

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

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Date of Judgment : 07.10.2010

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RSA No.117/2007

SHRI. KRISHAN LAL NAGPAL Appellant
Through: Mr.Alok Kumar and Ms.Manisha
Narain, Advocate.

Versus

SHRI DESH RAJ Respondent
Through: Mr.G.K.Sharma, Advocate.

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. (Oral)

1. This appeal has impugned the judgment and decree dated 20.01.2007 which had endorsed the judgment and decree of the trial judge dated 08.11.2005 decreeing the suit of the plaintiff for possession, declaration and mandatory injunction.

2. The factual matrix is as follows:-

- i. Plaintiff/respondent, Sh. Desh Raj, had filed a suit for possession, declaration and mandatory injunction against the appellant/defendant, Sh. Krishan Lal Nagpal. The property in dispute was premises bearing no. 128, Ram Nagar, Village Khureji Khas, Krishna Nagar (hereinafter referred to as the suit premises). Possession of one room, kitchen and latrine on the ground floor of the said property with a prayer for a declaration that the sale deed dated 29.04.1997 executed by

Smt. Kesar Devi in favour of the defendant qua half undivided

portion in the suit premises be declared null and void; further the defendant be directed to remove his locks from the said property of which possession has been sought by the plaintiff.

ii. Plaintiff claimed himself to be the absolute owner of this suit premises in terms of a registered sale deed dated 28.04.1962. Defendant being his real brother, in 1962, was permitted to occupy one room with the toilet and kitchen. License was on a temporary basis; it was settled that the defendant would handover peaceful possession of the suit premises back to the plaintiff as and when required by the plaintiff. Plaintiff had also permitted his mother, Smt. Kesar Devi, to live in another portion i.e. in one room and a kitchen. His mother expired on 23.03.1999. Plaintiff put his lock on this portion which was in the occupancy of his mother.

iii. Plaintiff had gone to perform the last rites of his mother to Haridwar. In his absence, the defendant put his locks in the said portion.

iv. Plaintiff had let out another portion (as depicted in green colour in the site plan) to his tenant, Sh. Ram Pyara. Sh. Ram Pyara was evicted by the order of the Additional Rent Controller. Defendant had illegally put his locks on this portion also. Proceedings under Section 145 of the CrPC had been initiated and were pending.

v. Legal notice dated 14/03/2000 was served upon the plaintiff but he had failed to vacate the suit property. He gave a false reply dated 28/03/2000 claiming himself to be the owner of half portion of this property in terms of sale deed executed by their mother, Smt. Kesar Devi, in his

favour. Defendant had also relied upon a power of attorney executed by the plaintiff in favour of his mother. These documents were denied by the plaintiff.

vi. Plaintiff revoked the license of the defendant vide the legal notice dated 11.03.2002. Defendant having failed to vacate the said property, the present suit was filed.

vii. Defendant contested the suit. He claimed ownership over one half of the suit property in terms of a sale deed which had been executed in his favour by their mother, Smt. Kesar Devi. Smt. Kesar Devi had been accorded the general power of attorney by the plaintiff dated 17.01.1997 pursuant to which the sale deed dated 29.04.1997 had been executed by Smt. Kesar Devi in favour of the defendant. The contention of the defendant was that this property had been purchased by his mother in the name of the plaintiff who was a minor at that time. Plaintiff was asked to transfer half of this property in favour of the defendant; he did not agree; thereafter with the intervention of the family members, the aforementioned arrangement had been arrived at.

viii. Trial Judge framed seven issues. They inter alia read as follows:

“1. Whether the pltf is the exclusive owner of the property in dispute? OPP

2. Whether the plaintiff has valued the suit property for the purpose of court fee and jurisdiction? OPP

3. Whether the suit is barred by limitation? OPD

4. Whether the plaintiff is entitled for the relief of declaration as prayed for? OPP

5. Whether the plaintiff is entitled for the relief of possession as prayed for? OPP

6. Whether the plaintiff is entitled for the relief of mandatory injunction as prayed for? OPP

7. Relief ?”

ix. Trial Judge held that vide sale deed Ex.PW-1/1 dated 28.4.1962 plaintiff was the owner of the suit property. Defendant has failed to discharge the onus that this property had been purchased in the name of the plaintiff by their mother from her funds. Reliance by the defendant on the power of attorney dated 17.1.1997 purported to have been executed by the plaintiff in favour of his mother was not proved; she not being the owner of the property could not have sold it. This finding was arrived at after examining the oral and documentary evidence led before the said Court. The suit of the plaintiff for possession was decreed; further a decree of mandatory injunction was passed in favour of the plaintiff and against the defendant directing him to vacate the suit property as also a declaration that the sale deed dated 24.9.1997 Ex.DW-6/A executed by their mother Kesar Devi in favour of the defendant qua 1/2 of the suit property was null and void.

x. The impugned judgment endorsed this finding. It held that the terms of the document i.e. the sale deed Ex.PW-1/2 had established title of the plaintiff in the suit property; the oral arrangement pleaded by the defendant was disbelieved; reliance was also made on the provision of Section 91 of the Indian Evidence Act.

3. This is a second appeal. After its admission on 7.5.2007 the following substantial question of law was formulated:

“Whether an oral family settlement binds the parties even against a registered sale deed executed in favour of the respondent?”

4. On behalf of the appellant, it has vehemently been urged that the judgments of both the Courts below had misinterpreted the oral and the documentary evidence; Ex.DW-6/A sale deed of 1/2 of this property executed by Smt.Kesar Devi, their mother in favour of the defendant, had proved the title of the defendant. Smt.Kesar Devi had entered into this sale transaction in terms of a valid, legal and subsisting general power of attorney dated 17.01.1997 which had been executed in her favour by the plaintiff. The concept of a family arrangement had been illegally ignored by the both Courts below. Testimonies of the witnesses of the defendant i.e. DW-1 to DW-5 all family members had not been appreciated in the correct perspective. Learned counsel for the appellant has placed reliance upon a judgment reported in AIR 1976 SC 807 Kale Ors. Vs. Deputy Director of Consolidation & Ors. to support his submission that an oral family arrangement does not require registration; terms of such a family arrangement are not required to be recited in a document. This important aspect has been ignored by the both Courts below which amounts to a perversity.

5. Arguments have been countered by the learned counsel for the respondent. It is pointed out that this Court is sitting in second appeal and cannot become a third fact finding court. The contentions raised before this Court had adequately been dealt with by both the Courts below. No interference is called for by this Court as no substantial question of law has arisen. For this proposition reliance has been placed upon the judgments reported in 1998 RLR (NSC) 49 Sheel Chand Vs. Prakash Chand and 1986 RLR NSC 67 Dudhnath Vs. Suresh Chand as also a judgment of the Apex Court reported in AIR 1991 SC 2216 Arumugham & Ors.

Vs. Sundarambal & Anr. It is submitted that the appellant is taking contrary pleas; on the one hand he is relying upon a family settlement and on the other hand he has produced a document i.e. the sale deed Ex.DW-6/A to substantiate his averments that he had purchased 1/2 of this property vide a sale deed executed by his mother Kesar Devi in his favour; both are contrary and conflicting stands. It is pointed out that the stamp paper for this document had also been purchased on the same day i.e. on 29.4.1997; demand draft is also of the same date; the NOC had been granted on 23.5.1997 i.e. after a much later date; all these factors also created a doubt on the authenticity of this document which had rightly been disbelieved by the Courts below. The judgment of Kale (supra) relied upon heavily by counsel for the appellant would not apply to the facts of the instant case; that was a dispute about the family settlement with the government; question involved was about the registration of the said document. Ratio would be inapplicable.

6. In rebuttal, learned counsel for the appellant has pointed out that the findings in the impugned judgment are a perversity which call for an interference and to support his submission he has highlighted para no.9 of the impugned judgment. It is pointed out that the finding in the impugned judgment that a family arrangement applies only to inherited property is clearly perverse; it is against the ratio of the Kale's judgment (supra); further the provisions of Section 91 of the Indian Evidence Act 1972 have also been misapplied.

7. This Court is sitting as a Second Appellate Court; it is not a third fact finding Court. Before the Trial Judge as aforementioned

seven issues had been framed; the oral and documentary evidence had been appreciated in detail. This is a dispute between two brothers. The plaintiff is the elder brother. He has come into witness box as PW-1 and the defendant is the younger brother; he has come into witness box as DW-1. Their two sisters Pushpa Rani Ahuja and Kamlesh Mittal had supported the version of the defendant; they came into witness box as DW-5 and DW-4. DW-5 had deposed that a power of attorney had been executed by her elder brother Desh Raj Nagpal in favour of their mother which was witnessed by her; this was in April 1997; the second sister Kamlesh Mittal examined as DW-4 had also deposed that a power of attorney had been executed by her elder brother Desh Raj Nagpal in favour of their mother in her presence; she has not given the date. In fact the affidavit of both the sisters by way of evidence is verbatim; so much so first in para no.3 the spelling mistake in the word "flattery" finds mention in both the appellants. DW-4 in her cross-examination has spoken of a Panchayat which had allegedly taken place in the year 1996-97; she was a member thereof. DW-2 is the niece of the parties and the daughter of Pushpa Rani. She had also deposed that a power of attorney was executed by plaintiff in favour of her Naani (maternal grandmother) in her presence. As per her version she had reached the Seelampur Court with her Naani for execution of the general power of attorney on 17.1.1997; she had also been called in the Panchayat. DW-3 Bansi Lal was the cousin maternal uncle of the parties. As per his version his cousin Smt.Kesar Devi had executed the GPA at the Seelam Pur Court in his presence and he had attested this document; in his cross-examination he had stated that

the leave taken by him on that day to attend Seelam Pur Court had not been recorded in any register. There is no doubt that the aforementioned witnesses were all family members and they had deposed in favour of the defendant; this had been taken into account by the Trial Judge. The Trial Judge had weighed the evidence adduced before it and had concluded that the balance had, however, tilted in favour of the plaintiff and against the defendant. This was endorsed in the impugned judgment.

8. The whole basis of the claim of the defendant in fact rests upon his power of attorney which the plaintiff had purported to have executed on 17.1.1997 in favour of his mother Kesar Devi. Admittedly this power of attorney did not see the light of the day; it was not adduced in evidence. Case of the defendant was that this document had been lost by him; no application for permission to lead secondary evidence under Section 65 or Section 66 of the Evidence Act had been filed to prove this document by the said mode. Section 91 of the Evidence Act also creates a bar; if there is a document in writing the contents of the same can be proved by primary evidence or by secondary evidence; this is either by producing the said document or leading secondary evidence to adduce its contents. The impugned judgment had correctly appreciated the said principle. The GPA should have been proved by primary evidence or secondary evidence in view of Section 91 of the Evidence Act.

9. The defendant had then relied upon a sale document i.e. the sale deed Ex.DW-6/A dated 29.4.1997 purported to have been executed by Kesar Devi qua 1/2 of the suit property in his favour. The basis of Ex.DW-6/A was the GPA dated 17.1.1997 as admittedly

Kesar Devi was not owner of this property; she had executed this sale deed in favour of the defendant only on the strength of this power of attorney dated 17.1.1997 which her elder son had executed in her favour; this power of attorney was not proved; obviously the sale deed which was based on this power of attorney also had no strength; it had no legs to stand. This was held by both the Courts below.

10. The plaintiff had purchased this property vide a registered sale deed dated 28.4.1962 Ex.PW-1/1. This document is not in dispute; it is not disputed by the defendant that such a sale deed had been executed in favour of the plaintiff; contention of the defendant being that subsequent thereto an oral family settlement had been arrived at between the parties in the year 1996-97 and since the money for the purchase of this property had been invested by their mother, in terms of this family arrangement it had been agreed that the half of the suit property would be given to the defendant. To give a final effect to this family settlement Ex.DW-6/A had been executed.

11. All these contentions now raised before this Court had been gone into in an indepth and deep detail by both the Courts below; both the oral and documentary evidence had been appreciated. It is settled position at law that this Court while exercising powers under Section 100 of the Code of Civil Procedure cannot interfere with findings of fact. Unless there is a perverse finding the hands of this Court are tied. What is perverse, has also been defined in various pronouncements. The Supreme Court in (2001) 1 SCC 501 Gaya Din Vs. Hamuman Prasad has defined the expression "perverse" to mean a finding not supported by the evidence

brought on record or against the law or suffering from the vice of procedural irregularity.

12. It is apparent and evident from the record that the findings in the impugned judgment can in no manner be termed as perverse. It is also not the case of the appellant that the evidence has been ignored. There is no dispute to the proposition that if two views are possible on the evidence adduced before the Court and the view taken by the first Appellate Court could be different from the view which this Court would have taken, would nevertheless then be no ground to interfere in a second appeal.

13. The judgment of Kale (supra) has no application to the facts of the instant case. It is an undisputed proposition that an oral settlement between members of a family is legal and if proved it is binding upon the parties; yet the question before the Court [in the judgment of Kale (supra)] was whether a family settlement is compulsorily registerable or not; that judgment had proceeded on the assumption that there was a valid oral family arrangement between the parties. The ratio of the said judgment is inapplicable in the instant situation.

14. The substantial question of law is accordingly answered as follows. The oral family settlement had not been proved; sale deed Ex.PW-1/1 was the binding document evidencing the ownership of the suit property in favour of the plaintiff. There is no merit in the appeal; it is dismissed.

INDERMEET KAUR, J.

OCTOBER 07, 2010
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