

Dalail Singh Vs. Lachman Singh and ors

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Court : Delhi

Decided On : Feb-19-2013

Judge : V.K.Shali

Appellant : Dalail Singh

Respondent : Lachman Singh and ors

Advocate for Def. : Mr. Vipin K. Singh

Advocate for Pet/Ap. : Mr. C.S. Dahiya

Judgement :

* HIGH COURT OF DELHI AT NEW DELHI + RSA 36/1979 & C.M. Nos.861, 1071, 1074/1997, 188/1998,14411-14426/2007 Decided on :

19. h February, 2013 DALAIL SINGH Through: Appellant Mr. C.S. Dahiya, Advocate. Versus LACHMAN SINGH & ORS Through: Respondents Mr. Vipin K. Singh, Advocate for LR's of R-1 to 4. CORAM: HONBLE MR. JUSTICE V.K. SHALI V.K. SHALI, J.

(ORAL) 1. This is a regular second appeal which has been pending since 1979. More than 32 years have passed and the appeal is still pending final adjudication. Today also, a request for adjournment is made on the ground that Mr. Y.D. Nagar, the learned counsel for the appellant has gone for some urgent work and, therefore, a date be given. It is not possible to adjourn the matter as it is one of the oldest matter pending in this court.

2. Vide order dated 30.7.1979, this appeal was admitted and three substantial questions of law purported to be arising from the appeal were formulated by Honble Mr. Justice Yogeshwar Dayal (as his Lordship then was) which are as under : (i) As to the effect of order of remand; (ii) Whether the suit is within time; and (iii) Decision of the issue No.4 and other as per grounds of appeal.

3. It may be pertinent here to mention that the issue No.4 pertains to the alleged exchange of land which was under the occupation and possession of the appellant herein and in respect of which the respondents had filed a suit for possession.

4. Briefly stated the facts of the case, in order to understand the controversy and the questions purported to be arising from the appeal, are that respondents herein filed a suit for possession on 1.5.1969 bearing Suit No.437/1973. The respondent No.1, Lachman Singh died on 25.8.2004, respondent No.2, Rati Ram died on 17.9.2006, respondent No.3, Bharat Singh died on 20.9.1995, respondent No.4, Ziley Singh died on 5.4.1994 and respondent No.5, Dan Kaur died on 20.3.1988. The plaintiffs/respondents had stated that the suit land measuring 120 x 40 (4800 square feet) out of Khasra No.736 belonged to Chattar Singh, father of respondent No.1 (Lachman Singh). It was alleged that the said land is under the occupation of the appellant/defendant herein, who had illegally occupied the land in question without any right, title or interest. Accordingly, the suit for possession against the appellant/defendant was filed.

5. The appellant/defendant raised preliminary objections regarding the payment of court fees, the suit being barred by limitation. On merits, the appellant/defendant stated that the suit land was actually exchanged by Chattar Singh, the predecessor in interest of the plaintiffs/respondents with Shankar Singh, the predecessor in interest of the appellant/defendant (both being the real brothers) in the year 1917 for a plot of equal area in Khasra No.748 situated in the same village at Munirka. It was accordingly stated that because of this exchange of land, the appellant/defendant was in lawful occupation of the land in question and the respondents/plaintiffs are not entitled to any decree for possession.

6. On the pleadings of the parties, following issues were formulated: 1. Whether the suit is correctly valued for the purposes of court fee and jurisdiction? OPP 2.

3. Whether the plaint is defective as alleged in para 3 & 4 of the preliminary objection of written statement? OPD 4. Whether the suit land was exchanged by father of the plaintiffs with an equal area of land with the father of the defendant in 1917? If so, to what effect? OPP 5. Whether the defendant has become the owner by adverse possession? OPD 6. Whether the plaintiffs are estopped from filing the present suit by their act and conduct? OPD 7.

7. Whether the suit is time barred? OPD Relief. The trial court vide order dated 4.6.1973 decided the issue Nos.2, 4, 5 & 6 in favour of the appellant/defendant and dismissed the suit on the ground that the suit is barred by time and the defendant has acquired ownership by adverse possession.

8. On the appeal being preferred by the plaintiffs/respondents herein, the appellate court on 30.1.1974 set aside the order dated 4.6.1973 and remanded the matter back to the trial court to decide it afresh after giving an opportunity to both the parties to produce evidence.

9. It is the contention of the learned counsel for the appellant since the only question which was raised before the learned appellate court was regarding non-payment of court fees on the basis of market value of the property, therefore, the remand of the matter was confined by the appellate court only to the question of proper valuation of the court fees and the decision thereon. It has been stated that the learned trial court under the garb of the appellate courts order regarding remand could not decide all the issues afresh as has been done by the learned Civil Judge vide judgment dated 1.5.1976.

10. I have carefully considered the submissions made by the learned counsel for the appellant as well as the learned counsel for the respondents and have also gone through the record.

11. At the outset, it may be pertinent here to mention that the court of Mr. B.B. Gupta, while remanding the matter back to the trial court vide order dated 30.1.1974 has specifically observed that the matter is to be decided by the learned Civil Judge afresh. When the learned appellate Court said that the matter be decided afresh, it meant that the decision of the civil court has been set aside in its

entirety. It is not open to the learned counsel for the appellant to contend that the appellate court had set aside the impugned order of the Civil Judge dated 4.6.1973 only with regard to the payment of court fees and its valuation. I do not accept this contention of the learned counsel for the appellant in the light of the specific order of remand where the appellate court by implication had set aside the entire order dated 4.6.1973 and directed that the entire matter is to be decided by the Civil Judge afresh meaning thereby all the issues which were framed had to be decided by the court again after giving an opportunity to the parties to produce evidence, therefore, in my considered opinion, so far as this aspect of the matter is concerned, no substantial question of law is arising from the present appeal as has been framed by my learned predecessor vide order dated 30.7.1979.

12. It may also be pertinent here to mention that one of the issues which was framed by the trial court in the instant matter was with regard to valuation of the suit for the purpose of court fees and jurisdiction. After remand, this issue was decided vide order dated 18.2.1975 against the present appellant. Feeling aggrieved, the appellant/defendant had preferred an appeal before the court of senior Civil Judge which was dismissed on 7.1.1976. The learned Additional District & Sessions Judge while deciding the appeal of the appellant against the order dated 1.5.1976 has specifically observed that the question of valuation of the suit and the question of the payment of court fees was no more res integra between the parties. The said issue had already been decided against the appellant not only by the trial court but also by the first appellate court and if the appellant felt aggrieved by the order of the appellate court dated 7.1.1976, the proper course of remedy opened to him was to file an appeal or any other proceedings in the High Court and assail the said order. Having not chosen to do so, it was observed by the learned appellate court by virtue of the impugned order that this plea cannot be taken by the appellant now as he had not taken the question of jurisdiction beyond the first appellate court and thereby he is estopped from raising it again.

13. So far as the substantial question of law framed by this court on 30.7.1979 regarding remand of the matter to the trial court is concerned, that stands already answered to the effect that the appellate court which ordered the remand on

30.1.1974 had specifically directed the trial court to decide the entire matter afresh after giving an opportunity to the parties to adduce evidence and it could not be confined to the question of payment of court fees and its jurisdiction.

14. As regards the second question which has been formulated with regard to the suit of the respondents/plaintiffs being barred by time is concerned, this issue has also been concurrently decided against the appellant both by the trial court as well as the appellate court. Therefore, concurrent finding of fact does not raise any question of law.

15. The third substantial question of law which is purported to have been framed is regarding the decision on issue No.4. The issue No.4 essentially pertained to the plea raised by the appellant/defendant in his written statement that he was in occupation of Khasra No.736 measuring 500 square yards in lieu of exchange of the land in Khasra No. 748 which is purported to have taken place way back in the year 1917 and which is also confirmed by the fact that after the death of Shankar Singh, father of the appellant/defendant, a suit for partition had been filed amongst the successors of Shankar Singh in respect of the suit property which is pending till today and the appellant/defendant continued to be in possession.

16. The plea regarding exchange of the two lands, one being in Khasra No.736, belonging to the respondents/plaintiffs and the other being in Khasra No.748 belonging to the appellant/defendant, has not been accepted either by the trial court or by the appellate court. The reason for non-acceptance of this plea of exchange is two-fold. Firstly, the trial court has held that if the land was actually exchanged and was in possession of the appellant/defendant from 1917 onwards at least khasra girdawaries and khatunies, would have recorded the name of the appellant, ought to have been proved. This has not been done and, therefore, lack of this vital piece of evidence resulted in the decision against the appellant/defendant. The appellant/defendant had also relied upon the oral testimony of four witnesses, namely, DW-1 (Het Ram), DW-2 (Bohru Mal), DW-3 (Lal Chand) and DW-4 (H.S. Chadha, Draftsman). Out of these defence witnesses, the testimony of DW-1 to DW-3 was not considered to be credible with regard to the exchange of the lands by the father of the appellant/defendant in

respect of Khasra No.748 with Chhattar Singh in lieu of Khasra No.736 on account of the fact that although these three witnesses had stated that lands were exchanged but in cross-examination they had admitted that it was not done by the parties in their presence. Similarly, so far as the appellant/defendant Dalail singh is concerned, he has also supported this theory of exchange of land but it was observed by the trial court that at the time when the purported exchange had taken place, he was not even in existence and, therefore, his testimony also did not carry any weight. All these findings of fact were scrutinized by the appellate court and confirmed on 17.2.1979. This takes care of the third question of law purported to be arising with regard to the issue No.4 as is framed vide order dated 4.6.1973.

17. In totality of circumstances, in my considered opinion, I feel that none of the questions, as are purported to have been framed, are essentially substantial questions of law arising from the appeal and even if they are considered so, none of them is of such a nature which would warrant the setting aside of the concurrent findings against the appellant returned by the two courts below.

18. It may be pertinent here to mention that most of the respondents/plaintiffs have already died and the dates of their death have already been given herein but no timely steps were taken by the appellant/defendant to substitute the legal heirs of any of the respondents/plaintiffs, i.e., within a period of 90 days from the date of knowledge of the death of the respondents/plaintiffs. The applications for substitution of legal heirs of plaintiffs/respondents are as under :C.M. Nos.1071/1997, 188/1998, 14413/2007, 14417/2007, 14421/2007 and 14425/2007.

19. The learned counsel for the respondents/plaintiffs had stated that as a matter of fact, the decree of possession which was passed in the instant case, was joint and coextensive against all the plaintiffs/respondents and the fact of the death of the first respondent No.1 (Lachman Singh) on 25.8.2004, was within the knowledge of the appellant/defendant, as he was closely related to the respondents/defendants, yet he has not chosen to file any application for substitution of the legal heirs of the respondent No.1 within a period of 90 days, therefore, the proceedings against not only respondent No.1 but against all the

respondents stands abated. For this purpose, the learned counsel has relied upon the judgment of the Apex Court in case titled Ram Sarup & Ors. vs. Munshi & Ors.; AIR 196.SC 553.

20. No doubt, the Apex Court in the said case has held that where the decree is joint against all the judgment debtors, the death of one of the appellants would result in abatement of proceedings against all and not one but still, as the appeal is very old, rather than dismissing the appeal on the technical grounds, in the first instance, I have purposely chosen to allow the applications without going into the merits of the same and decide the regular second appeal on merits rather than ousting the appellant/defendant on technicalities.

21. For these reasons, I allow all these applications of the appellant for substitution of legal heirs, after allowing their applications for setting aside the abatement proceedings against all the respondents being C.M. Nos.14411/2007, 14415/2007, 14419/2007 and 14423/2007 as well as condone the delay in filing the applications for substitution of legal heirs and for setting aside the abatement proceedings against all the respondents being C.M. Nos.1074/1997, 14414/2007, 14418/2007, 14422/2007 & 14426/2007 and C.M. Nos.14412/2007, 14416/2007, 14420/2007 & 14424/2007 respectively by assuming that the appellant has been able to prove sufficient cause for not filing the applications for substitution of legal heirs and for setting aside abatement proceedings on time.

22. Having regard to the aforesaid reasons, although this court is allowing the applications of the appellant/defendant for substitution of legal heirs, setting aside the abatement proceedings against the respondents and for condonation of delay but keeping in view the reasons given hereinabove, I am of the opinion that none of the questions, as has been formulated by my learned predecessor, are essentially substantial questions of law. In view of the abovementioned reasons, the appeal is dismissed. The amended memo of parties shall be filed by the respondents. V.K. SHALI, J.

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