

R-129

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

% *Judgment Reserved on: 30.11.2010*
Judgment Delivered on: 03.12.2010

+ **RSA No.53/2003 & CM No.170/2003 (for stay)**

GIRDHARI LAL Appellant
Through: Ms.Kamalakshi Singh &
Ms.Saundarya Singh, Advocates.

Versus

RAM LAL GILL & ORS.
.....Respondents
Through: None.

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 impugned the judgment and decree dated 29.11.2002 which had reversed the finding of the trial judge dated 31.10.1998. Vide judgment and decree dated 31.10.1998 the suit of the plaintiff Girdhari Lal seeking possession had been decreed. The impugned judgment had upset this finding; the appeal was allowed and the suit stood dismissed.

2. Briefly stated the facts are as follows:

i. Plaintiff was stated to be the owner of the plot bearing no.F-22, Laxmi Nagar, Patpatganj, New Delhi. He had purchased this plot vide sale deed dated 17.8.1955.

ii. The plaintiff being a retired railway employee could not construct a building on the plot as he was transferred to

different places because of his job.

iii. In 1979-80 when he visited the site he found that defendants no.1 and 2 had raised a boundary wall therein. Police complaint was lodged.

iv. On 15.11.1980 when he again revisited the spot he found that defendant no.1 had raised construction with the connivance of defendants no.2 and 3; this was on the land of the plaintiff.

v. The contention of the plaintiff was that originally this plot was bearing No.F-22 but defendants had put No.F-40 on the plot.

vi. Defendants in spite of requests did not vacate the suit property. Legal notice dated 23.7.1983 was not complied with. Present suit for possession was filed.

vii. Defendants filed a joint written statement. It was contended by defendant no.1 that the mother of the defendant namely Karmi Devi was the owner of this plot; defendant no.2 is the neighbor and defendant no.3 was the tenant in the house of Karmi Devi. Contention was that the plot in question was plot No.F-40A and not F-40 as contended by the plaintiff.

viii. On the pleadings of the parties, the following six issues were framed:

- "1. Whether the suit is bad for non-joinder and mis-joinder of necessary parties? OPD
2. Whether the suit is properly valued for the purpose of court fee and jurisdiction and proper court fee has been paid ?OPP
3. Whether this court has no peculiar jurisdiction to try this suit? OPD
4. Whether the plaintiff is the owner of the property in dispute, if so, whether he get the possession? OPP
5. If the issue no.4 is proved, whether the plaintiff is entitled to get the possession? OPP

6. Relief.”

viii. On the basis of oral and documentary evidence, plaintiff was held entitled to a decree of possession; his ownership to the suit land had been proved through his sale deed Ex.PW-5/A. The report of the local commissioner i.e. Kanongo examined as PW-2 and his accompanying member PW-3 was adverted to. The report of the local commissioner was proved as Ex.PW-2/1. It was held that the suit property was a part of Khasra No.59/18 which was the suit land purchased by the plaintiff in terms of sale deed Ex.PW-5/A. Contention of the defendant that he was in possession of only 144 sq. yards of land which is not in conformity with the contention of the plaintiff who had claimed purchase of 200 sq. yards of land was repelled. Trial Judge had held that intentionally the defendant had constructed on only 144 sq. yards of the area out of 200 sq. yards which was owned by the plaintiff. Suit of the plaintiff stood decreed.

iv. These findings were reversed in the impugned judgment. The impugned judgment had returned the following finding:

“8. Even though the appellant has challenged the entire findings of the trial court but the thrust of the matter which determines the rights of the parties had been decided in issue No.4 and 5 which have been decided together by the learned trial court. The plaintiff i.e. the respondent No.1 herein had stated on oath that he had purchased a plot No.F-22 measuring 200 sq. yds. in Laxmi Nagar, Patparganj, Delhi from M/s. Adarsh Finances Ltd. for a sum of Rupees 150/- through a registered sale deed number 6834, Book No.I, Volume No.265 pages 335-336 dated 17.08.1955 and has alleged that he had taken the physical possession of the said land. The plaintiff has also deposed that he did not visit the plot between 1979 and 80,

however, in late 1979 or 1980 when he visited the plot in question to raise the boundary wall thereon, defendant No.1 and 2 i.e. appellant and respondent No.2 obstructed. The matter was reported to the police and in December 1981, when again the respondent No.1 visited the plot in question for building on the said plot, it transpired that the appellant and the respondent No.2 and 3 had unauthorisedly occupied the said land which belongs to respondent No.1.

9. A notice exhibit PW1/1 was served upon the defendant to vacate the plot and respondent No.2 and 3 refused to accept the notice. The respondent No.1 has also alleged that the cost of the land at the time of filing of the suit was 100/- rupees per sq. yds. and the mesne profits would not have exceeded Rupees 400/- per month and as such Rupees 7600/- is being sought as mesne profits from 15.12.1981 to 15.7.1983. In the cross examination PW-1 has admitted that the site plan was not filed alongwith the plaint, however, the same had been filed subsequently. PW-1 cannot be said to be a very reliable witness regarding the location of the plot as PW-1 could not tell the number of the plots intervening between his plot and the main road nor could he tell the name of the other owners. He has deposed that the said plot is situated at turning point towards the left and could not tell the dimensions of the plot. As per the testimony in the cross examination, the witness PW-1 could not even identify the number of the plot and has denied that plot No.F-40A and 40F have been incorporated by the Municipal Corporation. In all the testimony of PW-1 cannot be strictly appreciated to make the respondent No.1 owner of a valuable right in exclusion of appellant and the respondent No.2 and 3. The plaintiff i.e. respondent No.1 has further examined Sh. Om Prakash Kanungo (Consolidation) who had stated after inspection of the suit property vide report exhibit PW2/1 dated 01.10.1985. Kanungo had stated that the property forms part of khasra No.59/8 and has proven the proceedings exhibit PW2/2 and the site plan with measurements as Ex.PW2/3 and Aksh Shizra as Ex. PW2/4. PW-2 has supported PW-3 who was Banarasi Dass Patwari who were together at the time of preparation of report exhibit PW2/1. PW-3 Banarsi Dass Patwari (Notification Branch has stated in the year 1985 for the execution of the commission he visited the site and the report was signed by him which is

exhibit PW2/1 and PW2/2 at point A, B & C. PW-3 agrees that the said plot is located in khasra No.59/18. PW-4 has also been examined as regards the report dated 16.12.1991 which was submitted by Sh. G.L. Luthra who has proven on record that the DD number of the complaint dated 16.12.1981 was G-287. In all the plaintiff has proven that as on the said date 16.12.1981, a complaint was filed before the Police. Witness PW-5 Sh. Vishnu Kumar LDC has proven a sale deed number 6834, book No.I, Volume 265 pages 335 to 336 dated 17.08.1955 which is exhibit PW5/A and original sale deed has been produced which is report of sale deed number 5657, book number 2, Volume 264, pages 11 and 12 dated 23.6.55. The certified copy thereof is exhibit PW5/8.

10. On the other hand the defendant as the appellant herein has deposed as DW-1 and had stated that the property in question was 40-A and it was owned by Karmi Devi his mother and the total area of the said plot was 144 sq. yds. The appellant herein has given the exact location of the plot stating therein that on the north side plot No.F-40 is situated and in south side there is F-38. DW-1 has conceded that the property number F-40 measures 200 sq. yds. and is owned by Mr. Dhawan. Property No.38 is owned by Ramanand Gupta. DW-1 has admitted that his mother had purchased the said property from a colonizer approximately in the year 1974/75. Though the witness could not produce any document, DW-1 has denied in the cross examination that he is in unauthorized possession of the property bearing No.F-22 part of khasra No.59/16, 59/17,59/18, 59/19, 59/23, 59/25/3 in the revenue estate known as Laxmi Nagar and the property could fetch a sum of Rupees 400/- per month. The defendant has also examined DW-2 Sh. J.R. Mehta who has stated that he is neighbor of defendant No.1 i.e. the appellant herein and has admitted that the property in dispute was owned by Smt.Karmi Devi mother of the appellant herein, however, the witness could not tell the khasra number or any particulars of the property of the plaintiff.

11. The appellant had always asserted that the property in his possession was 144 sq. yds. while the plaintiff/respondent no. 1 had claimed an area of 200 sq. yds. The respondent No. 1 has stated the number of the plot has been changed from F-22 to F-40 and the appellant had constructed a plot on plot No. F-40A. From the entire

evidence and the documents placed on record, it is indicative vide exhibit PW5/A that the property claimed by the respondent no. 1 is part of khasra No. 59/16, 59/17, 59/18, 59/19, 59/23, 59/25/3 and the said plot is numbered as F-22 which is presently stated to be F-40. The trial court was of the opinion that exhibit PW5/A confers title of the plot of land measuring about 200 sq. yds. Admittedly the defendant has not disputed the sale deed even though the said sale deed was neither registered while the property in dispute was marked and pointed to form part of khasra no. 59/18. The trial court was also of the opinion that though the plot was of 200 sq. yds. in total but there is a possibility that the construction was raised on 144 sq. yds. and the appellant had foregone the remaining area to take an undue advantage. Even though Karmi Devi was not produced as witness, it was incumbent upon the plaintiff i.e. respondent No. 1 to adduce evidence to show and prove that the plaintiff in exclusion of anybody else. The plaintiff i.e. respondent No. 1 could not identify the plot in question even though the defendant did not adduce evidence to establish a case for himself, however, the law requires that the plaintiff the one who asserts must prove his case and it was incumbent on the plaintiff i.e. respondent No. 1 to establish a case and to prove the same according to law. Accordingly the findings of the trial court cannot be sustained.

12. PW-2 on behalf of plaintiff has lent support vide exhibit PW2/1 that the property in dispute formed part of khasra No. 59/18. The trial court below had believed the case of the respondent No. 1 on the basis of the sale deed exhibit PW5/A. Certified copy of the same is Ex. PW5/B stated to have been a part of khasra no. 59/16, 59/17, 59/18, 59/19, 59/23, 59/23/3. It is stated that the defendant has not placed on record any document to prove the ownership and as such the issue had been decided in favour of the plaintiff i.e. respondent No. 1 herein. On the said premises the trial court was pleased to grant mesne profits and damage to the tune of Rupees 400/- per month together with Rupees 7600/- for the period between 5.12.1982 to 5.12.1983. The said findings are perverse. To grant a valuable relief to the plaintiff in exclusion of others, where exercise of such decision would be prejudicial to others the identity of the property should be certain and explicit.

13. It is the legal fiction that the plaintiff who asserts his case must prove his case in positive and it is only on such assertion where the defendant fails to negate the case of the plaintiff, the plaintiff shall have right to the claim.

14. In the instant case the plaintiff has asserted that the defendant had changed the number of the property from F-22 to F-40. It is a common observation that a property is numbered by the Municipal Corporation and there is in existence as per witness PW-2 and PW-3 the municipal number of the premises F-40A which is enclosed by plot No.F-40 in the North side, plot No.F-38 in the South and F-30 in the East and there is a street on the West side of the plot. The plaintiff i.e. respondent No.1 had always noted that F-22 has been changed to F-40 and has nowhere mentioned that the existing number of the plot number F-22 is F-40A. Despite the appellant not being successful in proving that he is the owner of plot F-40A yet has shown himself in possession thereof. But the respondent No.1 was required to prove that the plot of land sought by him through the suit was in fact the one i.e. owned by the respondent no.1 and had a right to claim the same. It is well settled in 1996, 8 AD SC Page 175 Nahak Singh Vs. Harnak Singh that in a suit for specific performance wherein agreement to sell was for immovable property and the vendor was not ready to execute the sale deed and the said agreement was for a vague and un-identified property whether the agreement could be enforced. It had been held in negative. In as much as it was held that unless the property in question for which the relief has been sought was un-identified no decree can be granted in respect of the same. It was further held that the property must be identified in order to avail the relief. It has been held that the exact area of the land to bound his length and width and from where it was measured and khasra number of the land was required. It was incumbent upon the respondent No.1 to identify the property in its exactness to be entitled to relief of possession. Where a number plots have been carved out on a khasra number given, it cannot be said with certainty that the said plot is the one purchased by the respondent No.1. The question that comes how is the property sought by the plaintiff to be identified. The provision of order VII Rule 3 of the Code of Civil Procedure also mandates where the relief sought by the party has to identify the said immoveable property in exactness. The

respondent No.1 has failed to provide adequate specific particulars to identify the property. The property sought by the respondent No.1 in the plaint before the trial court was F-22 renumbered allegedly by the defendant to F-40. PW-2 and PW-3 are the independent witnesses who had visited the property in question and have admitted in their testimony that the property at the spot was F-40A measuring 144 sq. yds. and on the northern side of the said plot is F-40 and on the south of the said plot is F-38 and on the east is plot No.F-30. From the relief claimed in the plaint, the plaintiff has claimed possession of plot No.F-40 formerly numbered as F-22, Laxmi Nagar, Delhi, Shakarpur and keeping in view the fact that the plaintiff has not been successful in identifying the property in question and as per 1996 6, Supreme Court, Page 699 in Civil Appeal No. 13388/96, they cannot be that the plaintiff has been successful in identifying the property and it has been held in 1997 CCC Page 91 that the relief cannot be granted in respect of vague and un-identified property.

15. In view of herein above, the respondent No.1 could not prove on record the property sought to be claimed through the suit is infact F-40 formerly known as F-22. It has already been established on record that the property sought by the plaintiff is numbered as F-40A and not the property number F-40. Accordingly respondent No.1 is not entitled to possession of F-40A and as such the issues are decided against the respondent No.1."

3. This is a second appeal. After its admission, the following substantial questions of law were formulated. They read as follows:

"1. Whether the first appellate court could ignore the report of the Local Commissioner particularly when no objections were filed by the opposite party and more so when no cross-examination was conducted on PW-2 Local Commissioner?

2. Whether the first appellate court could reverse the findings of the trial judge believing the oral evidence but ignoring the documentary evidence led by the appellant.

4. On behalf of the appellant, it has been urged that the appellate Court has perversely and illegally upset the findings of the trial judge. It has arbitrarily ignored the report of the local

commissioner when admittedly no objections had been filed to the said report. The documentary evidence led by the plaintiff i.e. the sale deed Ex.PW-5/A has been ignored.

5. In spite of service the respondents have not appeared.
6. Record has been perused.
7. Sale deed Ex.PW-5/A shows that 200 sq. yards land bearing plot no.F-22 comprised in Khasra No.59 had been purchased by the plaintiff in the colony known as Laxmi Nagar, Patpatgaanj, Delhi from M/s Adarsh Finances Ltd. for a consideration of Rs.150/-. The location of the plot was described as follows:

East- Plot no.42

West- Open Road Land

North- Plot No.72

South- Plot No.26

PW-1 had produced the sale deed which was subsequently proved in the version of PW-5 as Ex.PW-5/A. In his cross-examination PW-1 could not tell the number of the plot intervening between his plot and main road; he did not know the name of the other owners; he did not even know the dimension of his own plot. PW-2 Om Prakash, the Kanongo had submitted his report Ex.PW-2/1; he had gone for the inspection of the site on 19.8.1995; neither party was present on that date; inspection was re-fixed for 01.9.1995. The proceedings of 01.9.1995 have been proved as Ex.PW-2/1, Ex.PW-2/3 and Ex.PW-2/4. Ex.PW-2/1 are the proceedings of 01.9.1985; this document specifically states that the disputed land is a part of Khasra No.59/18 which has number F-40A affixed on it, it measures 145 sq. yards. On the North of which is plot No.40F, on the South is plot No.F-38, on the East is plot

No.F-30 and in the West there is a gali. Ex.PW-2/3 is the Naksha (map) showing the disputed area located in Khasra No.49/18 measuring 145 sq. yards. Aksjara Ex.PW-2/4 of the site also shows that the disputed property comprises of 145 sq. yards and is a part of Khasra No.59/18.

8. The description of this site where the disputed plot is located does not match the description of the boundaries as contained in Ex.PW-5/A. The boundaries of Ex.PW-5/A as aforementioned are completely different. It was for the plaintiff to establish that the property which is in possession of the defendant is the property which he had purchased in terms of Ex.PW-5/A; this onus had to be discharged by him. The report of PW-2, the Kanongo, does not in any manner advance the case of the plaintiff.

9. The area of land purchased by the plaintiff in terms of Ex.PW-5/A was 200 sq. yards of land; area in possession of the defendant is admittedly 144-145 sq. yards. PW-2 the local commissioner also found that the area had plots number i.e. plot No.40F. He had also noted that plot No.40F is on the northern side of 40A. The contention of the plaintiff is that his plot number was F-22 it had changed to F-40. His contention was never that his plot number was F-40A; plot Nos.F-40 and F-40A are distinct numbers.

10. Plaintiff had been unable to discharge the onus that the disputed property which was in possession of the defendant was the property which he had purchased vide Ex.PW-5/A. He having failed to discharge this onus, the suit of the plaintiff was rightly dismissed. The report of the local commissioner had well been adverted to in the impugned judgment; report of the local

commissioner was to the effect that the suit land comprised of 144-145 sq. yards and is located in Khasra No.59/18 having plot No.40A. This report does not help the case of the plaintiff. The boundaries as evident in Ex.PW-5/A did not match the site and inspection carried out by PW-2 in terms of his Ex.PW-2/1.

11. There is no merit in the appeal. The appeal as also the pending application is dismissed.

INDERMEET KAUR, J.

DECEMBER 03, 2010
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