

Devi Charan Vs. Ranpat Singh

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Court : Delhi

Decided On : Dec-01-1996

Reported in : 1997IAD(Delhi)632; 65(1997)DLT493; 1997(40)DRJ556

Judge : K. Ramamoorthy, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 6, Rule 17

Appeal No. : Interim Application Nos. 6420, 8360, 9029 and 9686 of 1996 and Suit No. 2651 of 1990

Appellant : Devi Charan

Respondent : Ranpat Singh

Advocate for Pet/Ap. : J.P. Gupta and; Manu Bhaskar, Advs

Judgement :

K. Ramamoorthy, J.

(1) The two plaintiffs in the suit have filed the suit against 20 defendants praying for the following reliefs against defendants 1 to 13:

A)a decree for possession in favor of the owners and against defendants No.1 to 13 be passed in respect of the portion marked with letters E fgh and shown in red colour in the accompanying plan, of property No. 1, Under Hill Road, Civil Lines,

Delhi - 110054; b) a decree for mesne profits for Rs. 1,20,000.00 up to the date of filing of the suit with future interest @ 18% per annum on the amount awarded by the Hon'ble Court be passed in favor of the owners and against defendants 1 to 13; c) a decree for future mesne profits @ Rs. 5,000.00 per month from the date of the suit till the possession is delivered by the defendants 1 to 13 be passed in favor of the owners and against the defendants 1 to 13;

(2) Before I deal with the rival contentions of the parties I want to place on record what happened earlier in this case between the parties. The plaintiff filed application for a direction to the defendants to deposit the mesne profits on the ground that they are in unlawful possession of the property. On 25.09.1995, an order was passed by this court directing the defendants to deposit a sum of Rs. 5000.00 every month and directing them to deposit a sum of Rs. 3,17,500.00 on or before 31.03.1996 towards damages for use and occupation for the period from 16.08.1990 up to 30.11.1995.

(3) The contesting defendants took up the matter in appeal before the Division Bench. In the Appeal bearing No. FAO(os) No. 305/95 and C.M No. 3626/95 the Division Bench passed the following order: The amount already deposited by the applicants pursuant to our orders dated 27.11.1995 is permitted to be withdrawn by the plaintiffs/respondent without security. As a condition for continuance of the further stay, we direct the appellant to deposit further amount of 25% within 4 weeks from today. That amount as and when deposited is permitted to be withdrawn by the Plaintiff/Respondent without security. The appeal appears to be still pending before the Division Bench.

(4) The defendants 2 to 7 and 13 have filed is No. 8360/96 for amendment/alternations of written statement. They have also filed documents as Annexures A to J in support of the application.

(5) Here I have to notice the pleadings of the parties. The case of the plaintiff briefly stated is this. The 16th defendant Mr. Raja Ram Seth as a Manager and Karta of his joint family consisting of himself and defendants 17 to 19 and 20 executed a sale deed in respect of part of the property bearing No. 1, Under Hill Road, Civil Lines, Delhi, measuring about 2544.80 sq. yards on 9th November

1972 and the same was registered on 13th November 1972 in favor of the plaintiffs and defendants 14 and 15 and thereby vendees were put in possession of the property. After the purchase, the purchasers applied for sanctioning of plan and the Municipal Corporation of Delhi on 04.09.1973 sanctioned the plan. The purchaser started construction. At that time, the 1st defendant, defendant 3 to 9 and the husband of the second defendant attorney of the 1st defendant filed a suit on 02.01.1974 on the file of the Senior Sub- Judge, Delhi, claiming a right of passage on the property of the purchasers. The plaintiff therein before the Senior Sub Judge prayed for interim injunction pending the suit. That application for injunction was dismissed on 02.02.1974 and appeal against that order was dismissed on 20.09.1974. The suit was also dismissed on 03.12.1974. The purchasers completed the boundary wall after the dismissal of the suit. In or about the 10th of March 1979 the defendants 1, 10 and 13 threatened to encroach on the property of the purchasers and his report to the police did not have any effect. In or about 18.03.1979 when the construction was going on the said defendant restrained the purchaser from putting up construction. The purchaser filed a suit for perpetual injunction on 09.03.1979 against the aforesaid defendants in the court of Senior Sub Judge Delhi, restraining the defendants from interfering with the rights of the purchaser from putting up a building as per the sanctioned plan. The Id. Senior Sub Judge granted injunction. The purchasers filed an application for the appointment of the Local Commissioner and that was ordered on 03.04.1979. Mr. P.C. Goel, Architect, was appointed as a Local Commissioner and he was directed to report about the construction and occupation of the premises and also to prepare the plan of the construction. The Local Commissioner acted in accordance with the warrants of appointment and submitted the report. No objection was filed to the report. The purchases put up two small hutments marked A and B in the plan for the purpose of keeping the tools and building materials. The said defendant again encroached on the property in violation of the order of injunction. The purchaser filed an application under Order 39 Rule 2A on 13.04.1979 and subsequently it was dismissed.

(6) In paras 22 to 26 the plaintiffs have stated the facts about encroachment by the said defendants in the following manner: 22. That defendants 1 to 13 who are large in number and at the instance of defendant Nos 14 and 15, Shri Shiv Charan

and Smt. Sheela Gupta, with a view to encroach upon the property of the owners, made two openings in the boundary wall at points marked Aa & Bb in the plan, removed chhappars, raised the height of the wall of the hutments, constructed for purposes of keeping the tools, as stated above, and put cemented sheets on or about 19th April 1988. 23. That defendant Nos.1 to 13, finding that there is a complete backing of defendants No.14 and 15 and their family members, have now completely closed the entry of the plaintiff and their family members from the eastern side of the property. The defendants No.1 to 10 and 12 and 13 have recently constructed two sheds marked C & D in the plan, completely blocking the passage of the property. 24. That the plaintiffs and their family members are now forced to use a temporary ladder to go in and come out of their property as there is no other means to enter or to come out of the property. 25. That earlier, sewer line could not be connected with the main municipal sewer line on account of unavoidable circumstances. 26. That defendants No.1 to 13 are now not permitting the owners/plaintiffs to get the sewer line connected with the main municipal sewer line on account of which the plaintiffs are suffering immense hardship and loss.

(7) In para 29 the plaintiffs have stated about the encroachment of 305 sq. yards of land thus: That defendants No.1 to 13 have completely deprived the plaintiffs and their family members of the use and occupation of about 305 sq. yards of land in collusion and conspiracy with defendant No. 14 and 15 and they are liable to compensate the owners for the unauthorised use and occupation of the said portion. The plaintiffs assess that a sum of Rs. 5,000.00 per month should be the reasonable compensation for the said deprivation.

(8) On 24th October 1990, the defendants 2 to 7 filed a common written statement stating that the plaintiffs are not the owners of the property that the sale deed relied upon by the plaintiffs cannot be projected against the defendants. That Mr. Kanwal Singh father of defendant 3 to 9 and the husband of the second defendant was in actual physical possession of the disputed land.

(9) On 07.08.1959 the aforesaid Mr. Kanwal Singh applied for grant of the license to the Municipal Corporation for the construction of a shop for the purpose of vending sweets, milk, curd and dal. There was a reply from the Assistant Health

Officer, Civil Lone Zone, on 01.09.1959 wherein he had mentioned about the unauthorised stall near No.1-A under Hill Road and the business should be stopped. Mr. Kanwal Singh again moved an application on 08.09.1959. On 19.10.1959 the Municipal Corporation wrote to him asking him to produce the license issued by the department in the year 1957-58 and 1959. In para 5 of the written statement the defendants stated that: Para 5 That para No. 5 of the plaint is admitted to the extent that the owners have made certain constructions in part of premises No.1 under Hill Road. However, this construction is adjacent to the disputed land which has been shown in red colour in the site plan attached to the plaint.

(10) In para 6 of the written statement the filing of the suit in 1974 is also admitted. In para 7 of the written statement the defendants stated thus: It is further submitted that the sheds as shown in red colour in the site plan are in fact puce rooms some of which are used by the replying defendants as sleeping rooms with bath rooms and kitchen. The remaining portion i.e. open portion is in possession of the legal representatives of late Shri Kanwal Singh and his brother since 1937 and Kanwal Singh during his life time installed a handpump and obtain electric connection in all the rooms which have been shown as sheds in the red colour in the site plan. Apart from the rooms Shri Kanwal Singh had also planted trees of Shatut, grapes, guava, mango, Jammun and kikar, some of which are more than 20 years old and some portion of the open space has been used for growing vegetables.

(11) In para 7 of the written statement the defendant stated thus: It is further submitted that the sheds as shown in red colour in the site plan are in fact puce rooms. Some of which are used by the replying defendants as sleeping rooms with bath rooms and kitchen. The remaining portion i.e. open portion is in possession of the legal representatives of late Shri Kanwal Singh and his brother since 1937 and Kanwal Singh during his life time installed a handpump and obtain electric connection in all the rooms which have been shown as sheds in the red colour in the site plan. Apart from the rooms Shri Kanwal Singh had also planted trees of Shatut, grapes, Guava, Mango, Jammun and kikar, some of which are more than 20 years old and some portion of the open space had been used for growing

vegetables.

(12) In para 8 without specifically admitting the dismissal of the injunction application in 1974 it is stated that it is a matter of record. The defendant denied the encroachment. In para 14 of the written statement the appointment of the Local Commissioner to visit the property No.1, Under Hill Road, Delhi, is not denied. The report of Local Commissioner is otherwise denied. In para 16 of the written statement it is stated: It is submitted that pint mark A & B in the site plan is in fact a sleeping room of about 9 or 10 ft. height and the sleeping room was constructed during the life time of Shri Kanwal Singh. The sheds as shown between points E & F in the site plan are puce shops which are in existence since prior to 1959 and this fact corroborated by the two letters annexures 'A' & 'B' filed with the written statement.

(13) In para 22 of the written statement it is stated thus: It is submitted that the two gates marked 'AA' and 'BB' in the site plan are in existence since the commencement of the tenancy of Shri Kanwal Singh and the puce rooms and puce shops including kitchen and bath room and the temple were constructed in the same condition during the life time of Shri Kanwal Singh. Here it may be noticed that a case of tenancy is set up. In para 29, it is stated thus: That para No. 29 of the plaint is wrong and hence denied. It is denied that the portion shown in red colour is about 305 sq. yards. It is submitted that the area of the property No.1, Under Hill Road in possession of the answering defendants and brother of Shri Kanwal Singh is about 400 sq. yds and this area is in possession of the answering defendants and brother of Shri Kanwal Singh since 1937. On these pleas these defendants prayed for the dismissal of the suit.

(14) On 23.04.1991, defendants 10 and 13 filed a common written statement stating that the Vendor of the plaintiffs had no title to convey - and the plaintiffs cannot rely upon the sale deed. In para 5 of the written statement it is stated thus: That para No. 5 of the plaint is admitted to the extent that the owners have made certain constructions in part of premises No.1 Under Hill Road. However, this construction is adjacent to the disputed land which has been shown in red colour in the site plan attached to the plaint. These defendants also admit the filing of the

application for injunction in the year 1974.

(15) In para 7 of the written statement it is stated thus: It is further submitted that the sheds as shown in red colour in the site plan are in fact two puce rooms. Some of which are used by the replying defendants as sleeping rooms with bath room and kitchen. The remaining portion i.e. open portion is in possession of the legal representatives of late Shri Kanwal Singh and his brothers since 1957 and Kanwal Singh during his life time installed a handpump and obtain electric connection in all the rooms which have been shown as sheds in the red colour in the site plan. Apart from the rooms Shri Kanwal Singh had also planted trees of Shatut, grapes, Guava, Mango, Jamun and Kikar, some of which are more than 20 years old and some portion of the open space has been used for growing vegetables. It is submitted that trees of shahtut, grapes, and flower beds were grown by Rai Singh and Man Singh in their portion of the disputed land. These two defendants also did not deny the appointment of the Local Commissioner. It is the specific case that the property shown in the red colour in the site plan was never in possession of the plaintiffs. In para 22 these defendants said: That para No.22 of the petition is wrong and hence denied. It is denied that the replying defendants at the instance of the defendants No.14 and 15 with a view to encroach upon the property of the owners made two openings in the boundary wall at points 'AA' and 'BB' in the plan or removed the chippers or raised the height of the wall of the hutments constructed for the purpose of keeping the tools and put cemented sheets on or about 19.04.1988. It is submitted that the two gates marked 'AA' and 'BB' in the site plan are in existence since the commencement of the tenancy of Shri Kanwal Singh and puce rooms and puce shops including kitchen and both rooms and the temple were constructed in the same condition during the life time of Shri Kanwal Singh. Here also the tenancy is referred to. According to these two defendants also Mr. Kanwal Singh was the tenant of the Pacca room and pacca shop. These two defendants stated in para 29 that the area of the property in possession of the answering defendants and brother of Kanwal Singh is about 400 sq. yds and the same is in possession of Kanwal Singh since 1937. These two defendants denied the other averments in the plant.

(16) On 04.03.1993 replication was filed by the plaintiffs to the written statement filed by the defendants 2 to 7. Plaintiffs have repudiated the averments made in the written statement.

(17) On 05.03.1993 the plaintiffs filed replication to the written statement filed by defendants 10 to 13 denying all the averments made in the written statement.

(18) As I had noticed above, after the order was passed by the Division Bench in September 1996, defendants 2 to 7 and 13 together have filed application being is No. 8360/96 for amendment of the written statement. In the Preliminary objection No.1 what they seek to amend is that Kanwal Singh, husband of the second defendant and father of defendants 3 to 9 was in adverse possession of the disputed property in 1937. In preliminary objection 2 the amendment sought for is that the seller of the property had no power to sell, the possession of the property was in adverse possession of Kanwal Singh. Further it is stated that the disputed property was never transferred to the plaintiffs. That the property was never partitioned between the purchasers. There is no sanctioned plan of construction that declaration of right and title of the plaintiffs is required that is not done. The suit is liable to be dismissed in view of the pendency of Civil Suit No. 120/79 in the Court of Mr. K.C. pal Civil Judge, Delhi. It is liable to be dismissed on the ground that the property was allegedly purchased on 13.10.1972 and the suit for possession was filed on 16.10.1990. Mr. Kanwal Singh had a license to run business and his application for license was dismissed that he was in occupation of unauthorised construction. Mr. Kanwal Singh planted trees which are now 20 to 30 in number. The relief relating to passage and connected sewer line cannot be granted as there was no building. Some amendments were sought with reference to the gate and tank etc. The defendants now seek to change the entire case and want to file a new written statement. The defendants filed a few documents as annexures just to show their possession of the property and now adverse possession is claimed on the ground that Kanwal Singh was in possession since 1937. A perusal of the application would show as I have mentioned above, having set up a case of tenancy now the case of adverse possession is projected and that cannot be permitted at all. The application is filed six years after filing of the suit and five years after the written statement of defendants 2 to 7. It appears that the

defendants are prone to file applications after applications. The longer the pendency of the suit the greater the inclination to file an application for amendment. No doubt a party can file an application for amendment at any time before the final disposal of the matter but in a case where the plaintiff has filed a suit for possession on the basis of title and nothing is mentioned in the original written statement filed by two group of defendants challenging the title of the plaintiff and having failed to put forth the plea of adverse possession, now they cannot be permitted to amend the written statement taking the plea of adverse possession. It is well settled with reference to a case of adverse possession averments must be there as to when the defendants entered into the possession of the property and when the possession became adverse. Having now realised their position after the order was passed by this court on 25.09.1995, the defendants are now trying to be very smart and are putting up a case of adverse possession on the basis of some documents which are to be proved. Suppose the documents are filed by the defendants without the pleading as now sought to be introduced the result would be those documents would not be admitted as there is no plea of adverse possession. Now just for the purpose of including those documents the defendants have come forward with this application for amendment. No Explanationn is forthcoming as to why when the documents now filed as annexures are anterior in point of time to the filing of the written statement have not been referred to in the written statement. If a new case is allowed to be set up by the defendants the plaintiffs would put to great loss which cannot be compensated. I need not expatiate on the scope of power of the court functioning under Order 6 rule 17 Civil Procedure Code .

(19) It is significant to notice that the defendants do not claim title to the property. The stand taken by the defendants in their written statement is that they had been in possession for a long time. Ipso facto possession, however, long cannot be adverse. They had admitted that the possession started with tenancy. therefore, on their own showing to start with, the possession was not hostile to the true owner. The principle is *nec vi nec clam nec precario*, that is being peaceful and continuous. The possession must be adequate in continuity, in publicity. Mere possession without a claim of right over a long time is not sufficient to make out a case of adverse possession and a mere user cannot be taken as a definite

assertion of proprietary right. A plea of adverse possession which rests upon proving of positive and essential fact has to be pleaded so that the the adversary might be able to meet the specific case of the party, who unjustly, wrest the property belonging to other. The Supreme Court has recently affirmed the principle laid down by various High Courts in India and also the Privy Council and had held that the burden undoubtedly lies on the defendant to plea and prove the adverse possession in *Parsinni (dead) by Lrs and ors Vs . Sukhi and ors. : (1993)4SCC375* . In the light of the law laid down by the Supreme Court we may also note the statutory provisions in the Article 65 of the Limitation Act, 1963, which reads as under: Article 65 : For possession of immovable property or any interest therein based on title. Explanationn : For the purpose of this article Twelve years When the possession of the defendant becomes adverse to the plaintiff. a) where the suit is adverse by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession; b) where the suit is by a Hindu or Muslim entitled to the possession of immovabled property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies; c) where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.

(20) The defendants must have been aware of the possession and must have pleaded the necessary facts, when they filed the written statement so that they can prove them at the trial. Having projected a case of tenancy they cannot now be permitted to take the plea of adverse possession.

(21) Learned counsel for the defendants 2 to 7 and 13 relied upon the following decisions in support of his contentions: *Ajarjeet Singh Vs . Municipal Corporation of Delhi : AIR1992 Delhi317* , *Dalip Kaur and another Vs . Major Singh and others* and *Johnskutty Joseph Vs . Abraham and another 0065/1996 : AIR1996 Ker268* . I do not find any principle laid down which could be give any help to the Applicants.

(22) Learned counsel further submits that the amendment sought for is only a clarificatory in nature and therefore, the amendment can be allowed and relied upon the judgment of the Supreme Court in Purushottam Umedbhai and Co. Vs . M/s Manilal and Sons : [1961]1SCR982 . I am quite unable to agree with the above argument in the light of the averments in the written statement, case of tenancy and the averments in the application for amendment. The judgment of the Supreme Court does not support the defendants.

(23) Under these circumstances, after considering the case of the defendants, I am unable to exercise my discretion in favor of the defendants and allow them to amend the written statement. Accordingly, is No/. 8360/91 filed by the defendants 2 to 7 and 13 under Order 6 Rule 17 Civil Procedure Code is dismissed. is No. 9029/96

(24) The defendants 2 to 7 have filed the above application for transferring this suit to Senior Sub Judge, Delhi on the ground of lack of jurisdiction with reference to valuation of the property. In para 3 of the application reference is made about the disputes between the plaintiffs and defendants 14 and 15 in Suit No. 2633/89 with reference to 2544.80 sq. yards. The plaintiff had filed a copy of the plaint in FAO(os) No. 305 of 1995 and that is how the defendants have come to know this suit. In that suit the value of 2544.80sq. yds is mentioned as Rs. 1,81,317.00 as 19.08.1972 as per the partition suit the total value of plot measuring 2045.80 sq. yds was about Rs. 5,00,000.00 . The case of the plaintiff is that the defendants have taken forceful possession of 300 sq. yds and out of the total plot and therefore, the value of the plot must be less than Rs. 70,000.00 . If that is so the suit has been over valued and therefore, the value of the suit being less than Rs. 5,00,000.00 must be transferred to the lower court or should be dismissed with heavy costs. It is all well settled that for the purpose of value of the suit the allegations in the plaint alone have to be considered. The value given in the plaint is Rs. 5,60,000.00 . For mesne profits Rs.1,20,000.00 and total value fixed is Rs. 6,80,000.00 and ad valorem court fees is Rs. 8981.00 has been paid.

(25) I do not find any substance in the application and accordingly it is dismissed. is No. 9686/96

(26) This is an application filed by defendants 2 to 7 under Section 151 for a direction to the plaintiff to produce complete set of documents in Suit No. 2631/83. This is a suit for partition filed by them. I fail to see how these documents can be relied upon by the defendants when they have to prove their case by proving their documents. The documents asked for relate to the title to the property and the defendants do not claim any title and therefore, these documents are not relevant and the defendants thus protracting the proceedings and had filed this application purporting to be under Section 151 CPC. The application is frivolous and I have no hesitation in dismissing the same. is No. 6420/96

(27) The plaintiffs have filed is no. 6420/96 claiming the following reliefs:

(28) Their case is that the defendants have not complied with the order passed by the Division Bench and, therefore, a decree of possession should follow. Learned counsel for the defendants submitted that the defendants have complied with the order passed by the Division Bench and the defendants had deposited the money in this court in obedience to the order passed by the Division Bench therefore, is filed by the plaintiffs is not at all competent. Learned counsel for the plaintiffs submit that he was not aware of the deposit made by the defendants and if the representation made by the defendants is true then the application need not be considered on merits and liberty may be given to the plaintiffs if the defendants had not complied with the order passed by the Division Bench to file appropriate application/applications. Giving liberty to the plaintiffs to move appropriate application or applications, if the defendants do not act in accordance with the order passed by the Division Bench, this application is dismissed. is No.8360/91 filed by defendants 2 to 7 and 13 under Order 6 Rule 17 Civil Procedure Code is dismissed. is No. 9029/96 filed by defendants 2 to 7 is dismissed. is No. 9686/96 filed by defendants 2 to 7 under section 151 Civil Procedure Code for direction is dismissed. is no. 6420/96 filed by the plaintiffs is dismissed.

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