

(2011) 03 DEL CK 0056

In the Delhi High Court

Case No : Regular Second Appeal No. 46 of 2003

Sh. Surinder chopra and Others

APPELLANT

Vs

Prem Wati (Since Deceased through L.Rs.) and Others

RESPONDENT

Date of Decision : 16-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 1, Order 2 Rule 2, Order 39 Rule 1,
Order 39 Rule 2, Order 41 Rule 20
Limitation Act, 1963 — Article 65

Citation : (2012) 1 CivCC 323 : (2011) 179 DLT 1 : (2011) 123 DRJ 98

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Sanjeev Behl and Eklavya Behl, No. 1 and Anisha Gupta, Nos. 2 and 3, for the Appellant; Abhik Kumar and Siddharth Shankar Ray, for the Respondent

Final Decision : Allowed

Judgement

Indermeet Kaur, J.—This appeal has impugned the judgment and decree dated 16.04.2002 which had reversed the finding of the trial judge dated 15.10.1985. Vide judgment and decree dated 15.10.1985, the suit of the plaintiff Smt. Prem Wati seeking possession, mandatory injunction and damages of the suit property had been dismissed. The impugned judgment had reversed this finding. The suit of the plaintiff stood decreed.

2. plaintiff claimed herself to be the owner of plot No. 43-C and 44-C measuring about 200sq. yards in Janta Garden Colony, Village Gharonda, Patpar Ganj, Delhi. She was a resident of Punjab. On 19.06.1974, she came to Delhi and found a room constructed in the gali between her two aforementioned plots. She objected; on intervention of the respectable members of the locality, the matter was referred to the Tehsildar, Delhi. The Filed Kanoongo gave a demarcation report of the plots on 14.07.1974. This report was in favour of the plaintiff. Meanwhile, Defendant No. 1 started raising illegal construction in said plot. Suit No. 406/74 was filed by the plaintiff seeking permanent injunction against the

Defendant from raising any further construction. Contention of the Defendant was that he was the owner of plot No. 63-C comprised in khasra No. 53/8 and 56/3 measuring about 550 sq. yards. Suit was dismissed on the ground that it is not maintainable. This was vide judgment dated 16.09.1974. Present suit was accordingly filed. Before filing this suit, a legal notice dated 21.10.74 was served upon the Defendants claiming damages for their illegal use and occupation.

3. In the written statement, the preliminary objection taken was that the suit had not been valued correctly for the purposes of court fee and jurisdiction; plaintiff was not the owner of the said property; suit property belongs to Smt. Nirmal Nand, Smt. Surinder Chopra, Varsha Chopra and Shakuntala Chopra; description of the property had not been properly given. On merits, it was stated that the Defendant had purchased this plot i.e. Plot No. 63-C, Janta Garden Colony in the year 1956; he had sold it to Defendant No. 2. Defendant Nos. 3 to 5 had obtained their title from Defendant No. 2. Report of the Field Kanoongo dated 14.07.1974 was disputed. It was contended that the Defendants were in possession of the suit property in their own right.

4. Issues were framed. On the basis of the oral and documentary evidence led before the trial court, suit of the plaintiff was dismissed. It was held that the suit was barred by limitation; it was filed 12 years after the date when the cause of action accrued in favour of the plaintiff. Defendant was in possession of the suit land since 1956; suit filed in 1974 was beyond the requisite period of limitation of 12 years. This issue was decided against the plaintiff. Issue No. 3 was also decided against the plaintiff. This was on the ownership of the suit land. Issue No. 4 was also relevant. It was held that the plaintiff is not entitled to the relief of possession. The demarcation report Es. PW 5/1 dated 14.07.1974 was rejected; earlier demarcation report dated 13.10.1973 Ex. DX was relied upon by the trial judge to hold that the Defendant was in occupation of the suit land in his own right. Testimony of the Filed Kanoongo Amrik Lal examined as PW -6 was discussed. Issue No. 5 was also decided against the plaintiff. It was held that suit No. 406/74 which was the earlier suit filed by the plaintiff was a suit simplicitor for permanent injunction; claim for possession had not been included; she was well-aware on that date (i.e. when she had filed the first suit) that Defendants were in possession of the suit plot but she had intentionally relinquished her claim for the said relief. She could not claim it now in this second suit. This issue was also decided against the plaintiff. Suit of the plaintiff was accordingly dismissed.

5. In appeal, the findings on issue Nos. 2,3 and 4 had been reversed. It was held that the suit was within limitation, plaintiff was the owner of the suit property; he was entitled to the relief of possession; there was no bar of Order 2 Rule 2 of the Code. Suit was decreed. This judgment is now impugned before this Court.

6. This is a second appeal. It had been admitted and on 21.02.2011, the following substantial questions of law were formulated. They inter alia reads as follows:

1. Whether the finding in the impugned judgment dated 16.04.2002 are perverse? If so, its effect?

2. Whether non-impleading of Smt. Varsha Chopra (Defendant No. 4 before the trial judge) before the first appellate court had defeated the right of the plaintiffs/ Respondents? If so, its effect?

7. On behalf of the Appellant, it has been urged that the appeal is liable to be dismissed on substantial question No. 2 as in the first appeal, Smt. Varsha Chopra (who was Defendant No. 4 before the trial judge) has not been impleaded before the first appellate court; the appeal is liable to be dismissed on this ground alone. For this proposition, reliance has been placed upon judgments reported in Ch. Surat Singh (Dead) and Others Vs. Manohar Lal and Others, . 1978 RLR 249 Invest Importers v. Watkin Mayor Co. as also on Sudha Rani and Another Vs. Post Master General and Others, . It is submitted that non-joinder of a necessary part is a sufficient ground for the dismissal of the appeal. On merits, it is pointed out that the reversal of the findings on issue Nos. 2, 3, 4 and 5 are uncalled for; the impugned judgment is also not reasoned or speaking. Findings returned on all these counts are illegal. It is pointed out that the suit filed by the plaintiff in the year 1974, in view of the provisions of Article 65 of the First Schedule of the Limitation Act, 1963, was time barred. The impugned judgment had not appreciated the fact that the first report of the Kanoongo Ex. DX was prior in time; for the purposes of demarcation, the land owned by the Defendants had been taken as the pacca point. This report was in favour of the Defendant and no interference was called for in this count either. The impugned judgment had also wrongly noted that the provisions of Section 11 which contain the doctrine of res Judicata and the provisions of Order 2 Rule 2 of the CPC are similar and for the applicability of either, the first suit should have been decided on merits. Attention has been drawn to para 41 of the impugned judgment wherein it has been noted that for the applicability of Order 2 Rule 2 of the Code, the earlier suit should have been decided on merits. It is submitted that this is an incorrect and an illegal finding.

8. Arguments have been countered. It is submitted that the fact findings arrived at in the impugned judgment do not, in any manner, call for any interference; the impugned judgment had re-appreciated the oral and documentary evidence to arrive at the finding in the impugned judgment. It had rightly been held that Ex. PW 5/1 which was the report dated 14.07.1974 of the Kanoongo was an authentic report. The suit was within limitation. Bar of Order 2 Rule 2 of the Code was not applicable.

9. This is a second appeal court. Interference with findings of fact is not permitted unless the fact findings are perverse. No such perversity had been pointed out. The impugned judgment has, in fact, re-appreciated the entire evidence-both oral and documentary- to arrive at the conclusion that the suit of the plaintiff is liable to be decreed. It had examined the report of the Kanoongo Ex. PW 5/1 dated 14.07.1974 as also the prior report dated 30.10.1973 Ex. DX,

both of which had been scrutinized. The record has been produced by PW 5 who was a summoned witness; it was in the testimony of PW 6, the Kanoongo Amril Lal, that these reports had been adverted to.

The impugned judgment, in this context, had returned the following finding:

20. There is no dispute that the suit property is situated in Block-C at Janta Garden Colony, village Gharonda. The fact that plot No. 43 C and 44 C are in khasra No. 58/4 and 57/8 and plot No. 63-C is situated in khasra No. 53/8 and 56/3 is also not in dispute.

21. According to the Appellant/plaintiff, she came to Delhi on 19.06.1974 and found a room constructed in the Gali between her plot No. 43C and 44C. She filed a suit for injunction in the Court of Sub-Judge 1st Class, Delhi being suit No. 406/74 and the court held that this suit was not maintainable, so the present suit was filed.

22. Her case is that on 14.07.74, she got the suit property demarcated under the order of Tehsildar/Delhi through Filed Kanungo PW 5 vide his report Ex. PW 5/1, which is accompanied by the plan prepared by the officials and another site plan of the Janta Garden Colony, Block-C is proved by PW 7 as Ex PW 7/2 which he received from Shri. Mehta Kishan Lal, the erstwhile owner of the suit property along with Exchange Deed executed between the Appellant/plaintiff and said Shri. Mehta Kishan Lal.

23. The Respondents/Defendants are relying upon the report Ex. DX regarding identification of plot No. 63 C which is admitted by PW 6 Shri. Amrik Field Kanungo, to be correct, in the cross -examination.

24. The Respondents/Defendants case is that the Respondent No. 1/Defendant No. 1 purchased the plot No. 63 C in 1956, from Mehta Kishan Lal and subsequently, sold it to Respondent No. 2/Defendant No. 2 in 1962 who in-turn subsequently, sold the portions of plot to Respondents No. 3 to 5/Defendant's No. 3 to 5.

25. I have perused the report Ex.PW 5/1 accompanied by the plan prepared by the revenue department and also report Ex. D-x relied by the Respondents/Defendants. In the report Ex. D-x, it is mentioned that plot No. 63-C, is situated in Khasra No. 53/8 and 56/3 and a house is already constructed on it. This report is Ex. D-x is dt. 30.10.73. The question arises when the house was already constructed than what was need for Respondent No. 1/Defendant No. 1 to get the suit land demarcated and identified, particularly, when as per the case of the Respondents/Defendants, she had already sold the suit land to Respondent No. 2/Defendant No. 2 who had subsequently, sold it to Respondent's No. 3 to 5/Defendant's No. 3 to 5. Further demarcation and identification of the land is required before the commencement of construction on the land to identify the land correctly and not after the construction of the house on it. The report Ex. D-x, therefore, appears to have been procured by Respondent No. 1/Defendant No.

1 for some ulterior motive.

26. The Appellant/plaintiff has relied upon Ex. PW5/1 which shows that the Field Kanungo PW6 in his report has stated that Respondent No. 1/Defendant No. 1 has constructed the house on plot No. 44-C. This report also shows that Respondent No. 1/Defendant No. 1 was also present at the spot at the time of demarcation and identification of the suit land on the request of the Appellant/plaintiff and had alleged that he had constructed the house after identification of the land pertaining to his plot No. 63-C. The report Ex. D-x shows that the house was already constructed in the suit land as on the date of the report Ex. D-x i.e. 10.10.73. As per Ex. PW 5/1, the Respondent No. 1/Defendant No. 1 has informed the Field Kanungo that he had constructed the house after identification of the land. Thus, report Ex. D-x cannot be the same report which has been obtained by the Respondent No. 1/Defendant No. 1 before construction of house as the mention and existence of house is also shown in the report Ex. D-x. No earlier report of demarcation and identification of plot No. 63-C in Janta Garden Colony in question is produced on behalf of the Respondents/Defendants. Thus, the necessary inference arises that the report Ex. D-x is procured one at the instance of the Respondent No. 1/Defendant No. 1. If Respondent No. 1/Defendant No. 1 had already sold the suit property, there was no need for him to obtain report Ex. D-x after selling the same. This leads to grave-doubt in the defence of the Respondents/Defendants that the suit property is 63-C, Janta Garden Colony. The demarcation/identification of plot No. 43-C & 44-C vide Ex. PW5/1 was done in presence of the Appellant/plaintiff and deceased Respondent No. 1/Defendant No. 1. The report Ex. PW5/1 shows that in the process of demarcation and identification of plot No. 43-C & 44-C belonging to the Appellant/plaintiff, it was found that deceased Respondent No. 1/Defendant No. 1 Shri Bodh Raj Chopra had constructed the house on plot No. 44-C and there was also already a house constructed on plot No. 43-C along with boundary wall. Thus, the disputed premises is plot No. 43-C & 44-C belonging to the Appellant/plaintiff and not plot No. 63-C as alleged by the Respondent/Defendants. The Respondents /Defendants have trespassed into the suit property taking advantage of the fact the Appellant/plaintiff was residing in Punjab i.e. far away from the suit property.

27. During the pendency of the suit before Trial Court Respondent No. 1/Defendant No. 1 died and the application of Respondent No. 2 to 5/Defendant No. 2 to 5 the suit has abated as legal representative of deceased Respondent No. 1/Defendant No. 1 were not brought on record was dismissed by the Trial Court vide order dt. 17.2.1981.

28. Now I come to the question of limitation. According to the Respondents/Defendants, the Respondent No. 1/Defendant No. 1 purchased the suit property from Mehta Kishan Lal by registered sale deed Ex. P-x2 in 1956, which was subsequently, sold by Respondent No. 1/Defendant No. 1 to Respondent No. 2/Defendant No. 2, who subsequently, sold the same to Respondent No. 3 to 5/

Defendant No. 3 to 5, so the present suit filed by the Appellant/plaintiff in 1974 is barred by time.

29. The arguments on behalf of the Appellant/plaintiff are that the Appellant/plaintiff is resident of Punjab and for the first time came to know about the construction being made by on her plots by the Respondents/Defendants in 1974, so she filed suit for injunction in 1974, and application for interim injunction was dismissed by the then Sub-Judge First Class, Delhi in suit No. 406/74. According to the Appellant/plaintiff, the Respondents/Defendants for the first time denied the title of the Appellant/plaintiff in the year 1974, when she visited the suit property after she came from Punjab, so the suit is filed within time.

30. In the written arguments filed by the Appellant authorities are mentioned in para No. 5, out of which AIR 1977 SC 1337 and AIR 1977 S.C. 996 are not to produced.

31. In *Madhab Chandra Barua and Ors. v. Smt. Joytati Kalitani Barua* AIR 1976 Gau 10, Gauhati High Court was confronted with the case where one co-owners. It was held that though the other co-owner was in possession of his own behalf and on behalf of all other co-owners. It was held that though the other co-owners do not have actual possession, they do have constructive possession of the property. Therefore, a co-owner to acquire title by adverse possession should have been in open and hostile possession to the knowledge and exclusion or ouster of other CO-owners.

32. In the present case, the parties are not co-owners of the suit property, they are claiming title of the suit property on the basis of different documents. It is not a case where adverse possession is claimed by one Co-owner against the other co-owners. Thus, *Madhab Chandra's* case (supra) is not applicable to the present case. Similarly, *Hazari Mull Jain Vs. Md. Nazir and Others*, deals with the case of claim of adverse possession of one co-heir as against another and so is not applicable to the present case.

33. In *Premendu Bhusan Mondal Vs. Sripati Ranjan Chakravarty*, the Division Bench of Calcutta High Court was seized-off the case in which the person in unauthorised possession admitted title of true owner and Hon'ble High Court of Calcutta held that his possession was not adverse quo the owner. It was also held that a squatter or trespasser, who does not set up a claim of right cannot plead adverse possession and no length of mere squatting possession is a good defence in a suit for possession by the true owner. Calcutta High Court relied upon the authorities *Surajnath Ahir and Others Vs. Prithinath Singh and Others*, and AIR 1957 Trav-Co. 14.

34. In the present case, the facts are distinguishable as the Respondents/Defendants are not admitting the title of the Appellant/plaintiff as was done by the Respondents/Defendants in *Premendu Bhusan Mondal's* case (supra). The Respondents/Defendants in the present case, have asserted that number of suit

property 63-C which initially belonged to Respondent No. 1/Defendant No. 1 who sold it to Respondent No. 2/Defendant No. 2, who in-turn sold it to Respondents No. 3 to 5/Defendants No. 3 to 5. Thus, Respondents/Defendants are not claiming adverse possession of the suit property, but have asserted their possession on the basis of their own title and have denied that the suit property is on plot No. 43-C & 44-C belonging to the Appellant/plaintiff. Thus, there is no question of adverse possession of Respondents/Defendants qua the Appellant/plaintiff. The Appellant came from Punjab to Delhi and found a room was constructed in Gali between plot 43-C & 44-C which led her to file a suit for injunction before Civil Court. The plea of the Respondents/Defendants that suit property is 63-C and not 43-C & 44-C is already discarded, in view of the aforesaid discussion on this point. Thus, the possession of the Respondents/Defendants to the disputed property quo the Appellant/plaintiff became adverse only w.e.f. 1974 when she came from Punjab to Delhi and found a room constructed in Gali between plot No. 43-C & 44-C and tried to prevent further construction on the suit property by filing a suit for injunction before the Civil Court bearing suit No. 406/74. Thus, the period of limitation would commence in the year 1974 when the demarcation/identification of the suit property through revenue officials by the Appellant/plaintiff vide Ex.PW5/1 was got done and the Respondents/Defendants started further construction in 1974 and to stop the same the Appellant/plaintiff to file the suit for injunction. It is only in 1974 when Respondents/Defendants asserted their title and claimed possession against the Appellant/plaintiff, the period of limitation as per Article 65 of the Limitation Act is to be reckoned. The suit under present appeal being filed in 1974 is, therefore, not barred by time. Thus, the findings of Ld. Trial Court with regard to issue No. 2 are liable to be reversed. In addition the findings of Ld. Trial Court regarding the fact that the suit property belongs to the Respondents/Defendants, is also liable to be reversed.

35. The next question which arises is whether the Appellant/plaintiff is owner of the suit property. Both parties have relied upon the documents which show that they are claiming suit property from erstwhile owner Mehta Kishan Lal who was owner of plot No. 43-C & 44-C & 63-C. I do not agree with the finding of Ld. Trial Court that title of the immovable property can only be acquired by way of sale deed. The title of immovable property can also be acquired by a person by way of gift deed, Exchange deed, will and any other valid mode of transfer in addition to by way of sale deed.

36. In the present case, the registered exchange deed Ex.PW7/1 shows that the Appellant/plaintiff exchanged her three plots No. 284-B, 285-B & 286-B in lieu of suit property from erstwhile owner Mehta Kishan Lal on 10.12.1957. There is no evidence on record that anybody else is owner of plot No. 43-C & 44-C. There is no document of title on record to show that some other person is owner of Plot No. 43-C & 44-C. It is already held by me that suit property is no plot No. 63-C claimed to be owned by the Respondents/Defendants, but is consisted of plot No. 43-c & 44-C. Thus, the Appellant/plaintiff is owner of the suit property and

finding on issue No. 3 of the Ld. Trial Court is also liable to be set aside and reversed.

37. The next controversy between the parties is regarding applicability of Order 2 Rule 2 CPC in the suit in question. This controversy was decided in favour of the Respondents/Defendants by the Trial Court by way of finding on issue No. 5.

38. The burden to prove issue No. 5 was upon the Respondents/Defendants. No evidence is produced by the Respondent/Defendants in support of their plea that the suit in question is barred u/o Rule 2 CPC. It was the duty of the Respondents/Defendants to file and prove the pleadings of the earlier suit No. 406/74 to enable to ascertain whether the cause of action in both the suits is same, but they have failed to produce and prove the same.

39. One of the essential requirements of Order 2 Rule 2 CPC is that the parties in both the suits should be same. The identity of parties in both the suits is essential to attract Order 2 Rule 2 CPC. The only record of the earlier suit No. 406/74, present on the file of the Trial Court is the certified copy of the Order dt. 16.9.74, which was filed by the Appellant/plaintiff on 22.10.1981 before Ld. Trial Court. The same shows that in the earlier suit No. 406/74 only deceased Respondent No. 1/ Defendant No. 1 was made party by the Appellant/plaintiff, alleging that Respondent No. 1/Defendant No. 1 was made party by the Appellant/plaintiff, alleging that Respondent No. 1/Defendant No. 1 was raising constructions in the suit property. The plea of the Respondents/Defendants is that the Respondent No. 1/Defendant No. 1 had already sold plot No. 63 C to Respondent No. 2/Defendant No. 2 who sold the same to Respondents No. 3 to 5/ Defendant No. 3 to 5, also before filing of the suit No. 406/74, and the Respondents Nos. 3 to 5/Defendants No. 3 to 5 had raised further constructions in the suit property. Thus, since in the earlier suit Respondent No. 2 to 5/ Defendants No. 2 to 5 were not party like in the present suit, Order 2 Rule 2 CPC does not apply to the present suit on account of non-identical of parties in both the suits.

40. The Order dated 16.9.74 of suit No. 406/74 in the application u/s 39 Rule 1 & 2 CPC shows that in the written statement Respondent No. 1/Defendant No. 1 has taken the plea that the present Respondent Nos. 2 to 5/Defendant Nos. 2 to 5 were owner of the suit property by giving its description as plot No. 63-C. Another plea of Respondent No. 1/Defendant No. 1 was that Respondent No. 3/ Defendant No. 3 Shri. Surinder Chopra had repaired the room and roof of the room in the suit property. Thus, it appears that the Appellant/plaintiff came to know about the fact that the Respondents No. 2 to 5/Defendants No. 2 to 5 were now in possession of the suit property and since application Under Order 39 Rule 1 & 2 CPC was dismissed vide order dated 16.9.74 by the then Sub-Judge First Class, Delhi holding that the Appellant/plaintiff being not in possession, the suit for injunction was not maintainable as she has not claimed the relief of possession, so the present suit is filed by the Appellant/plaintiff impleading all the necessary parties in possession of the suit property.

41. Like the applicability of res-judicata u/s 11 CPC Rule 2 of Order 2 CPC also requires that the earlier suit should have been decided on merits. As per Rule 1 of Order 2 CPC suit should be so framed as to afford ground for final decision upon the subject in dispute and to prevent further litigation, concerning them. Thus, emphasis in these Order 2 Rule 1 CPC is upon final decision on the subject in dispute. It is contended on behalf of the Appellant/plaintiff that in the earlier suit, neither issues were framed nor evidence was lead and the suit was dismissed being not maintainable on technical ground. But the order of the court in the earlier suit regarding dismissal of the suit is not on record.

However, Judgment of the Trial Court in para No. 17 of page No. 11, while deciding issue No. 5, shows that it was contented on behalf of the Respondents/ Defendants that the Ld. Sub. Judge First Class, Delhi dismissed the earlier suit of the Appellant/plaintiff being not maintainable, she being out of possession on the date of filing of plaint i.e. 23.07.1974. It was also submitted that the Appellant/plaintiff withdrew that suit without seeking permission from Court to file the fresh suit on the same cause of action. Of the face of it, the above two contentions raised before the Trial Court are contradictory. If the suit was dismissed being not maintainable as the Appellant/plaintiff was not in possession of the suit property at the time of filing of the earlier suit, whereas is question of withdrawal of the earlier suit by the Appellant/plaintiff after it was dismissed being not maintainable.

42. In any case, there is no dispute that earlier suit was not decided on merits, after framing of issues and recording of evidence. The decision of the earlier suit being not on merit, the subsequent suit is not barred U/O 2 Rule 2 CPC.

This view is supported by the authorities Kiran Chandra Pramanik Vs. Purna Chandra Pramanik and Others, and Brahma Kumari v. Sarwan Singh 1982 RLR 486.

43. Ld. Counsel for the Appellant/plaintiff has relied upon four authorities, out of which authority Sidramappa Vs. Rajashetty and Others, is applicable that too only with regard to the relief of mandatory injunction claimed in the present suit as the same was perhaps available to the Appellant/plaintiff at the time of filing of earlier suit for injunction.

44. The cases of Abnashi Singh and Ors. v. Smt. Lajwant Kaur and Anr. AIR 1977 P&H 1 Baidyanath Dutta and Others Vs. Radheshyam Dutta and Others, relied on behalf of the Appellant / plaintiff are distinguishable on facts and so are not applicable. Another authority The State of Madhya Pradesh Vs. The State of Maharashtra and Others, relied on behalf of the Appellant/plaintiff also support her case, as the Appellant/plaintiff came to know about the fact that she should have file suit for possession after Order dated 16.9.74 of Sh. M.A. Khan, Sub-Judge 1st Class, Delhi vide which the application Under Order 39 Rule 1 & 2 CPC was dismissed by Sub-Judge 1st Class, Delhi in the earlier suit and she also came to know about the occupation of the suit property by the Respondents No.

2 to 5/Defendant No. 2 to 5 and passing of the title from the Respondent No. 1/Defendant No. 1 to them in the earlier suit.

45. In view of the above discussion, the suit decided by Judgment/decreed dt. 15.10.1985 by the Trial Court i.e. subsequent suit is not barred Under Order 2 Rule 2 CPC and the finding on issue No. 5 also needs to be set aside. 46. In view of the above discussion, the findings of the Ld. Trial Court on issue No. 2,3,4 & 5 are required to be reversed.

There is no perversity in these findings. Order 2 Rule 2 of the Code is, in fact, based on the principle that the Defendant should not be vexed twice for one and the same cause. Thus provision is analogous to the provisions u/s 11 of the Code. Res Judicata refers to both the parties and precludes the plaintiff as well as the Defendants; while Order 2 Rule 2 of the Code refers only to the plaintiff. The doctrine of res judicata is different from the rule laid down in Order 2 Rule 2 of the Code only to the extent that the former refers to the plaintiff's duty to bring forward all the grounds of attack in support of his claim while the latter only requires the plaintiff to claim all reliefs flowing from the same cause of action.

10. No interference is called for on the question of limitation either. The impugned judgment had rightly noted that the plaintiff had come to know about the Defendants' unauthorized occupation only in 1970-71. The suit filed in 1974 was well within limitation. Article 65 of the First Schedule of the Limitation Act had rightly been adverted to. The demarcation report Ex. PW 5/1 had been accepted after a detailed scrutiny of both the documents i.e. PW 5/1 and DX; Ex. DX had been held to be procured.

11. A second appeal court is not entitled to examine fact findings unless the same are perverse; what is perversity has not been detailed but the catena of judgments have held that perversity is a finding which is based on no evidence or a misreading of evidence or it is distorted from right and deviated from what is correct and proper. This is not so in the instant case.

12. Substantial question No. 1 is answered accordingly.

13. This Court shall now advert to the substantial question No. 2. Present suit had been filed by the plaintiff against five Defendants. Smt. Varsha Chopra was Defendant No. 4. She was admittedly not arrayed as a Defendant before the first appellate court. The non-joining of Varsha Chopra had not been agitated before the first appellate court. This has been raised for first time before the second appeal court. Nevertheless, this question being a purely legal question, it can be entertained in a second appeal.

14. The trial judge vide judgment dated 15.10.1985 had dismissed the suit of the plaintiff. The suit was a suit for possession, mandatory injunction and damages. The perusal of the record shows that the relief claimed by the plaintiff was a joint relief against all the Defendants. plaintiff had prayed for a decree of possession as also damages; Defendants had illegally occupied this plot of land. The written

statement filed by the Defendant was also a joint written statement by all the Defendants. After the oral and documentary evidence led by the respective parties, the suit of the plaintiff was dismissed. This was a joint decree against all the Defendants. This was a denial against all the five Defendants. 15. In appeal before the first appellate court, Defendant No. 2, Varsha Chopra, had not been arrayed as a Respondent. This is an admitted fact. There is no explanation whatsoever for not having impleaded Varsha Chopra. In the judgment of Surat Singh (*supra*) where in the first appeal, the Appellant had failed to show any good ground for not impleading the son of the plaintiff after the death of the plaintiff, he being a necessary party, the appeal was dismissed on this ground alone. In *Invest Importers v. Watkin Mayor Co.* also, the Division Bench of this Court had held that under Order 41 Rule 4, 20 and 33, if a necessary party is not impleaded in the appeal and the decree against the said person has become final, the appeal filed by one of the Defendants is not competent.

16. The present suit filed by the plaintiff had resulted in a joint decree of dismissal against five Defendants. Relief was also claimed against Defendant No. 4 i.e. Varsha Chopra. She was admittedly not arrayed as a Respondent in the appeal filed by the plaintiff. She was a necessary party. The impugned judgment had reversed the finding of the trial judge and had decreed the suit against Varsha Chopra as well which has affected her valuable right; she was admittedly not heard; dismissal of the suit on 15.10.1985 was a dismissal against all the Defendants; impugned judgment reversing this decree which was a joint and several decree against all the Defendants wherein admittedly one of the said Defendants had not been impleaded was an illegality. Varsha Chopra was a necessary party. The impugned judgment had decreed the suit of the plaintiff thereby ordering Varsha to be evicted from the suit property without giving her an opportunity of being heard. This has resulted in two inconsistent and contrary decrees.

17. Learned Counsel for the Respondent has also placed reliance upon *Invest Importers* (*supra*) i.e. the same judgment which has been relied upon by learned Counsel for the Appellant. This judgment supports the stand of the Appellant. In no manner can it be said that Varsha Chopra was not a necessary party in the first appellate court. This statement has even otherwise not been expanded any further by the learned Counsel for the Respondent.

In this case of *Invest Importers* (*supra*), the Division Bench of this Court held as follows:

the test for determining whether a person is a necessary party in appeal or not or whether the appeal can proceed without his presence and whether in the event of the appeal being allowed as against the remaining Respondent or Respondents there would or would not be inconsistent decrees in the same litigation in respect of the same subject matter. The principle has always been accepted that if the appeal succeeds which will lead to incongruous position of inconsistent decrees on account of a particular person not being made a party in

the appeal, even though he was a party to the suit, the entire appeal must fail.

18. Applying the ratio of the aforementioned test, it is clear that the appeal having succeeded has led to an incongruous position of two inconsistent decrees on count of Varsha Chopra not having been made a party in the appeal although she was a party in the suit. The trial judge had dismissed the suit; impugned judgment had decreed it. There is inconsistency in the two decrees; the entire appeal must necessarily fail.

19. Substantial question of law No. 2 is answered in favour of the Appellant.

20. Appeal is allowed. The result being that the appeal by the plaintiff not arraying Varsha Chopra (who was a necessary party) must fail.

21. Appeal disposed of in the above terms.