

R-118

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

% *Judgment Reserved on: 19.11.2010*
Judgment Delivered on: 23.11.2010

+ **R.S.A. No.185/2002**

MANGAT RAM (since deceased)

Through L.Rs.

.....Appellant
Through: Mr.Abhik Kumar,
Mr.Siddhartha Shankar &
Mr.Rajesh Kr.Naidu, Advocates.

Versus

RAMPHAL RATHI

.....Respondent
Through: Mr.M.R.Chawla & Mr.N.Vinoba
Bhoopathy, Advocates.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J.

1. This appeal has been directed against the impugned judgment and decree dated 30.10.2002 which has endorsed the finding of the trial judge dated 5.3.1999 whereby the suit of the plaintiff Ram Phal Rathi for permanent injunction has been decreed in his favour.

2. Briefly stated the factual matrix of the case is as follows:

- (i) Plaintiff had purchased land comprising of 16 bighas 17 biswas in village Tigri Kalan, Delhi-41 in Khasra No.25/8, 9, 10, 57/14/1, 78/18/2 & 717 vide a registered sale deed Ex.PW1/2 dated 4.4.1996 from Chand Singh.
- (ii) The land was mutated in the name of plaintiff on 7.6.1996.

Plaintiff is stated to be in actual physical possession of the

suit property.

- (iii) Plaintiff had constructed boundary wall along with one tin shed room in land measuring 18 biswas comprised in Khasra No.57/14/1 in September, 1996.
- (iv) On 28.10.1996, the defendant and his associates tried to take forcible possession of the suit property; on the intervention of the neighbours the defendant ran away from the site.
- (v) On 31.10.96 the defendant again visited the site along with certain anti-social elements to take forcible possession of the suit property.
- (vi) Defendant had filed a petition under Section 85 of the Delhi Land Reforms Act, 1954 (hereinafter referred to as "the DLR Act) for declaration of his bhumidari rights which petition was dismissed.
- (vii) By way of the present suit plaintiff has claimed a decree of permanent injunction restraining the defendant from dispossessing the plaintiff or interfering with his peaceful possession of the suit property.
- (viii) Defendant filed written statement. His preliminary objection was that the suit is barred under provisions of Section 53 of the Transfer of Property Act. It was stated that the defendant was in actual physical possession of the said 18 biswas of land comprised in Khasra No.57/14/1; plaintiff has no connection with the same. Contention of the defendant was that he had purchased land comprised in Khasra No.997 measuring 1 bigha 14 biswas on 23.5.1972 vide a registered sale deed Ex.DW1/X from Sukh Devi who is the mother of Chand Singh. Defendant had in part performance of the

contract taken possession of the land in the said khasra. Thereafter Consolidation of Holding proceedings took place in the Revenue Estate in the year 1975-76; in lieu of the possessory right of the defendant in Khasra no.997 he was allotted and given possession of 18 biswas of land in Khasra No.57/14/1. Since then he is in possession of the suit property to the exclusion of others. Plaintiff has no right in the suit property.

(ix) Trial judge had framed seven issues; they inter alia read as follows:

- i) Whether suit of the plaintiff is barred u/s 53-A of Transfer of Property Act? OPD
- ii) Whether suit of the plaintiff is bad for non-joinder of necessary parties? OPD
- iii) Whether plaintiff has no locus standi to file the present suit? OPD
- iv) Whether suit of the plaintiff as framed is not maintainable? OPD
- v) Whether there is no cause of action for filing the present suit? OPD
- vi) Whether plaintiff is entitled to permanent injunction prayed for? OPP
- vii) Relief.

(x) Trial judge on the basis of oral and documentary evidence had returned a finding that the plaintiff had vide registered sale deed dated 4.4.1996 Ex.PW1/2 and the subsequent mutation effected on 7.6.1996 proved his ownership and title to the suit property. Version of PW1 that he had constructed boundary wall with a tin shed room in this land was accepted. The testimony of PW2 the Patwari was also considered. Defence of the defendant that he is in possession of this property since Consolidation of Holding proceedings in August, 1976 in lieu of the property which had been held by him in Khasra no.997 was reflected. The further documents i.e. Ex.DW1/3 to Ex.DW1/7 which were khasra girdawaris

ranging from the year 1983 to 1986 were also considered. Court held that admittedly as on date it was the plaintiff whose name was recorded in the mutation/revenue records; weighing the balance of evidence it tilted in favour of the plaintiff; plaintiff was held entitled to a decree of permanent injunction as he had established his possession in the suit property.

(xi) This finding of the trial judge was endorsed by the first appellate court. Vide the impugned judgment dated 30.10.2002, the registered sale deed of the defendant Ex.DW1/X was rejected on the ground that this sale deed had been executed by Sukh Devi on behalf of herself as also her three minor children and the requisite permission of the District Judge not having been obtained under Section 8 of Hindu Minority & Guardianship Act, 1956 hereinafter referred to as 'HMG Act'); this sale deed was invalid. The appeal of the appellant/defendant Mangat Ram was dismissed.

3. This is the second appellate court.

4. On behalf of the appellant it has been urged that appellant has been non-suited in the impugned judgment and his registered sale deed Ex.DW1/X has been declared invalid only on the ground that the provisions of Section 8 of HMG Act have not been adhered to. It is pointed out that this provision could not have been resorted to by the first appellate court as non compliance of the said provision would not make the sale deed void ab initio, at best it would become voidable and that also only at the option of the minor which in this case was not so. The rejection of the sale deed

is an illegality. It is pointed out that admittedly a registered sale deed Ex.DW1/X had been executed in favour of the defendant on 23.5.1972 for land comprised of 1 bigha and 14 biswas in Khasra No.997. It is also not disputed that in the Consolidation Proceedings Ex.DW1/A dated 16.8.1976, 18 biswas of land had been allotted to the defendant in lieu of the land held by him in Khasra no.997. All these are admitted facts. The possession of the defendant in the suit land up to 1986 is evident from the khasra girdawaris which had been proved before the court as Ex.DW1/3 to Ex.DW1/8. Attention has been drawn to the provisions of Section 85 of the DLR Act. Ex.DW1/P-1 is the order of the Revenue Assistant dated 27.3.1985 wherein although his petition had been dismissed yet it had been affirmed that the petitioner is in possession over the disputed land although possession without consent has not been proved. Learned counsel for the appellant has submitted that vide notification dated 8.11.1989 there was a change in the DLR Rules as a result of which the columns 4 and 5 in the khasra girdawaris i.e. Form P-4 did not record the name of the actual possessor of the land; it was only the name of the bhumidar which was being recorded. This was pursuant to the amendments to Rule 49 and Rule 63 which has since been struck down by the Supreme Court in the judgment reported in JT 2000 (6) SC 643 Additional District Magistrate (Rev.) Delhi Admn. etc. vs. Shri Siri Ram etc. It is pointed out that this was for the reason that the name of the defendant was not appearing in the revenue record in this intervening period and the name of bhumidar i.e. of Chand Singh was appearing. It is further pointed out that the defendant/appellant had also challenged the

mutation of the land effected in the name of the plaintiff before the Additional Collector, Rampura whose decision is yet awaited and this also finds mention in the arguments of the defendant recorded before the trial judge. Learned counsel for the appellant has drawn the attention of this court to the order dated 29.7.2003 passed by this court where a Local Commissioner had been appointed; the report of the Local Commissioner is dated 31.7.2003; it is pointed out that this report is in favour of the appellant and this also categorically records that the name plate of the appellant was found affixed on the gate at site; so also were the visiting cards showing his possession in the suit property. Learned counsel for the appellant has also drawn attention of this court to the provisions of Section 21 (3) of the East Punjab Holding (Consolidation and Prevention of Fragmentation) Act, 1948 (hereinafter referred to as 'the said Act'). It is pointed out that under this provision of law any person who is aggrieved by the order of the Consolidation Officer may file an appeal before the Settlement Officer within one month. In this case, the Consolidation Proceedings Ex.DW1/A are of the year 1975-76 which have not been challenged; they have since attained a finality. Attention has also been drawn to Section 44 of the said Act which bars the jurisdiction of the Civil Court. For all the aforesaid reasons the impugned judgment is liable to be set aside.

5. Per contra, arguments been countered by the counsel for the respondent. It is stated that two concurrent findings of fact cannot be disturbed. The report of the Local Commissioner is only a piece of evidence against which objections have been filed and which are pending. They have yet to be adjudicated upon. Attention has

been drawn to the provisions of Order 26 Rule 9 of the Code of Civil Procedure (hereinafter referred to as 'the Code'); it is submitted that the report of Local Commissioner cannot per se be accepted as a gospel truth. Learned counsel for the respondent has placed reliance upon a judgment reported in AIR 1970 Mysore 314 Rangayya Kanantha and Ors.vs. Govinda Chatra and Ors. to support this submission as also another judgment of the Supreme Court reported in (2000) 6 SCC 506 Rajinder & Co. vs. Union of India & Ors. It is submitted that the report of the Commissioner is always subject to the rider regarding his tenability. It is pointed out that defendant has not challenged the sale deed Ex.PW1/2 dated 4.4.1996 executed by Chand Singh in favour of the plaintiff. The plaintiff had been able to establish both by oral and documentary evidence that he is in possession of the suit land entitling him to a decree of permanent injunction.

6. Record has been perused. This is the second appellate court. On 1.9.2008, after the admission of the appeal the following substantial question of law were formulated; they inter alia read as follows:

“(1) Whether the appellant defendant, who is the registered owner of the suit land vide sale deed dated 23.5.1972 vide exhibit DW1/A, could still be enjoined by the learned Trial Court in the present suit filed by the alleged subsequent purchaser of suit land alleging to have purchased the same in the year 1996, after about 24 years of the purchase of the suit land by the defendant appellant?

(2) Whether the respondent plaintiff who has never been and still is not at all in possession of the suit land and was also not in possession thereof even on the date of the institution of the suit before the learned Trial Court, can still be allowed and granted a decree for permanent

injunction thereby restraining the defendant/appellant, his agents, employees, attorneys etc. from dispossessing or interfering in the actual physical possession of the plaintiff respondent over the suit land, by the learned Trial Court?

(3) Whether the appellant defendant who is the recorded occupant of the suit land in the various Khasra Girdawaris filed before the learned Trial Court vide documents exhibit PW1/3 to 7 and who has been shown to be in possession of the suit land, could still be enjoined by the learned Trial Court and the First Appellate court in the false and frivolous suit filed by the respondent plaintiff?

(4) Whether the appellant defendant whose possession was also observed and confirmed by the learned SDM vide Judgment dated 25.4.1988 exhibit DW1/P1 in the proceedings under Section 85 of the Act but however dismissing the above petition on the ground that the appellant had not been able to show his adverse possession over the land in dispute but was in permissible possession thereof, could still be enjoined by the courts below by way of impugned judgment and decree?"

7. It is not disputed that vide registered sale deed dated 23.5.1972 Ex.DW1/X the defendant/appellant Mangat Ram had purchased 1 bigha 14 biswas of land in Khasra no.997, Tikri Kalan from Sukh Devi. Sukh Devi is the mother of Chand Singh. It is also not in dispute that vide Consolidation Proceedings Ex.DW1/A dated 16.8.1976 in this revenue estate, in lieu of the land held by Mangat Ram in Khasra No.997 (1 bigha 14 biswas), he was allotted 18 biswas of land in khasra no.57/14/1. It is also not disputed that these Consolidation Proceedings dated 16.8.1976 have since attained a finality; they were not challenged. Ex.DW1/3 to Ex.DW1/8 were the khasra girdawaries for the years 1980 to 1986 showing the cultivatory possession of the defendant Mangat Ram in

the suit land i.e. 18 biswas of land comprised in Khasra no.57/14/1, Tigri Kalan. It is also not in dispute that the defendant Mangat Ram had filed proceedings under Section 85 of DLR Act to enforce his rights in the aforesaid land. The judgment of Revenue Assistant is Ex.DW1/P1 dated 27.3.1985. All the abovesaid submissions which have been urged before this court today have been recorded in this order. The contention of the petitioner that he was in possession of this land without the consent of the respondent was rejected yet his possession over the said land was otherwise not disputed. It is also not in dispute that Rules 49, 63, 65 and 67 as also Form P-4 of the Delhi Land Revenue Rules (notified on 8.11.1989) were held to be ultra vires vide a judgment of a bench of this Court on 7.1.1995; this had been upheld by the Supreme Court in the judgment of Additional District Magistrate (Rev.) Delhi Admn. (supra); under the amended Rules 49 and Rule 63 the name of a person in possession was not be recorded in Form P-4 even if he is in possession of the land; only the names of the tenure holder and the sub tenure holder as prescribed in the khatoni were to be recorded. These rules were struck down as ultra vires the Statute; it was held that such a rule would adversely affect the possessory rights as names of those persons in actual possession of the land would not be reflected in the annual report which is contrary to the provisions of the DLR Act.

8. Trial judge in the judgment dated 5.3.1999 had noted this aforenoteds contention of the learned counsel for the appellant that the names of the persons who are in possession of the land was not recorded for the said reason.

9. The plaintiff has relied upon a sale deed Ex.PW1/2 dated 4.4.1996 executed in his favour qua 18 biswas of land in khasra no.57/14/1, Tigri Kalan. This was executed by Chand Singh in his favour. Mutation was effected on 7.6.1996. The Supreme Court in (2004) 12 SCC 58 Suman Verma vs. Union of India & Ors. had pointed out the distinction between owning of agricultural property and getting the name entered in revenue records as two different and distinct things; mutation entries did not confer right or title to the property. The mutation proceedings in the instant case are also under challenge before the Additional Collector which are yet pending. This is also an admitted position.

10. Impugned judgment has illegally ignored the sale deed Ex.DW1/X dated 23.5.1972; only reason given is that the permission of the District Judge not having been obtained this document cannot be looked into.

11. Section 8 of the HMG Act deals with the powers of a natural guardian. Section 8 (3) reads as under:

8. (3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2) is voidable at the instance of the minor or by any person claiming under him.

12. A transaction of immovable property entered into by a natural guardian on behalf of the minor is voidable only at the instance of minor or any person claiming under him. No such procedure had been resorted to by the minor; the impugned judgment has illegally and arbitrarily ignored this sale deed. The impugned judgment has cursorily dealt with the appeal. It has not gone into the merits at all. It has failed to adjudicate or express its opinion or mind on the other documentary evidence adduced by the respective parties.

13. The documents relied upon by the defendant/appellant clearly established that in 1972 he had entered into a sale transaction for 1 bigha and 14 biswas of land in Khasra no.997, Tigri Kalan; in lieu thereof on 16.8.1976 vide Consolidation Proceedings Ex.DW1/A he had been allotted 18 biswas of land in Khasra no.57/14/1 which was the land belonging to Sukh Devi. In these Consolidation Proceedings this land had been allotted to the appellant in lieu of the sale deed Ex.DW1/X which was entered into with none other than Sukh Devi who is the mother of Chand Singh. The Consolidation Proceedings Ex.DW1/A had also not been challenged under Section 21 of the said Act. The khasra girdawaris for the subsequent years i.e. upto the year 1986 Ex.DW1/3 to Ex.DW1/8 established the cultivatory possession of the defendant/appellant over the suit land. It is also not in dispute that pursuant to the new Rules incorporated in the Statue i.e. DLR Act i.e. Rules No.49, 63, 65 and 67 and Form P-4 the name of the actual possessor of the suit land was not to be reflected in the annual report; the names of the tenure holder and the sub tenure holder alone were to be reflected in the annual report. These Rules were struck down in 1995 by the High Court and upheld by the Supreme Court in 2000. It was for the reason that the name of the bhumidar/tenure holder Chand Singh continued to find mention in the subsequent years. It is also not in dispute that pursuant to the mutation proceedings dated 7.6.1996 effected in favour of the plaintiff, challenge was led to them before the Collector which proceedings are pending adjudication. This find clear mention in the judgment of the trial judge. Possession of the defendant had stood established.

14. Local commissioner had been appointed in the proceedings before this court on 29.7.2003; his report dated 31.7.2003 has been perused; he had gone to the site and inspected the suit property in presence of both the parties. He had taken photographs of the site; his report is to the effect that the name of the appellant finds mention on the name board and the gate; name of the plaintiff finds freshly painted; objections to the said report have also been perused. They have not challenged the report on any other ground except that it has been filed after eight days and the factual submission have been wrongly reported.

15. Order 26 Rule 9 of the Code deals with the commissions for legal investigation. The commissioner has been appointed only to investigate the matter. Admittedly, his report is only a piece of evidence had to be weighed and examined by the Courts. It is not in dispute that the second appeal court is not a third fact finding court and cannot make any enquiry into facts. Nevertheless, it also cannot be ignored that it was in the presence of both the parties that the order dated 29.7.2003 had been passed and the Local Commissioner had been appointed to ascertain who is in possession of the suit property. Report is largely in favour of the appellant/defendant establishing his possession in the suit property.

16. Even ignoring the report of the Local Commissioner yet the findings in the impugned judgment are perverse; it had illegally and arbitrarily ignored the documents of title by the defendant. In a judgment reported in AIR 1978 SC 1329 Jadu Gopal Chakravorty (deceased) by LRs. vs. Pannalal Bhowmick & Ors. it has been held that misconstruction of a document of title on which the claim of

the party is based would be an error of law which the High Court is competent to correct in second appeal.

17. Appeal is allowed. The impugned judgment is set aside, result is that the suit of the plaintiff Ram Phal Rathi is dismissed.

INDERMEET KAUR, J.

NOVEMBER 23, 2010
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