

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 02.11.2010
Judgment Pronounced on: 09.11.2010

+ **CS(OS) No. 1634/2002**

MR. V.M. GUPTA & OTHERS **.....Plaintiff**

- versus -

MR. SHASHI GUPTA & OTHERS. **.....Defendant**

Advocates who appeared in this case:

For the Plaintiff : Mr Sanjay Goswami, Adv.
For the Defendant : Mr Sanjeev Sindhvani, Adv. for
Defendants 1 to 3
Mr Dinesh Garg, Adv. for
D-5&6

CORAM:-

HON'BLE MR JUSTICE V.K. JAIN

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

V.K. JAIN, J

1. This is a suit for declaration and permanent injunction. Late Smt. Kamla Wati, mother of plaintiff No.1, mother-in-law of plaintiff No.2 and grandmother of plaintiff Nos.3 and 4 was the recorded lessee in respect of plot No.16, School Lane, Babar Road, New Delhi. She expired on 21st December, 1984. In her lifetime, she had executed a

registered Will dated 09th August, 1994, bequeathing the aforesaid property to her sons, namely, Radhey Mohan Gupta, Inder Mohan Gupta and Virender Mohan Gupta and given ownership rights in respect of different constructed portions of the property individually to them. All the three sons of late Smt. Kamla Wati entered into an agreement/settlement on 22nd January, 1985, with respect to the division of the property on the basis of the Will of their mother. The first floor, verandah, living room and dining room, bed room, kitchen and toilet, barsati toilet and the terrace on the top floor, shown in green in the plan annexed to the Will fell to the share of Shri Radhey Mohan Gupta, who was the husband of defendant No.1 Shashi Gupta and the father of defendant No.2 Smt.Namita Gupta and defendant No.3 Kavita Gupta. The back portion of the ground floor consisting of two bed rooms, one bath room, toilet, rear gate and open area in the rear portion, as also a portion of the first floor consisting of three bed rooms with loft on rear bed room, toilet, passage and half of open terrace fell to the share of Inder Mohan Gupta, husband of plaintiff No.2 and father of plaintiff Nos. 3 and 4. He was also permitted to use the loft by putting a wooden staircase

in the courtyard and the portion bequeathed to him was shown in yellow in the site plan, annexed to the Will. The ground floor portion consisting of open lawn, covered verandah, the loft, drawing and dining room, two bed rooms, open courtyard WC and bath and one store and verandah on the top floor and terrace, including biggest loft upon the bed room of the ground floor, were bequeathed to plaintiff No.1 Virender Mohan Gupta and was shown in red colour in the site plan, annexed to the Will. Inder Mohan Gupta expired on 09th October, 1991, whereas Shri Inder Mohan Gupta expired on 25th March, 2000. It is alleged in the plaint that defendants 1 to 3 have converted certain windows, shown at points 'A' and 'B', in the site plans, into doors and thereby they have access to certain areas in the form of open courtyard and terrace which otherwise vests in the plaintiffs. It has further been alleged that defendants 1 to 3 vacated the portion occupied by them on 30th August, 2002 after informing the plaintiffs that they had sold their rights in favour of a builder, who was to use that portion or was to give the same on rent for commercial purpose. They also informed the plaintiffs that the purchaser would also make some additional construction on their portion on the

first floor terrace and convert it into a multistoried building. According to the plaintiffs, since property in question is a lease hold property and no sub-division and sale or transfer of any portion is permissible, the defendants could not have sold, alienated or agreed to purchase only a portion of the property in a lawful manner. They also apprehend an imminent threat of breach of the lease deed by defendants by using the property for non-residential purpose and by raising unauthorized construction therein. They have sought a decree for declaration, declaring that the sale or transfer made by defendants 1 to 3 in favour of defendants 5 and 6, pursuant to the agreement to sell, General Power of Attorney and possession letter dated 06th September, 2002 is illegal and void. They also want permanent injunction, restraining the defendants from using any portion of the property for non-residential purpose and from making unauthorized construction therein. They also want an injunction, restraining them from disturbing the use and occupation of the plaintiffs, in respect of the portion occupied by them. They also want an injunction against mortgage of the property or creation of any charge or third party interest therein.

2. The suit has been contested by the defendants. In their written statement, defendants 1 to 3 have taken a preliminary objection that the suit has not been properly valued for the purpose of Court Fee and jurisdiction and is bad for misjoinder to defendant No.4. On merits, it has been alleged that the plaintiffs have no locus standi to challenge the agreement to sell executed by them in favour of defendant No.6. They have also alleged that the plaintiffs themselves have carried out unauthorized construction in the property and have misused it by carrying out commercial activities there. They claim that they have not violated any term of the lease and have neither carried out any unauthorized construction nor have they ever misused the property. They have also denied having converted the windows at point 'A' and 'B' of site plan into doors. According to them, the door exists since 1971 when defendant No.1 got married. They have admitted that they had entered into an agreement to sell their portion to defendant No.6 on 06th September, 2002 and have handed over the vacant possession of that portion to it. They have also admitted execution of General Power of Attorney in favour of defendant No.5. They have, however, denied

having threatened commercial use of the property or unauthorized construction therein.

3. Defendant Nos. 5 and 6, in their written statement, have taken similar preliminary objections and have admitted that defendants No.1 to 3 had handed over vacant possession of their portion to defendant No.6 and had executed a General Power of Attorney in favour of defendant No.5. It has also been admitted that the portion of the defendants 1 to 3 is now in occupation of defendant No.6.

4. No written statement has, however, been filed by defendant No.4 Union of India, which has been sued through Land and Development Office, Ministry of Development and Urban Affairs.

5. The following issues were framed on the pleadings of the parties:-

“1. Whether the suit has been property valued for the purposes of court fee and jurisdiction and the property court fee has been paid? OPP

2. Whether plaint discloses any cause of action against defendant Nos.5 and 6 on the date of filing of suit or afterwards? OPP

3. Whether the plaintiff have any locus standi to challenge the sale of their portion by defendant Nos. 1 to 3?

OPP

4. Whether the sale of their portion by defendants No.1 to 3 to defendant No.6 is liable to be set aside?
5. Whether the plaintiffs are entitled to the declaration as claimed?
OPP
6. Whether the plaintiffs are entitled to the injunction as claimed? OPP
7. To what relief the plaintiffs are entitled to.
8. Relief.”

6. **Issue No.1**

No arguments on this issue were advanced before me. Fixed Court Fee of Rs 19.50/- is payable on the relief of declaration under Article 17(iii) of Schedule II, if no consequential relief is prayed.

As held by a Full Bench of this Court in **Purshottam Dass and Ors. Vs. Har Narain and Anr.** AIR 1978, Delhi 114, a suit for injunction will be treated as a suit under Section 7(iv)(d) if the plaintiff can get the injunction sought by him without the necessity of praying for declaration and in such a case, the prayer for declaration will be the surplusage. If, however, there is an obstacle to be removed

before the plaintiff can remove the relief of injunction simplicitor, it cannot be said that the relief of declaration sought by the plaintiff should be ignored as a surplusage. The expression "consequential relief" used in Section 7(iv)(c) of Court Fee Act refers to a relief which would follow directly from the declaration given, the valuation of which is not capable of being definitely ascertained, which is not specifically provided for anywhere in the Act and cannot be claimed independently of declaration, as a substantive relief. This proposition of law laid down by Lahore High Court in a Full bench of Lahore High Court in **Zeb-ul-Nisa v. Din Mohammad** was approved by Supreme Court in **Shamsher Singh Vs. Rajinder Prashad and Ors.** AIR 1973 SC 2384. Though the plaintiff has claimed declaration as well as permanent injunctions, the reliefs of injunction cannot be said to be the reliefs, consequent to relief of declaration sought by the plaintiffs. The injunctions against use of the property for non-residential purpose, against its mortgage as well as injunction against forcible dispossession of the plaintiff from the portion occupied by them could have been claimed by the plaintiffs, even without the transaction between defendants 1 to 3 and

defendant No.6. Thus, prescribed Court Fee has been paid by the plaintiffs on the relief of declaration, claimed by them. With respect to relief of injunction, in view of the provisions contained in Section 7(iv)(d) of Court Fee Act, the plaintiff could have given any valuation and was required to pay ad valorem Court Fee on the transaction. They have valued the relief at Rs.5,50,000/- for the relief of injunction and have paid ad valorem Court Fee on that amount. The issue is, therefore, decided in favour of the plaintiffs and against the defendants.

7. **Issue No.2 to 4**

These issues are interconnected and can be conveniently decided together. The perpetual lease deed executed by the Land and Development Office in respect of Property No.16, School Lane, Babar Road, New Delhi is Ex.P-1 and to the extent it is relevant, the document reads as under:-

(11) The Lessee shall before every assignment or transfer of the said premises hereby demised or any part thereof obtain from the lessor or the Chief Commissioner of Delhi or such officer or body as the lessor may authorize in this behalf approval in writing of the said assignment or transfer and all such assignees and transferees and the heirs

of the lessee shall be bound by all the covenants and conditions herein contained and be answerable in all respects therefor.

8. The question which comes up for consideration is whether by entering into an agreement to sell a portion of the suit property to defendant No.6, executing a General Power of Attorney in favour of defendant No.5 and handing over possession of a portion of the house constructed on this plot to defendant No.6, defendants 1 to 3 have contravened the aforesaid term contained in lease deed. There shall be contravention of the aforesaid term if defendants 1 to 3 have either assigned or transferred the portion occupied by them in the suit property to defendant No. 6. Admittedly, no sale deed or any other registered document of transfer has been executed by defendants 1 to 3 in favour of defendant No. 6, thereby transferring the ownership of their portion to defendant No.6. They have only entered into an agreement to sell in favour of defendant No. 6, but no sale deed in its favour has been executed by them. The agreement to sell by itself does not amount to sale, transfer or assignment of the property subject matter of the agreement, to the person to whom it is agreed to be

sold, assigned or transferred. It only gives a right to that person to obtain sale, transfer or assignment of the property subject matter of the agreement, in his favour. It is very much open to the lessee to apply to the lesser for the requisite permission to sell, assign or transfer the property to another person. If the requisite permission is granted, the sale deed or other instrument of transfer can then be executed by the lessee in favour of the person who has agreed to purchase the property. But, there is no sale, transfer or assignment so long as neither a sale deed is executed and registered nor a document of transfer is executed by the seller in favour of the purchaser. In this regard, it would be appropriate to refer to the provisions of Section 54 of Transfer of Property Act which provides that transfer of ownership of immovable property of the value of one hundred rupees and upwards can be made only by a registered instrument. No such instrument has, however, been executed by defendants 1 to 3 in favour of defendant No. 6.

9. This issue came up for consideration before this Court in **Kuldip Singh Suri vs. Surinder Singh Kalra**, 1998 (IV) AD Del 469. The perpetual sub-lease in that case

stipulated that the sub-lessee shall not sale, transfer, assign or otherwise part with the possession of the whole or any part of residential plot to any other member of the lessee society except with the previous consent of the lessor which he shall be entitled to refuse in his absolute discretion. It was contended before this Court that the transaction between the parties for sale of the plot subject matter of the sub-lease was illegal in view of the aforesaid clause contained in the sub-lease. Rejecting the contention, this Court inter alia observed as under:

"The argument of learned counsel for the plaintiff that if the transaction is considered to be an agreement to sell, then in that event the same would be clearly void as no prior permission for entering into such a transaction was taken from the DDA for the transfer of the land, is devoid of force. An agreement to sell does not amount to sale or transfer of the immovable property. Therefore, under clauses 6(a) and (b) of the perpetual sub lease, there is no bar for a sub lessee to enter into an agreement to sell. As per clause 6(a) if the sub lessee desires to sell or transfer an unbuilt plot to any person who is not a member of the lessee, he is required to take the consent in writing of the Lessor.

10. The view taken by this Court in the case of **Kuldip Singh Suri** (supra) was reaffirmed in **Vinod Singh vs.**

Phutori Devi, 2006 (III) AD Del 234. In the case of **Kuldip Singh** (supra), the covenant contained in the sub-lease, prohibited the sub-lessee not only from selling, transferring or assigning the plot, but also from parting with the possession of the whole or any part of the plot except with previous consent in writing of the lessor. The sale deed executed by Land & Development Office in the case before this Court is more liberal since it does not contain any covenant against parting with possession of the whole or any part of the land subject matter of lease deed though it does contain a prohibition against its sale, transfer or assignment, except with the prior approval in writing of the lessor. Therefore, the aforesaid clause, contained in the lease deed has not been contravened by defendants 1 to 3 by entering into an agreement to sell in favour of defendant No.6, appointing defendant No.5 as their attorney and by handing over vacant possession of the constructed portion occupied by them to defendant No.6.

11. Since there has been no sale of any portion of the suit property by defendants 1 to 3 to defendant No.6, there is no question of setting aside that transaction and the plaintiffs, challenging the same on the ground that it

contravened the covenants contained in the lease deed. Since there is no breach of the covenants contained in the lease deed, merely by defendants 1 to 3 entering into an agreement to sell in favour of defendant No.6 appointing defendant No.5 as their attorney and by handing over the constructed portion occupied by them to defendant No.6, it is not permissible for the lessor to determine the lease and re-enter the suit property on this ground alone. The issues are decided accordingly.

12. **Issue No.5**

In my finding in Issues No. 2 to 4, the plaintiff is not entitled to the declaration sought by them.

13. **Issue No.6**

The lease deed executed by Land and Development Officer, inter alia, stipulates as under:-

“(5) The Lessee will not without the previous consent in writing of the Chief Commissioner of Delhi or of such officer or body as the Lessor or the Chief Commissioner of Delhi may authorise in this behalf erect or suffer to be erected on any part of the said demised premises any buildings other than and except the buildings erected thereon at the date of these presents.

(6) The Lessee will not without such consent as aforesaid use the said

premises or permit the same to be used for any purpose other than that of a residence or do or suffer to be done thereon any act or thing whatsoever which in the opinion of the Chief Commissioner of Delhi may be an annoyance or disturbance to the Governor General in Council or his tenants in the New Capital of Delhi. The front room of the said residence may, however, be used by the Artisans' Class for their legitimate deed."

14. In view of the aforesaid covenants contained in the lease deed, it cannot be disputed that none of the parties has any right to raise any construction in the suit property, without prior approval of the lessor and none of them is entitled to use the suit property or any part thereof for any purpose other than that of a residence. The front room of the property can, however, be used by artisan's class for their legitimate right as permitted in the lease deed. If there is contravention of 2(5) or 2(6) of the lease deed, the lessor will be entitled to determine the lease and re-enter upon the property in view of the provisions contained in clause 3 of the lease deed which, to the extent it is relevant, provides that if there shall have been in the opinion of the Lessor or the Chief Commissioner of Delhi whose decision shall be

final, any breach by the Lessee or by any person claiming through or under him of any of the covenants or conditions hereinbefore contained and on his part to be observed or performed then and in any such case it shall be lawful for the Lessor or any person or persons duly authorized by him notwithstanding the waiver of any previous cause or right of re-entry upon any part of the premises hereby demised or of the buildings thereon in the name of the whole to re-enter and thereupon this demise and everything herein contained shall cease and determine and the Lessee shall not be entitled to any compensation whatsoever, nor to the return of any premium paid by him.

15. As regards mortgage of the suit property or any part thereof, since the land underneath the suit property jointly belongs to all the lessees, it can be mortgaged only by all of them, acting together in this regard and unless all of them do it jointly, it is not permissible to mortgage the suit property or any part thereof. The documents of title such as lease deed of the land underneath the suit property is property of all the lessees and, therefore, no one can pledge those documents or create any equitable mortgage of the suit property or any part thereof by depositing the lease

deed, except with the approval of the other co-lessees and if required with the permission of the lessor. The issue is decided accordingly.

16. **Issues 7 and 8**

In view of my findings on the issues, the plaintiffs are entitled only to injunction against sale, assignment or transfer of any portion of the suit property, without prior approval of the lessor. They are also entitled to injunction against any construction in the suit property, without prior permission of the Competent Authority. They are further entitled to permanent injunction against use of the suit property or any part thereof for any purpose other than as a residence except to the extent that the front room of the house can be used by artisans' class for their legitimate trade, wherever applicable. They are also entitled to injunction, restraining defendants¹ to 3, 5 and 6 from interfering with their possession of the portion occupied by them in the suit property and shown in red and yellow colour in the site plan, annexed to the plaint, except by due process of law. They are also entitled to injunction against mortgage or charging of the suit property or any part thereof either against title deed/lease deed of the land underneath

the suit property or in any other manner.

17. The plaintiffs have also claimed mandatory injunction, seeking closure of the doors shown at point 'A' and 'B' in the site plan. The plaintiffs have not filed the approved building plan of the suit property to show that at the time this property was constructed, two windows existed at the points shown at point 'A' and 'B' in the site plan, annexed to the plaint. In the absence of the sanction building plan of the suit property, the Court is not in a position to ascertain what exactly was the construction at these places when this building was constructed. at The prescribed period of limitation for claiming this relief is three years from the date the doors are alleged to have been closed and the case of defendant No.1 to 3 is that doors shown at point 'A' and 'B' existed even when defendant No.1 was married in the year 1971. No evidence has been led by the plaintiffs to prove that these doors were closed within three years before this suit was filed on 09th October, 2002. In fact, the plaint even does not disclose the date on which the windows at point 'A' and B' in the site plan are alleged to have been closed. The plaintiff has not produced any evidence to prove the date on which the windows at points

‘A’ and ‘B’ in the site plan were allegedly closed. The defendant No.1, on the other hand, has specifically stated in her affidavit by way of evidence that doors existed at these places even at the time she got married in the year 1971. In view of failure of the plaintiff to produce any evidence to prove the date on which the windows are alleged to have been replaced by doors, I see no reason to disbelieve the deposition of defendant No.1 in this regard and hold that windows, if any, at point ‘A’ and ‘B’ were replaced by doors on or before the date on which defendant No.1 got married in the year 1971. Computed from that date, the suit is patently barred by limitation as far as the relief of mandatory injunction for removal of these doors is concerned.

ORDER

18. In view of my findings on the issues, all the parties to the suit are hereby restrained from using the suit property or any part thereof for any purpose other than that of a residence with the sole exception that front room can be used by the artisan’s class for their legitimate trade, as provided in the lease deed. They are also restrained from raising any construction in the suit property, except with

the prior permission of the Competent Authority. They are further restrained from mortgaging the suit property shall not create any mortgage in respect of the suit property or any part thereof or charging the same in any manner, except with the prior approval of all the lessees and if required also with the prior approval of the lessor. Defendant No.6, which is stated to be in possession of the lease deed of the land underneath the suit property shall not create any mortgage in respect of the suit property or any part thereof by deposit of this title deed/lease deed, except with the prior approval in writing of other lessees and if required also of the lessor. Defendants 1 to 3, 5 & 6 are also restrained from dispossessing the plaintiff from any portion occupied by them in the suit property except with due process of law. There shall be no order as to costs. Decree sheet be prepared accordingly.

(V.K. JAIN)
JUDGE

NOVEMBER 09, 2010
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