joined as one of the defendants in this suit.

(7) The Mcd contested the suit pleading that the aforesaid property had been transferred to the Corporation on 1.1.69 by Ministry of Rehabilitation and that the suit is barred by limitation and was also not maintainable for want of notice u/ Ss. 477 and 478 of the Mun Corp. Act. The title of the appellant was also disputed.

(8) The D.D.A.. also pleaded that the suit was barred for want of notice u/S. 35-B of Delhi Dev. Act. Plea was also taken that suit was not properly valued for the purposes of court fees and jurisdiction. The title of the appellant was also disputed.

(9) Uoi also took the plea that the appellant has no cause of action to bring the suit and Uoi is neither a necessary nor a proper party to the suit. One of the pleas raised was that Suit was barred for want of permission under Slum Areas Act. [In para 10 to 17, issues framed in the case, decision of trial Court and appellate Court is noted by which suit was dismissed.].

(10) Only two questions have been agitated before me. One of the questions is whether the suit is barred by limitation and the second question is whether the civil courts had any jurisdiction to try this suit and whether the previous judgment operated as res-judicata on the point of jurisdiction of civil court to try the matter.

(11) It is significant to mention that in the W/S no plea had been taken by any of the defendants that they or anyone of them had become owner of the property in question by adverse possession. The suit of the plaintiff was based on title. There are a number of judgments which hold that when a suit is brought on the basis of title, the limitation does not start running against the owner of the property till

the defendants in the suit set up any adverse possession viz a viz the owner,

(12) In *Delhi Cloth & General Mills vs. Ganga Charan*, 1979 Raj LR 401, T.P.S. Chawla, J, as his Lordship then was, in a very lucid analytical judgment, had referred to the conflict of law apparently prevailing in judgments of different High Courts with regard to the point of limitation as was envisaged in Articles 142 and 144 of the Limitation Act. It was held that ownership is the largest right or bundle of rights relating to immovable property known to law. It includes right of possession and usually two go together and inhere in the same person and the only defense to a suit by an owner for recovery of possession of immovable property is adverse possession. Further elaborating, the learned Judge has held that there are three conceivable classes of suits for possession of immovable property, (i) a suit based on previous possession filed within six months of dispossession ; (ii) a suit based on previous possession filed after six months from the date of dispossession ; and (iii) a suit based on title.

(13) Referring to the provisions of Specific Relief Act, it was observed that if a suit is brought within six months of dispossession, the question of title becomes immaterial and the suit has to be decreed if dispossession is even by the real owner within six months. In case falling in the second category, if suit is brought on the basis of previous possession, which is commonly known as possessory title, the suit has to be brought within 12 years of such dispossession and without even proving the actual title of the property, the suit can be decreed for possession against a third person if possessory title is established and while referring to third kind of suit, it was held that the suit for possession on the basis of title can be brought at any time and limitation does not commence to run against the title holder till the adverse possession is established in accordance with law against the said title holder. So, it was held that suit on the basis of possessory title would be governed by Article 142 of the old Act and if the suit is based on title, only Article 144 would apply.

(14) The Supreme Court in *Gaya Parshad Dikshit Vs. Dr. Nirmal Chander and Another*, held that u/Art. 65, in a suit for possession by the owner, the question of limitation does not arise till the plea of adverse possession is established. It was also held that mere fact that on termination of a license, the licensee continues in possession does not lead to any inference that the licensee has set up any hostile title or adverse possession.

(15) So, it is evident that on passing of the decree for eviction against the tenant, which became inexecutable on account of execution being not filed within limitation, does not by itself lead to any inference that the possession of the respondents in the property in question had become adverse to the appellant. It is also settled principle of law that a plea of adverse possession must be taken in the w/s and then only Court could give any finding whether the title had passed to the person in possession of the property by adverse possession.

(16) In the present case, no such plea at all has been raised by the defendants,

so question of defendants becoming owner of the property in question by adverse possession did not arise. The suit of the plaintiff could not be considered to be barred by limitation as the suit is based on title. So, the Adj was not right legally in dismissing the suit on the ground that the suit was barred by limitation.

(17) The undisputed facts also show that the tenancy rights created in favor of Habib Ahmed vested in the Custodian by virtue of Adm. of Evacuee Property Act. Learned counsel for the appellant has vehemently argued that the judgment given by Sh. N.R. Sharma, Sub Judge, copy of which is Ex. P-9, operates as res judicata between the parties on the issue whether Civil Court had jurisdiction to try the suit. He has argued that if a particular issue regarding jurisdiction had been raised and had been decided even erroneously, the same operates as res-judicata. There is no dispute about the principle of law that once a plea has been raised on point of jurisdiction and has been decided one way or the other and the decision is not challenged by filing any appeal and is allowed to become final, the same would operate as res judicata in the subsequent proceedings,

(18) In Avtar Singh and Others Vs. Jagjit Singh and Another, , a civil suit was brought but the Civil Court held on merits that it had no jurisdiction to try the suit and directed the return of the plaint for presentation to the proper Revenue Court. That decision of the Sub Judge was not challenged and it became final. On plaint being presented to the Revenue Court, the Revenue Court, however, came to the conclusion that Revenue Court had no jurisdiction to try the matter. The plaintiff instituted another suit on the same subject matter in the Court of Sub Judge. Plea was taken that the previous decision of the Sub Judge holding that civil Court had no jurisdiction to try the suit operated as res-judicata. The Supreme Court held that such a decision which has become final operates as res-judicata even on the question of jurisdiction.

(19) However, in the present case, the judgment, of which Ex. P-9 is the copy, has not at all given any finding with regard to the tenancy rights having become evacuee. The finding has only been given that the plot in question was non-evacuee property and suit for eviction for getting vacated the plot is not barred by Evacuee Property Act. So, there is no finding on the issue whether the evacuee tenancy rights were amenable to the jurisdiction of the civil Court. As no such finding has been given, hence this judgment would not operate as resjudicata, rather the judgment is per incuriam inasmuch as the judgment had ignored provisions of Evacuee Property Act which make it abundantly clear that no civil Court would have jurisdiction in respect of the evacuee property. It cannot be disputed that the tenancy rights are covered by the term property and tenancy rights having been vested in the property in question by virtue of the provisions of Evacuee Property Act could not be the subject matter of decision by the civil Court. A judgment which is given ignoring the statutory provisions is held to be per in curium and not binding (see A.R. Antulay Vs. R.S. Nayak and Another,).

(20) In view of the above discussion, I hold that civil Court had no jurisdiction to

try the previous suit as well as the present suit and thus, the suit was not maintainable. I, hence, dismiss the appeal but in view of the peculiar facts, I leave the parties to bear their own costs throughout.