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

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*Judgment reserved on : 25.10.2016*

*Judgment delivered on : 27.10.2016*

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W.P.(C) 3633/2012

PHOOL SINGH

..... Petitioner

Through Mr. Naresh Thanai, Advocate

versus

MUNICIPAL CORPORATION OF DELHI THROUGH ITS  
CHAIRMAN (SOUTH) AND ANR

..... Respondents

Through Mr. Mini Pushkarna, Standing  
Counsel, South MCD with Ms.  
Namrata Mukim, Ms. Anushruti and  
Ms. Vasundhara Nayyar, Advocates  
Mr. Ajay Verma, Senior Standing  
Counsel with Mr. Vaibhav Mishra,  
Advocate for DDA  
Mr. Rajiv Kumar Ghawana, aDvocate  
for R-4 and R-5(a) to (f)

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

**INDERMEET KAUR, J.**

1 The present writ petition has been filed by the petitioner namely Phool Singh. In the course of these proceedings, Phool Singh had expired. His legal representatives have been brought on record. They are now pursuing this litigation.

2 At the outset, this Court had noted that prayers (a) and (c) cannot be granted and the petition had been confined to prayer (b) alone which reads herein as under:-

*“Issue writ order or direction in the nature of declaration declaring that the land use in respect of 13 biswas of land (admeasuring 650 square yards) forming part of Khasra No.50/1, Humayunpur, New Delhi in possession of the petitioner is residential and land use shown as park in the development plan of Humayunpur is illegal and arbitrary.”*

3 The averments in the writ petition disclose that the petitioner is stated to be in possession of property constructed on a plot of land measuring 13 biswas (admeasuring 650 square yards) forming part of khasra No.50/1, Humayunpur, New Delhi. It is stated that the petitioner is in possession of this plot of land since the last six decades.

4 A civil suit had been filed by one Khazan Singh and others in the year 1971 for possession against the petitioner qua 200 square feet of land. This suit was decreed on 30.10.1976 but the decree has not been executed till date. That decree has now become un-enforceable.

5 In the year 1985, the officers of the MCD and the DDA attempted to interfere in the peaceful possession of the petitioner qua the said suit land. Pursuant thereto, demarcation was ordered of the suit land which was accordingly carried out.

6 In the year 1989, part of this khasra was notified under Sections 4, 6 and 17 (1) of the Land Acquisition Act for a public purpose. This acquisition was challenged by the petitioner in a writ petition. This writ petition was disposed of on 24.02.1999. The acquisition proceedings stood quashed. An appeal filed against that judgment also stood dismissed by the Division Bench on 16.05.2000.

7 In the year 1996, Khem Chand and residents of the area had filed a suit for injunction against the petitioner. This suit was registered as Suit No.85/1996. The interim application filed by the petitioner under Order XXXIX Rules 1 & 2 of the CPC was dismissed by the Trial Judge on 09.10.1996. The appeal against that order was also dismissed. The contention of the petitioner all along was that he is in settled possession of the aforementioned land.

8 Thereafter in the year 2006, a suit was filed by Khazan Singh for possession and damages against the petitioner. The application under Order

XXXIX Rules 1 & 2 of the CPC filed by them was allowed in their favour. This was vide order dated 03.02.2009. The petitioner filed an appeal against that order which was disposed of by a Bench of this Court on 11.09.2009. The appeal was allowed. It was held that since the petitioner was in settled possession of the suit property (legal or otherwise), he could not be restrained from carrying out additions/alterations/construction in the suit property. The appeal against that order stood dismissed by the Apex Court on 11.02.2010.

9 In June, 2010, the petitioner had approached the office of the respondents seeking a sanction of his building plan. This application was not accepted by the respondents. The petitioner was constrained to file W.P. (C) No.6348/2010. This writ petition was disposed off on 08.04.2010. A copy of that order has not been placed on record but the further averments in the writ petition disclose that pursuant thereto that the petitioner had again submitted his application seeking a sanction of his building plan. This application was rejected. Admittedly against the rejection of sanction of building plan, the petitioner had a remedy of filing an appeal and as such prayer (a) was not pressed before this Court. This was noted in the order dated 01.06.2012. At the cost of repetition, it is only prayer (b) which is being pressed.

10     Vehement contention of the learned counsel for the petitioner is that all these facts clearly show that the petitioner is in settled possession of the land; he has become the owner by adverse possession. Accordingly, prayer (b) which is to the effect that the land user as depicted in the layout plan of the colony (shown as park) be permitted to be changed to a residential user. Learned counsel for the petitioner in support of his submission has placed reliance upon Section 55 of the Delhi Development Act, 1957. Submission being that even where a land situated in an area is required by the Master Plan or the Zonal Development Plan to be kept as an open space and the same has not been acquired, after the expiry of 10 years from the date of the operation of the plan, user of the land is deemed to be changed. Learned counsel for the petitioner in support of his submission has also placed reliance upon a judgment of the Apex Court in (2005) 11 SCC 222 Raju S. Jethmalani and Others Vs. State of Maharashtra and Others; submission is that in this case where the land in question had been sought to be acquired but could not be successfully acquired, the open park and the garden was permitted to be allowed to be personally used by the petitioner of that case. Submission being that in the instant case as well, the site which has been designated as a park be permitted to be converted to a residential user.

11 The counter affidavit has been perused. The stand of the Department (respondents No.1 & 2) all along was that the land in question as per the development plan is earmarked as a park in the village plan of Humayunpur as approved by the DDA vide its order dated 08.01.1986. Since the site under reference forms a part of the earmarked area for a park, the contention of the petitioner that he should be permitted to use it for his residential activities and his building plan be sanctioned was accordingly rejected on 04.11.2011. The development plan cannot be changed. It has been approved by the DDA.

12 The stand of the DDA/respondent No.3 was brought to the notice of this Court through its counter affidavit. Submission is that the petitioner has claimed his right by adverse possession which can be set up as defence and it cannot be used as a shield. Disputed questions of facts are involved. Submission being that this area now vests with the MCD and the land user only be confirmed by the Corporation. Admittedly the layout plan of village Humayunpur was approved by the Vice-Chairman, DDA on 08.01.1986; it has been earmarked as a park and it cannot be converted to a residential user.

13 Arguments have been heard. Record has been perused.

14 The petitioner does not have any acquired title on the land. He is claiming right over this land by adverse possession; a suit qua this land is pending between the petitioner and the alleged owner namely Khazan Singh and others who have claimed title over this land. That suit is yet to decide the fate of the parties. The petitioner claims title by way of adverse possession. Adverse possession, (as rightly pointed out in the counter affidavit of respondent No.3), can only be used as a defence; it cannot be set up as a claim. There is no document of title in favour of the petitioner. Even presuming that he is in settled possession since the last six decades, it would only be possessory rights and no title accrues thereto in favour of the petitioner which at the cost of repetition is yet pending adjudication.

15 Admitted position qua the layout land is also that the area in dispute has been shown as a park. The Zonal Development Plan has also recorded this and so also the layout plan of village Humayunpur. This is the stand of respondents No. 1 & 2 as also of respondent No.3. The change of the land user cannot be made at the asking of the petitioner. He does not qualify as an owner.

16 Recourse to provisions of Section 55 of the Delhi Development Act also do not come to his aid; at best it would apply qua the deemed status of

an owner. The judgment of Raju S. Jethmalani (supra) is of help to the petitioner. This was a case where the owner had set up a plea that the garden/park which had been de-notified by the Government should be permitted to be used by the owner.

17 The facts of the instant case are clearly distinct. The whole case of the petitioner is bordered on his plea of adverse possession and at the cost of repetition, is a plea where can be used as a defence and not as a shield to protect himself; the details of his claim for adverse possession are also missing.

18 The Supreme Court in (2006) 7 SCC 570 T Anjappa and Others Vs. Somalingappa and Another in this context had noted herein as under:-

*“The concept of adverse possession contemplates a hostile possession i.e. a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. The principle of law is firmly established that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. Adverse possession is commenced in wrong and is aimed against*



*right. A person is said to hold the property adversely to the real owner when that person in denial of the owner's right excluded him from the enjoyment of his property.”*

19 The question of a person perfecting his title by adverse possession is a mixed question of law and fact. Admittedly the suit filed by Khazan Singh for possession and damages against the petitioner is yet pending. This Court is of the view that it is this suit which will decide the title of the parties. Claim of adverse possession set up by the petitioner has not been perfected.

20 This petition is without any merit. Dismissed.

**INDERMEET KAUR, J**

**OCTOBER 27, 2016**

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