

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 27.07.2010

CS(OS) No. 393/1998

SUSHILA DEVI

..... PLAINTIFF

Vs

VIJAY KUMAR

..... DEFENDANT

Advocates who appeared in this case:

For the Plaintiff : Mr J.M. Bari & Ms Shweta Bari, Advocates
For the Defendant: Mr Arvind Kr. Gupta & Mr Bipin Bihari Singh, Advocates

**CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER**

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment ? | No |
| 2. | To be referred to Reporters or not ? | Yes |
| 3. | Whether the judgment should be reported in the Digest ? | Yes |

RAJIV SHAKDHER, J

1. This suit is instituted by the plaintiff for recovery of possession, damages and mesne profits. The prayers in the suit are as follows:-

- “a) a decree of the recovery of the possession of the suit property as described in para 1 of the plaint.
- b) decree of past damages/mesne profits of Rs 10,08,000/- or directing an enquiry as to such damages/mesne profits;
- c) decree for directing an enquiry as to damages/mesne profits from the institution of the suit until-
- i) the delivery of the possession of the suit property to the plaintiff;
- ii) the expiration of 3 years from the date of decree which ever event first accrues;
- d) where an enquiry is directed as to the damages/mesne profits as prayed hereinabove, a final decree in respect of the damages/mesne profits be passed in accordance with the result of such enquiry.

- e) award interest on the decretal amount at such rates as may be deemed fit and proper;
- f) award costs of the present suit;.....”

2. Briefly, the case set up in the plaint is as follows:-

2.1 The plaintiff is the owner of property, which comprises of land and the superstructure built thereon being: at House No.A-57, New Govind Puri, Chander Nagar, Hotel wali Gali, Krishna Nagar built on plot No.H-4, Govind Pura, Anarkali Road, Village Khureji Khas Illaqa Shahdara, Delhi-110051 (hereinafter referred to as the suit property). The suit property (then a vacant piece of land) was purchased vide sale deed dated 07.02.1972 (Exhibit PW1/D-1/PW2/D-1) in the name of the minor son of the plaintiff, Mukesh Chand Sharma (in short Mukesh) and, her brother-in-law Satya Narayan Sharma (i.e., husband’s brother). The consideration paid for purchase of the suit property, which admeasured 102.2/9 square yards, was a sum of Rs 3,000/-. Soon after the purchase of the suit property, the plaintiff’s minor son Mukesh, (the other co-owner of the suit property along with plaintiff’s brother-in-law Satya Narayan Sharma); died.

2.2 In 1988, the defendant laid claim to the suit property on the strength of, the execution of an agreement to sell dated 08.09.1988 (Ex.DW1/5) along with the following related documents of even date, i.e. agreement to sell (Ex.DW1/5), the General Power of Attorney (Ex- DW1/2), Will (Ex- DW1/3) and a receipt (Ex- DW1/4) [herein after collectively referred to as the “documents”] in his favour.

2.3 These documents were admittedly executed in favour of defendant by Niranjana Lal Sharma, the husband of the plaintiff and the father of deceased Mukesh. It is not disputed by the defendant that Niranjana Lal Sharma derived his power to execute the aforementioned documents in favour of the defendant by virtue of a GPA dated 26.02.1974 (Ex- DW4/1), which was, registered on 13.03.1974 by his brother Satya Narayan Sharma, that is, other co-owner of the suit property.

2.4 The stated consideration in the documents, which was evidently paid by the defendant, was a sum of Rs 45,000/-. It is the plaintiff's case that the sale deed dated 07.02.1972 (Exhibit PW1/D-1/PW2/D-1) was executed in favour of Satya Narayan Sharma alongwith Mukesh, since Niranjana Lal Sharma was not only wayward and indulged in physical abuse but also a drunkard; and hence, could not be trusted with the suit property. It is also the plaintiff's stand that the funds for the suit property were provided by plaintiff's father and brothers. However, as apprehended by the plaintiff, the said documents were executed by Niranjana Lal Sharma in favour of defendant in connivance with him. Resultantly, in 1989, the plaintiff was dispossessed of the suit property.

2.5 In the background of these short facts, the plaintiff, in 1996, instituted an action in this court. Since the plaintiff claimed indigency, the action was registered as an IPA bearing No. 08/1996. Accordingly, an enquiry was carried out. On the conclusion of the enquiry; by an order dated 26.02.1998, the aforementioned IPA was registered as a suit.

2.6 In suit the following issues were framed:

- i) Whether the plaintiff is the owner of house No. A-57, Chander Nagar built on Plot No. H-4, Govind Pura, Shahdara, Delhi? OPP
- ii) Whether the defendant purchased the suit property in accordance with law and whether the entire amount was paid by the defendant? OPD
- iii) Whether the defendant is in possession of the suit property? If not then to what effect? OPD
- iv) Whether the suit is within limitation?
- v) Whether the plaintiff is entitled to decree for recovery of possession and mesne profit as prayed for in the plaint? If so from whom and to what extent?
- vi) Relief.

3. Mr.Bari, who appears for the plaintiff, has briefly submitted as follows:

- (i) The plaintiff's relief in the suit even though cast widely is, presently confined to that half of the share in the suit property, which was owned by the deceased

son Mukesh. The reason for this, it was submitted was the enactment of Benami Transactions (Prohibition) Act, 1988 (hereinafter referred to as the Benami Act). (To be noted the Benami Act was preceded by an Ordinance which was promulgated on 19.5.1988. The Benami Act received assent of the President on 5.9.1988. Sections 3, 5 and 8 came into force immediately while the remaining provisions deemed to have been brought into force on 19.5.1988). It is his contention that in view of the provisions of the Benami Act, it may not be permissible in law for the plaintiff to claim any right in respect of other 50% share in the suit property which, in terms of sale deed dated 07.02.1972 (Exhibit PW1/D-1/PW2/D-1), was one owned by Satya Narayan Sharma.

(ii) However, in so far as the other half share in the suit property was concerned, after the death of her son Mukesh, in accordance with the provisions of the Hindu Succession Act, 1956, (hereinafter to as the Hindu Succession Act) the right, title and interest, in respect of the said share, would devolve on the plaintiff: being a class I heir.

(iii) Niranjana Lal Sharma based on the GPA dated 26.02.1974 (Ex-DW4/1) could have at best transferred in law, only the share of his brother Satya Narayan Sharma, in favour of the defendant. As regards the remaining 50% share, which was owned by Mukesh, Niranjana Lal Sharma had no authority in law or infact.

(iv) The documents on the basis of which title is claimed are fraudulent and sham documents, which cannot confer any right, title or interest on the defendant.

3.1 To buttress his submissions, Mr. Bari relied upon the evidence of PW-1 and her brother Ramesh Chand, PW-2.

3.2 On the issue of damages and mesne profits, Mr. Bari fairly conceded that no positive evidence had been placed on record. He, however, submitted that the court could direct payment of nominal damages for the period the suit property had been in illegal occupation of the defendant, even if, no positive evidence in that regard had come on

record. Mr. Bari attempted to find support on this aspect of the matter in the testimony of DW-1, wherein, it was put to the said witness that prevailing rent of the suit property was Rs 30,000/- p.m; a suggestion which the witness promptly refuted.

4. As against this, the case set up by the defendant, in the written statement broadly is, as follows:

- (i) Plaintiff was all along been aware, that the property was sold to the defendant, and that “some amount was given to the plaintiff at that time”, by her husband, i.e. Niranjana Lal Sharma; a fact which is borne out from the statement of the plaintiff made before the Court at the time when an enquiry was conducted as to the plaintiff’s claimed status of indigency;
- (ii) Plaintiff is not an owner of the suit property;
- (iii) that the suit is bad in law on account of non-joinder of necessary parties. In this regard defendant has referred to the fact that some portion of the suit property, i.e., 90 square yards has already been sold to his wife Smt. Prem Lal, since then deceased. Smt. Prem Lal, in turn, had sold a portion of the suit property admeasuring 23.5 square yards along with superstructure, comprising of one room measuring 10ft X 21ft out of the total area of 90 square yards to his brother Suraj Prakash Khanna; and
- (iv) Lastly, the suit is barred by limitation. In this regard, it is submitted that the legal notice dated 25.01.1996 (Ex- PW1/E) was duly replied by the defendant vide communication dated 28.03.1996 (Ex- PW1/F).

5. In support of the aforesaid objections taken in the written statement, Mr. Gupta who appears for the defendant, states that the averments made in the plaint are obviously false. This was sought to be demonstrated by Mr. Gupta, by alluding to the fact that the plaintiff’s case, that the suit property was bought with the funds provided by her father and brother, seems incredulous. The reason for coming to this conclusion was that: had the suit property been bought, out of the funds provided by the father and the brother of the plaintiff then, in the normal circumstances the family of the plaintiff would not have got 50% of suit property conveyed in favour of Satya Narayan Sharma, the brother-in-law

of the plaintiff. This argument was taken further by Mr. Gupta, by submitting that in fact Niranjana Lal Sharma, i.e. husband of the plaintiff was the real owner of the suit property. It was submitted that Niranjana Lal Sharma had invested funds to purchase the suit property in the first instance. Therefore, the execution of the documents in respect of the suit property in favour of the defendant way back in 1988, was in order. Since money for the property for purchase of the suit property was paid in the presence of the plaintiff, she ought not to be permitted to press the present action after a time lag of nearly eight years. In this context, Mr. Gupta submitted that since plaintiff was aware of the aforementioned fact she had not filed the instant action, till after her husband Niranjana Lal Sharma, had expired.

5.1 Mr. Gupta also brought to my notice the order passed by this court dated 02.05.2006, wherein liberty had been granted to the plaintiff to make necessary amendments in the suit to claim partition of the suit property qua the share of Mukesh, which had devolved upon the plaintiff. Mr. Gupta submitted that in view of the fact that the plaintiff had not applied for an amendment to claim partition, the decree as sought could not be granted.

6. I have heard learned counsel for the parties and considered the pleadings and the evidence on record. On the consideration of the material on record, in my view, the following fact situation emerges:

6.1 There is no challenge to the sale deed dated 07.02.1972 (Ex-PW1/D-1/PW2/D-1). The sale deed (Ex-PW1/D-1/PW2/D-1) has been accepted by both the parties. As a matter of fact, after the Registry of this Court had lost the original during the enquiry carried out to determine the indigency of the plaintiff; the defendant had filed a certified copy of the said sale deed (Ex.PW1/D-1/PW2/D-1). What has emerged from the testimony of the PW-1 and her brother PW-2, that the father of the plaintiff as also the brothers were persons of some means. The father evidently was a contractor, while the brothers ran a “chakki” business as well as gave motor vehicles on hire. The father had

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given, by way of assistance, a sum of Rs 1,00,000/-, and thereafter from time to time Rs 20,000/- to Rs 25,000/-, amounting to total of Rs 2,50,000/- for purchase and construction of a residential dwelling house. Even though, in the cross-examination of PW-1, it has emerged that money was given by the father, while in the cross-examination of PW-2, it is stated that money was given by him; the fact remains that the money was received by the plaintiff for purchase of the suit property, and construction of the super-structure thereon; from her family. The defendant's witness Hakim Singh (DW-2) contrary to the case set up by the defendant and the endorsement made in the sale deed (Ex-PW1/D-1/PW2/D-1) sought to suggest that a sum of Rs 3,50,000/- was paid as consideration for the suit property. This claim of DW-2 is not supported by the defendant (DW-1) or by the contents of the sale deed (Ex-PW1/D-1/PW2/D-1). There is, therefore, nothing placed on record by the defendant which would show that the testimony of the plaintiff on this aspect of the matter, that the, funds for purchase of the suit property were provided by her family, was false. Except for a bald denial, there is nothing to demonstrate to the contrary.

6.2 Moreover, the arguments of the learned counsel for the defendant that the money was paid by Niranjana Lal Sharma and not by the plaintiff's father and brothers as stated in the plaint, in my view, even if accepted, would not further the case of the defendant. At best what could be said in favour of defendant is that Niranjana Lal Sharma purchased the suit property in 1974, in the name of his son. It is not the stand of the defendant that Mukesh was not ostensible owner of the property. It is possible that Niranjana Lal Sharma had purchased the suit property out of love and affection in the name of his son. In law, Mukesh would be the owner of the property and on his death, the plaintiff would automatically become the owner of the property, being the class I heir. Mr. Gupta's arguments to the contrary, thus in my view, have no merit.

6.3 This apart, the fact remains, as indicated by me hereinabove, the sale deed (Ex-PW1/D-1/PW2/D-1) is not challenged by the defendant. Mr. Bari during the course of

arguments has confined its claim to only 50% of the share of the suit property which was in the name of deceased Mukesh, i.e., son of the plaintiff. On the death of the deceased, the suit property would undoubtedly devolve on a class I heir. The plaintiff being a class I heir, would in law be the owner of the property. Therefore, the father who is a class II heir, under the Hindu Succession Act, could not have sold the suit property in its entirety to the defendant. Since, the plaintiff has not challenged the ownership of Satya Narayan Sharma with respect to the other half share of the suit property, the defendant can legitimately claim title to that part of the suit property which was owned by Satya Narayan Sharma; which Niranjana Lal Sharma evidently sold to the defendant.

6.4 The issue, however, remains as to whether the consideration paid by the defendant was for the entire suit property or only for the 50% share which was owned by Satya Narayan Sharma. The money even according to the defendant was paid to Late Niranjana Lal Sharma, the husband of the plaintiff. In the evidence of PW-1, it has emerged that perhaps Rs 20,000/- out of the total consideration of Rs 45,000/- paid by the defendant was deposited in the bank in the name of daughter of the plaintiff and Late Niranjana Lal Sharma, i.e., Laxmi Sharma. Even if that be so, in my view, that by itself would not create any estoppel, in so far as plaintiff is concerned. This is for the reason that there is nothing on record to show that the plaintiff was aware that the money which was deposited in the bank: firstly, came from the defendant, and secondly, was in lieu of documents executed by Niranjana Lal Sharma in favour of the defendant vis-à-vis the said property. On the contrary, the plaintiff (PW-1) in her testimony has categorically stated that she warned the defendant not to purchase the suit property as there were disputes with regard to the same. Therefore, the payment of consideration of Rs 45,000/- by itself would not entitle the defendant to claim ownership of the entire suit property, since in law Niranjana Lal Sharma could not have sold at least that half (50%) of the share of the suit property which was owned by his son Mukesh; in respect of which he had decidedly no authority in law or in fact. The only authority which the Niranjana Lal Sharma possessed if at all was qua the share of Satya Narayan Sharma in the suit property. An

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authority which he derived by virtue of GPA dated 26.02.1974 (Ex.DW4/1) executed in his favour by Satya Narayan Sharma.

6.5 Therefore, the purchase of the entire suit property by the defendant was not in accordance with law, for the reason that the defendant cannot have a better title than what the Vendor, i.e., Niranjana Lal Sharma had. It is not even the case of the defendant that money was paid to the plaintiff. The money was decidedly paid to Niranjana Lal Sharma.

6.6 It is not disputed by Mr. Bari that defendant is in possession of the suit property. In fact, in the plaint itself, it is averred that in 1989 the plaintiff was dispossessed. In view of the fact that the plaintiff in law, is the owner of 50% of the suit property, the plaintiff would be entitled in law to seek possession of that one-half of the suit property of which late Mukesh was the owner.

6.7 The submissions of Mr. Gupta that the suit is barred by limitation is untenable. Even according to the defendant, he had purchased the property on 08.09.1988, the action in this court is filed in 05.04.1996. As per the Article 64 & 65 of the Limitation Act, 1963, the period of limitation provided for action of like nature is 12 years. Demonstrably, the suit is within limitation.

7. In these circumstances, according to me, the plaintiff is entitled to decree for possession. The fact that plaintiff has not asked for partition by itself does not disentitle the plaintiff to seek a decree for possession. I have not been shown any authority to the contrary, which would have me rule otherwise. As is obvious the plaintiff will have to restart to separate proceedings if she wishes to crystallize her one-half share in the suit property.

8. In so far as, relief of damages and mesne profit is concerned, Mr. Bari fairly conceded that no positive evidence has been led as regards this aspect of the matter. He sought nominal damages in that behalf. The burden of proof with respect to the profits which the defendant is likely to receive on account of wrongful possession of the suit

property is on the plaintiff. Though the burden with respect to what is *actually received as profit* is on the defendant being a fact within the defendant's special knowledge. See *Ramakka vs V. Nagesam AIR 1925 Mad. 145 at page 146* and *Harendra Nath Mukherji & Ors. vs Hari Pada Mukherji & Ors. AIR 1939 Cal. 387 at page 393*. The relevant observations made in Ramakka (supra), on this issue are as follows:-

“The profit which a person actually received is a matter within the peculiar knowledge of that person and, under Section 106 of the Evidence Act, the burden of proving the amounts actually received will lie on the person who received them; **but the burden of proving the profits that the person in occupation might have received will lie on the person who claims them.**” (emphasis is mine)

The dicta with respect to burden of proof of proving mesne profits was followed by the Calcutta High Court in *Harendra Nath Mukherji (supra)*. The relevant observations being:

“The learned advocate on the authority of a decision of the I Madras High Court in Ramakka v. Nagesam AIR1925Mad145 contended that the defendant being admittedly in possession of the property, the onus was upon him to show what amount he actually got from the two houses after the death of the widow. In that case it was held that a person who had a special knowledge of certain facts must prove them. Section 106, Evidence Act, says so. In that case it was also held that if a certain amount was claimed by the plaintiff as mesne profits on the footing that that amount the defendant could get from the property with due diligence, the onus was upon the plaintiff to prove what amount the defendant could have got from this property with due diligence. It is true that the defendant has adduced no evidence to show what amount actually he received during the period of his possession. The plaintiffs have also adduced no evidence to show what amount the defendant could have got from the properties. Under the circumstances it is impossible for the Court to determine the amount of mesne profits and the claim for mesne profits must therefore fail for want of evidence. The trial Judge was therefore right in dismissing the claim for mesne profits. The cross-objections, so far as mesne profits are concerned, are therefore dismissed.”

8.1 On this aspect, however, one may only note the testimony of DW-1, wherein it has emerged that the super-structure built on the suit property, inter-alia comprises of three shops. Out of the three shops, one had been let out at Rs 440/- p.m. while, the other two had been let out at Rs.250/- p.m. The total rent which the defendant had earned was Rs 940/- p.m. In so far as, the shop which earned Rs 450/- p.m., it is stated that it has been let out for about 7-8 years, while the remaining two shops have been on rent for the

past 20 years. In the absence of plaintiff leading evidence on the issue it is not known whether the shops are of equal area; the facilities available therein; as also other incidents attached to the said property (i.e., the shops) which are, crucial for determination of mesne profits. Therefore, in my view, if the lowest base rent is applied to all the three shops, i.e. Rs 250/- p.m. , plaintiff should be entitled to mesne profit of Rs 750/- p.m from 25.01.1996; which is when the plaintiff issued a legal notice to the defendant.

9. In view of the discussions above, my answers to the issues framed in the case are as follows:

(i) The plaintiff is the owner of one-half of the suit property, which devolved on her after the death of her son, Mukesh: being his class I heir. This issue is, therefore, partly decided in favour of plaintiff.

(ii) The defendant in law could not have purchased at least that half of the suit property which was owned by Mukesh. The purported sale by Niranjana Lal Sharma, conferred no right in that half of the suit property which was owned by Mukesh. The amount of Rs 45,000/- evidently paid by the defendant conferred, in law, no interest in the defendant with respect to at least 50% share in the suit property which was owned by the deceased Mukesh. Therefore, the payment of Rs 45,000/- to Niranjana Lal Sharma would not enure to the benefit of the defendant insofar as one-half of the share in the suit property was concerned, as it belonged to Mukesh. The said issue is, thus, decided against the defendant, and in favour of plaintiff.

(iii) The defendant is in possession of the suit property, a fact which is borne out from the averments made in the plaint to the effect that the plaintiffs were evacuated from the suit property in 1989. This issue is, thus, decided in favour of the defendant.

(iv) The suit is within limitation.

(v) The plaintiff is entitled to a decree of possession and mesne profits. Decree of possession is granted in favour of the plaintiff with respect to one-half of the undivided suit property. As indicated above, plaintiff will have to take out separate proceedings to fructify her share. In so far as mesne profits are concerned they be

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calculated at the rate of Rs 750 per month to be paid with effect from 25.01.1996 till the date of decree, and thereafter at the same rate till the date of possession or a period of three years; whichever occurs earlier in point of time. Plaintiff shall also be entitled to the interest at the rate of 6%, on the arrears of mesne profits, accruing to her between the date of institution of suit and date of the decree. The plaintiff shall be entitled to a further interest, at the rate of 6% on the mesne profits from the date of decree to the date of payment.

10. It is ordered accordingly. The suit be consigned to record.

RAJIV SHAKDHER, J

JULY 27, 2010
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