$~65(Appellate)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ RSA 118/2022 & CM APPL.42446/2022, CM APPL.42447/2022

SALEEM & ORS. ..... Appellants

Through: Mr.Rakesh Kumar Dudeja and Mr.Madan Lal Kalkal, Advs.

versus

WAHID MALIK ..... Respondent

Through: None

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT(O R A L)

% 26.09.2022

1. Suit 488/2017 was instituted by the respondent Wahid Malik against the appellants Saleem and others. The respondent, as plaintiff, claimed to have purchased a property admeasuring 90 sq. yds. located in Khasra No. 67-68, Gali No. 27, Jafrabad, Delhi-110053 ("the suit property") for a consideration of ₹ 6 lakhs from its previous owner, under a general power of attorney (GPA), agreement to sell, receipt, Will and affidavit duly notarized by the notary public in the presence of witnesses. The plaint asserted that the respondent was in peaceful possession of the suit property and was using the suit property as a godown.

2. The plaint alleged that, on 28th April 2017, the petitioners-defendants broke the locks on the suit property and effected forcible ingress. This misfeasance, it was alleged, was repeated by the

petitioners on 1st May 2017. The plaint also alleged that the petitioners had extended verbal threats to the respondent, resulting in the respondent having to lodge a written complaint at PS Jafrabad on 4th May 2017. As no action was taken by the police authorities, the respondent claimed to have been constrained to approach the learned Trial Court. The respondent prayed for a decree of permanent injunction in favour of the respondent and against the petitioners, restraining the petitioners from trespassing on the suit property or breaking the locks thereon and from dispossessing the respondent from the suit property without following due process of law.

3. The petitioners filed a written statement, by way of response to the aforesaid suit of the respondent. The written statement alleged that the respondent was neither the owner, nor in possession, of the suit property. The assertion of the respondent, that he had purchased the suit property from the previous owner under GPA, agreement to sell, Will and receipt dated 14th August 2003 was also denied in para 2 of the written statement, which reads thus:

> "2. That the contents of para 2 of the plaint are wrong and hence denied. It is wrong and denied that on 14.08.2003 the plaintiff has purchased the suit property admeasuring 90 sq.yds. vide Khasra no. 67-68, bearing no.709, Gali no. 27, Jafrabad, Delhi-53 for a consideration amount of Rs. 6,00,000/- from its previous owner namely Sh. Mohammeddeen son of Sh. Bundu by virtue of GPA, Agreement to sell, Receipt, Will and Affidavit which is duly notarized by notary public in the presence of witnesses. It is submitted here that the photocopy of the title documents attached with the plaint are forged and fabricated documents by the plaintiff and because of the same reason the said documents have no authenticity in the eye of law. It is also

> submitted here that on the basis of the said documents the plaintiff has no right, title or interest in the suit property. Even the plaintiff is not in possession of the suit property and thus, the suit of plaintiff is liable to be dismissed on this ground alone. The site plan filed by the plaintiff is also not correct. The plaintiff should be put to the strict proof of the allegations made in the para under reply."

4. The petitioners further claimed that the suit property was their ancestral property and consequently, claimed titular rights in respect thereof, in para 6 to 8 of the written statement. Needless to say, all allegations of the petitioners having ever tried to effect forcible ingress into the suit property were also denied.

5. The respondent filed a replication to the written statement of the petitioners, broadly reiterating the contents of the plaint and denying the assertions, to the contrary, in the written statement.

6. Consequent to completion of pleadings, the respondent-plaintiff tendered, in evidence, the following documents which were duly exhibited:

(i) GPA (Ex. PW-1/A),

(ii) agreement to sell (Ex. PW-1/B),

(iii) receipt (Ex. PW-1/C),

(iv) affidavit (Ex. PW-1/E),

(v) site plain (Ex. PW-1/F),

(vi) receipt dated 23rd September 2003 issued by BSES in the name of the respondent (Ex. PW-1/G)

(vii) electricity bill dated 27th February 2007 issued in the name of the respondent (Ex. PW-1/H), and

(viii) complaint dated 4th May 2017 filed at PS Jafrabad (Ex. PW-1/I).

7. The petitioners chose not to file any document in their support.

8. Consequent to completion of pleadings, the following issues were framed by the learned ASCJ:

> "(i) Whether the plaintiff is in possession of suit property and was in possession of the suit property on the date of filing the suit? OPP
>
> (ii) Whether the plaintiff is entitled to decree of permanent injunction as prayed for? OPP
>
> (iii) Whether the suit of plaintiff is under valued? OPD
>
> (iv) Relief"

9. The respondent tendered his affidavit in evidence which was exhibited as Ex. PW-1/1. He vouchsafed the contents of the affidavit in his examination-in-chief. He was cross examined by learned Counsel for the petitioners. In cross examination, the respondent submitted, *inter alia* that (i) he had purchased the stamp paper, for purchasing the suit property, on 30th July 2002, (ii) the title documents were prepared at Tis Hazari Courts in the presence of two witnesses, namely Shamsher and Suresh, (iii) the title documents were also notarized by the notary public on 14th August 2003, and (iv) except for the electricity bill, the respondent had not filed any other document or photograph to show that he remained in possession of the suit

property. He denied the suggestions that he was not in possession of the suit property at any point of time and that the titular documents (Ex. PW-1/A, Ex. PW-1/B, PW-1/C, PW-1/E and PW-1/H) were forged and fabricated.

10. No other witness was cited by the respondent.

11. Consequent to closure of the respondent's evidence (PE), the petitioners, as defendants in the suit, made a statement, on 14th August 2019, that the defendants did not seek to lead the evidence of any witness. Accordingly, DE was closed on 14th August 2019.

12. As such, the petitioners did not choose to lead any evidence either documentary or oral, though they did cross examine the respondent who deposed as PW-1.

Order dated 26th September 2019 passed by the learned ASCJ

13. On Issue 1, the learned ASCJ noted that the respondent had, as PW-1, deposed that he was in possession of the suit property and had also proved the GPA, agreement to sell, receipt and affidavit, which were exhibited as Ex. PW-1/A to Ex. PW-1/C, Ex. PW-1/E respectively as well as the electricity bills of the suit property, for 15th September 2015 and 27th February 2007 as Ex. PW-1/H, which was issued to him. This, it was held, proved that the respondent was in possession of the suit property during the years 2007, 2015 and 2017. Nothing contrary to this position, it was noted, was elicited in cross

examination of the respondent, as PW-1, by the petitioners.

14. The petitioners, for their part, never chose to step into the witness box or lead any evidence to show that they were in possession of the suit property. A bald assertion to the effect that, after the death of the previous owner of the suit property, locks were placed on the suit property by the respondent as well as the petitioners, was made without any supportive evidence.

15. In these circumstances, the learned ASCJ held that, applying the principles of preponderance of probability, the respondent had succeeded in proving that he was in possession of the suit property.

16. Issue (i) was, therefore, decided against the petitioners and in favour of the respondent.

17. Qua Issue (ii), the learned ASCJ noted the submission of the petitioners that the suit was not maintainable in view of the law laid down in ***Anathula Sudhakar v. P. Buchi Reddy***[1]**.** The respondent having succeeded in proving possession over the suit property, and no evidence having been led by the petitioners to indicate to the contrary, or that the possession of the suit property by the respondent was wrongful, a simplicitor suit for injunction against forcible dispossession was maintainable without having to seek any titular rights over the suit property.

18. Issue (ii) was also, therefore, decided against the petitioners and

[1] **(2008) 4 SCC 594**

in favour of the respondent.

19. No dispute has been raised with respect to Issue (iii) and, therefore, the need to refer to the said issue is obviated.

20. In these circumstances, the learned ASCJ held that the respondent had made out a case for an injunction against forcible dispossession. The respondent's suit was, therefore, decreed, and a decree of permanent injunction was passed, restraining the appellants from trespassing in the suit property or from forcibly dispossessing the respondent therefrom without following due process of law.

21. Aggrieved, the petitioners appealed to the learned ADJ by way of RCA DJ 132/2019 ***(Saleem & Ors. v. Wahid Malik)***.

22. By the impugned order dated 25th July 2022, the learned ADJ has dismissed the said appeal. He has observed, in doing so, relying on the following passages from ***Anathula Sudhakar***[1], that, where there was no cloud on the title or possession of the plaintiff over the suit property, a simplicitor suit for injunction was maintainable:

> "13. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.
>
> 13.1. *Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a*

prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

13.2. Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

13.3. Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from the defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of the plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction."

(Emphasis supplied)

23. Apropos the contentions advanced by the petitioners, the learned ADJ holds that, barring bald assertions in the written statement, no evidence had been led, at all, by the petitioners, to make out the case propounded therein. Not a single document was filed in support of the assertions in the written statement, and no oral evidence was led. The petitioners sought to aver that the suit property was their ancestral property. The petitioners also sought to aver that the title documents, on which the respondent placed reliance, were forged and fabricated. No effort, whatsoever, had been made to substantiate either of these assertions/allegations by way of any evidence, oral or documentary. The cross examination of the respondent, as PW-1, by the petitioners, did not elicit any material on the basis of which the title documents of the respondent, or the possession of the respondent

over the suit property could be regarded as having been rendered vulnerable.

24. The petitioners sought to contend, before the learned ADJ, that no title could pass under a GPA, Will, agreement to sell and receipt. Reliance was placed, for the said purpose, on the judgment of the Supreme Court in ***Suraj Lamp & Industries v. State of Haryana***[2]**.** The learned ADJ has dealt with this submission by relying, *inter alia*, on the judgment of this Court in ***Ramesh Chand v. Suraj Chand***[3] which took note of ***Suraj Lamp & Industries***[2] and held that, even if title could not pass under Agreement to Sell, GPA and Will, the said documents, if executed validly/properly, did convey certain rights over the property in question, under Section 53A[4] of the Transfer of Property Act, 1883.

25. In these circumstances, the learned ADJ has chosen not to interfere with the decision of the learned ASCJ.

26. Aggrieved thereby, the defendants have approached this Court

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[2] **(2012) 1 SCC 656**
[3] **(2012) ILR (V) Del 48**
[4] **53-A. Part performance**. – Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty:

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that , where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

by means of the present appeal, under Section 100 of the CPC.

27. I have heard Mr. Rakesh Dudeja, learned Counsel for the appellant at length.

28. Mr. Dudeja has sought to contend that the courts below were in error in failing to note that the title as well as the possession, of the respondent, over the suit property was seriously disputed. He has drawn my attention to para 2 of the written statement, reproduced hereinabove, in which it was specifically alleged that the photocopies of the title documents dated 14th August 2003, placed on record by the respondent, were forged and fabricated. It was also alleged, in the said paragraph, that the respondent was not in possession of the suit property.

Analysis

29. It is well settled that, in a suit for possession simplicitor or a suit for injunction against dispossession simplicitor, the plaintiff is not required to establish title or ownership. The plaintiff is only required to establish a better right to remain in possession of the suit property as compared to the right of the defendant.

30. In ***Poona Ram v. Moti Ram***[5], the legal position was clearly exposited by the Supreme Court, thus:

> "**11.** The law in India, as it has developed, accords with jurisprudential thought as propounded by luminaries like

[5] **(2009) 11 SCC 309**

Salmond. *Salmond on Jurisprudence* (12 Edn. at paras 59-60) states:

> "These two concepts of ownership and possession, therefore, may be used to distinguish between the de facto possessor of an object and its de jure owner, between the man who actually has it and the man who ought to have it. They serve also to contract the position of one whose rights are ultimate, permanent and residual with that of one whose rights are only of a temporary nature.
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> ***
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> In English law *possession is a good title of right against anyone who cannot show a better.* A wrongful possessor has the rights of an owner with respect to all persons except earlier possessors and except the true owner himself. Many other legal systems, however, go much further than this, and treat possession as a provisional or temporary title even against the true owner himself. Even a wrongdoer, who is deprived of his possession, can recover it from any person whatever, simply on the ground of his possession. Even the true owner, who takes his own, may be forced in this way to restore it to the wrongdoer, and will not be permitted to set up his own superior title to it. He must first give up possession, and then proceed in due course of law for the recovery of the thing on the ground of his ownership. The intention of the law is that every possessor shall be entitled to retain and recover his possession, until deprived of it by a judgment according to law.
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> Legal remedies thus appointed for the protection of possession even against ownership are called possessory, while those available for the protection of ownership itself may be distinguished as proprietary. In the modern and medieval civil law the distinction is expressed by the contrasted terms petitorium (a proprietary suit) and possessorium (a possessory suit)."

12. As far back as 1924, in ***Midnapore Zamindary Co. Ltd.* v. *Naresh Narayan Roy***[6], the learned Judge observed

[6] **1924 SCC OnLine PC 18**

that in India, persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a court. Later, in ***Nair Service Society Ltd.* v. *K. C. Alexander***[7], this Court ruled that when the facts disclose no title in either party, possession alone decides. It was further held that *if Section 9 of the Specific Relief Act, 1877 (corresponding to the present Section 6) is employed, the plaintiff need not prove title and the title of the defendant does not avail him*. When, however, the period of six months has passed, questions of title can be raised by the defendant, and if he does so the plaintiff must establish a better title or fail. In other words, such a right is only restricted to possession in a suit under Section 9 of the Specific Relief Act (corresponding to the present Section 6) but does not bar a suit on prior possession within 12 years from the date of dispossession, and title need not be proved unless the defendant can provide one.

13. It was also observed by this Court in ***Nair Service Society Ltd.***[7] that a person in possession of land in assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against the entire world except the rightful owner. In such a case, the defendant must show in himself or his predecessor a valid legal title and probably a possession prior to the plaintiff's, and thus be able to raise a presumption prior in time.

14. In ***Rame Gowda* v. *M. Varadappa Naidu***[8], a three-Judge Bench of this Court, while discussing the Indian law on the subject, observed as under: (SCC p. 775, para 8)

"*8.* It is thus clear that so far as the Indian law is concerned, the person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law; he

[7] **AIR 1968 SC 1165**
[8] **(2004) 1 SCC 769**

cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injuncting even a rightful owner from using force or taking the law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force. *In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title*. Law presumes the possession to go with the title unless rebutted. The owner of any property may prevent even by using reasonable force a trespasser from an attempted trespass, when it is in the process of being committed, or is of a flimsy character, or recurring, intermittent, stray or casual in nature, or has just been committed, while the rightful owner did not have enough time to have recourse to law. In the last of the cases, the possession of the trespasser, just entered into would not be called as one acquiesced to by the true owner."

15. The crux of the matter is that a person who asserts possessory title over a particular property will have to show that he is under settled or established possession of the said property. But merely stray or intermittent acts of trespass do not give such a right against the true owner. Settled possession means such possession over the property which has existed for a sufficiently long period of time, and has been acquiesced to by the true owner. A casual act of possession does not have the effect of interrupting the possession of the rightful owner. A stray act of trespass, or a possession which has not matured into settled possession, can be obstructed or removed by the true owner even by using necessary force. Settled possession must be (*i*) effective, (*ii*) undisturbed, and (*iii*) to the knowledge of the owner or without any attempt at concealment by the trespasser. There cannot be a straitjacket formula to determine settled possession. Occupation of a property by a person as an agent or a servant acting at the instance of the owner will not amount to actual legal possession. The possession should contain an element of animus possidendi. The nature of possession of the trespasser is to be decided based on the facts and circumstances of each case.

31. In ***Rame Gowda***[8], the Supreme Court held that "in the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title".

32. Mr Dudeja is correct in his submission that, in para 2 of the written statement filed in response to the suit instituted by the respondent, the petitioners alleged that the titular documents on which the respondent was seeking to place reliance were forged and fabricated. However, having thus alleged, the petitioners, apparently, decided to sit back and relax. They appear to have been harbouring a misconception, throughout, that mere allegations in a written statement were sufficient to dispute the case set up by the respondent, and that no responsibility, thereafter, lay on the petitioners to support the allegations with evidence. This is not a case in which a suit had been decreed at an initial stage. It has suffered trial. The respondent had led his own evidence as PW-1. He was cross examined by the petitioners. The record of cross examination does not disclose anything which would serve to cast any cloud either on the genuineness of the title documents dated 14th August 2003 or on the assertion, by the respondent, that he was in possession of the suit property. The respondent also placed on record electricity bills with respect to the suit property, which were in the name of the respondent, dated 15th September 2015 and 27th February 2017. In these circumstances, applying the principle of preponderance of probability, the learned ASCJ and the learned ADJ held, correctly, that, while the respondent had proved the execution of titular documents dated 14th

August 2003 in his favour and had also proved the fact that he was in possession of the suit property in 2007, 2015 and 2017, no evidence to the contrary, whatsoever had been led by the petitioners. Nor had the assertions to that effect, been rendered questionable, in any manner, in the testimony of the respondent in cross examination.

33. The petitioners, it was further noted, had sought to claim titular rights in respect of the suit property, claiming it to be their ancestral property. Having thus asserted in the written statement, the petitioners, true to form, decided not to place any document on record in support of their assertion or lead any evidence in that regard. The assertion, therefore, remained a mere assertion, unsupported by any material.

34. In these circumstances, the learned ASCJ and learned ADJ were perfectly justified in holding that the fact that the respondent was in settled possession of the suit property stood established, and the petitioners, *per contra*, had failed to establish any titular or possessory right over the suit property.

35. The findings in the impugned order with respect to the submission that no title to the suit property could pass under GPA, agreement to sell, Will and receipt, has also been correctly addressed by the courts below. While it is true that agreement to sell, GPA, receipt and Will do not pass title in respect of immoveable property, ***Suraj Lamps*** itself states, in the following passage, that, where the documents were genuine, they did confer certain rights in respect of

the property even if they were not titular rights:

> "26. We have merely drawn attention to and reiterated the well-settled legal position that SA/GPA/will transactions are not "transfers" or "sales" and that such transactions cannot be treated as completed transfers or conveyances. They can continue to be treated as existing agreements of sale. Nothing prevents the affected parties from getting registered deeds of conveyance to complete their title. The said "SA/GPA/will transactions" may also be used to obtain specific performance or to defend possession under Section 53-A of the TP Act. If they are entered before this day, they may be relied upon to apply for regularisation of allotments/leases by development authorities. We make it clear that if the documents relating to "SA/GPA/will transactions" have been accepted/acted upon by DDA or other developmental authorities or by the municipal or Revenue Authorities to effect mutation, they need not be disturbed, merely on account of this decision."

36. A suit which does not claim titular rights and merely claims a right to continue in possession without possession being disturbed save and except in accordance with law, is not required to make out a case of title. The law respects possessory rights over immoveable property, even in the absence of valid title. A person in settled possession of immoveable property is entitled under Section 9 of the Specific Relief Act, to continue in such possession, without being dispossessed save and except in accordance with law. In that view of the matter, the learned ADJ was correct in holding that no question relating to title arose for consideration. The reliance, by the learned ADJ, on the decision in ***Anathula Sudhakar***[1] is also apt.

37. Mr. Dudeja sought to question the validity of the title documents on which the respondent sought to place reliance by

submitting that the stamp papers, on which the documents had been executed, were purchased more than six months prior to the execution of the documents. No such contention has been advanced either before the learned ASCJ or before the learned ADJ. No such contention has even been advanced in the present appeal. The said contention, therefore, cannot make out any substantial question of law, within the meaning of Section 100 of the CPC, at a second appellate stage.

38. In the aforesaid circumstances, no error can be said to exist in the orders either of the learned ASCJ or of the learned ADJ. No substantial question of law arises in the present second appeal, which is accordingly dismissed in *limine* with no orders as to costs.

C.HARI SHANKAR, J

SEPTEMBER 26, 2022/kr