

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

% *Judgment Reserved on: 16.9.2010*
Judgment Delivered on: 21.9.2010

+ **RSA No.5/2007**

NATHU RAM JAIN Appellant
Through: Mr.Sanjeev Anand & Mr. Vikaram
Singh, Advocates.

Versus

DELHI DEVELOPMENT AUTHORITY & ANR Respondents
Through: Mr.Ajay Verma and Mr.Amith Mehra,
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.

CM No.266/2007(for exemption)

Allowed subject to just exceptions.

CM No.1663/2009

Not pressed. Dismissed.

RSA No.5/2007

1. Plaintiff Nathu Ram Jain had filed a suit for mandatory injunction. It had been averred that by virtue of a probated will dated 19.10.1981 in respect of property No.A2/252, Paschim Vihar, New Delhi, the plaintiff had acquired title of the aforementioned property. A direction had been sought against the defendant i.e. the Delhi Development Authority (DDA) that the defendant be directed to mutate the aforementioned suit property in the name of the

plaintiff in terms of the aforementioned will which had been executed in his favour.

2. In the written statement, the contention of the defendant was that the original allottee of this property was admittedly S.K.Jain who had been given possession of the same on 27.4.1976. Plaintiff Nathu Ram Jain was seeking mutation of this plot in terms of a will which had been executed in his favour; admittedly the original allottee S.K.Jain was not the blood relation of the plaintiff; plaintiff had been asked by the department to furnish a copy of the will and other documents which were essential for the mutation of the plot as the plaintiff was a non-blood relation; further if a will had been made in favour of a non-blood relation, mutation could be allowed only after charging a 50% unearned increase. Contention of the defendant was that in spite of repeated request and letters of communication, the plaintiff had failed to supply the requisite documents to the department.

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

- "1. Whether plaintiff is liable to pay 50% unearned increase to DDA? OPD
2. Whether the suit of the plaintiff is bad for misjoinder of plaintiff No.2? OPD
3. Whether the suit is time barred? OPD
4. Whether the suit of the plaintiff is bad for want of notice U/S 53-B of DD Act? OPD
5. Whether the suit is bad for the purposes of court fees and jurisdiction? OPD
6. Whether plaintiff is entitled for the relief as claimed for? OPP
7. Relief."

4. All the issues were decided in favour of the plaintiff and against the defendant. The suit of the plaintiff was accordingly decreed.

5. The first Appellate Court vide the impugned judgment dated 20.9.2006 reversed the findings of the Trial Judge. The appeal was allowed; consequence of which was that the suit stood dismissed. In the impugned judgment, it was held that the nomenclature of the suit was a suit for mandatory injunction yet it was actually a suit for declaration. Plaintiff has sought declaration of his title; Article 58 of the Limitation Act was applicable. Cause of action first accrued on 6.9.1984 or at best on 17.12.1984 when the plaintiff had asked the DDA for mutation of the suit property. Suit was filed on 7.4.1992; being beyond a period of three years it was time barred. It was further held that the plaintiff is not entitled even on merits to the decree; he had failed to file the requisite documents before the department; in this view of the matter, being a non-blood relation he was liable to pay 50% of the unearned increase which had not been paid. Suit was accordingly dismissed.

6. This is a second appeal. After admission, on 2.3.2007, the substantial questions of law were formulated which inter alia read as follows:

- “(i) Whether Section 53(B) of the DDA Act or Article 58 of the Indian Limitation Act on the one hand or Article 113 of the Indian Limitation Act on the other hand applied in this case?
- (ii).If this question is decided in favour of the appellant, whether he will be liable to pay 50% of the unearned increase in the facts and circumstances of this case?”

7. On behalf of the appellant, it has been urged that the findings in the impugned judgment are perverse and clearly call for an interference. The suit as is evident from the averments in the plaint was simplicitor a suit for mandatory injunction; Section 53(B) of the Delhi Development Act (DDA Act) was not applicable; the residuary Article i.e. Article 113 of the Limitation Act was the

applicable provision. Three years would commenced from the date when the right to sue accrues which in this case is the date of the legal notice i.e. the notice dated 19.3.1990. Suit filed on 7.4.1992 was within time. It is submitted that there is no dispute that letters of administration and the probated will had been furnished to the department; it was not the case of the DDA that the will dated 19.10.1981 probated in favour of the plaintiff was a sham document; in these circumstances it was the bounden duty and obligation of the defendant to have mutated the suit property in the name of the plaintiff. Findings by the Appellate Court on this score are perverse. Learned counsel for the appellant has placed reliance upon a judgment of single Bench of this Court reported in 143 (2007) DLT 26 K.K.Shrivastava Vs. DDA to support his submission that in similar facts where the petitioner had also claimed mutation of the property on the basis of a will, the DDA had been directed by the Court to mutate the property in favour of the said petitioner. Applying the ratio of the aforementioned judgment the suit of the plaintiff is liable to be decreed.

8. Arguments have been countered by the learned counsel for the respondent. It is stated that the contention of the department all along has been that the requisite documents had not been furnished by the plaintiff to the department. As such the enquiry mandated as per the policy guidelines of the department to unearth as to whether the probated will was a sham or a genuine document could not be conducted. Learned counsel for the DDA has drawn the attention of this Court to a judgment of the Apex Court rendered in 106(2003) DLT 1819 (SC) DDA Vs. Vijaya C. Gurshaney & Anr. The policy of the DDA formulated by the Lt. Governor of

Delhi dated 26.7.1988, containing guidelines with regard to payment of unearned increase on the value of the land on the basis of a will left by deceased allottees had been upheld. It is pointed out that this judgment had detailed the documents which are necessary to be furnished to the department to make this enquiry; the rationale behind this policy being to curb illegal transfers in favour of persons not being blood relations of the allottee, which practice was rampantly being followed. The requisite documents not having been furnished by the plaintiff, no such enquiry could have been concluded by the department; it is pointed that this is a classic example of a case where the plaintiff having murdered his parents is now claiming clemency stating that he has become an orphan. The plaintiff himself not having complied with the requisite formalities cannot now seek a sympathetic consideration from the Court. The judgment of the single Bench of this Court in the case of K.K. Shrivastva (supra) is distinct on its facts; it was a writ petition which had challenged a demand of unearned increase. The findings in the impugned judgment that the suit is barred by limitation also call for no interference. The cause of action had accrued on 17.12.1984; suit having been filed on 7.4.1992, i.e. eight years after the cause of action had accrued, was rightly held to be time barred.

9. This is a second appeal. This Court has to answer substantial questions of law which had been formulated on 2.3.2007. The present suit had been titled as a suit for mandatory injunction. Body of the plaint has to be looked into to determine the actual nature of the suit; the nomenclature by itself is not sufficient. The prayer clearly recites that the defendant/DDA be directed to

mutate the subject matter of the suit i.e. property bearing no.A2/252, Paschim Vihar in the name of the plaintiff. This is a declaration which the plaintiff has sought; it necessarily has to be described as a suit for declaration. Findings of both the fact finding Courts below had so held; this finding call for no interference.

10. Section 53(B) reads as under:-

“53B. Notice to be given of suits.-(1) No suit shall be instituted against the Authority, or any member thereof, or any of its officers or other employees, or any person acting under the directions of the Authority or any member or any officer or other employee of the Authority in respect of any act done or purporting to have been done in pursuance of this Act or any rule or regulation made thereunder until the expiration of two months after notice in writing has been, in the case of the Authority, left at its office, and in any other case, delivered to, or left at the office or place of abode of, the person to be sued and unless such notice states explicitly the cause of action, the nature of relief sought, the amount of compensation claimed and the name and place of residence of the intending plaintiff and unless the plaint contains a statement that such notice has been so left or delivered.”

(2) No suit such as is described in sub-section (1) shall, unless it is a suit for recovery of immovable property or for a declaration of title thereto, be instituted after the expiry of six months from the date on which the cause of action arises.

(3) Nothing contained in sub-section(1) shall be deemed to apply to a suit in which the only relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponement of the institution of the suit.”

11. A suit for declaration is excluded from the operation of this provision. Article 58 of the Ist Schedule of the Limitation Act 1963 is the applicable provision. Under this provision the period of limitation prescribed in a suit for declaration is three years; this period of three years has to commence from the date when the right to sue accrues. Contention of the counsel for the appellant that the right to sue had accrued on 19.3.1990 when legal notice had been served upon the defendant is an incorrect proposition.

Plaintiff is seeking a declaration of the title in the property on the basis of a will dated 19.10.1981. This will had been probated in his favour on 6.9.1984. On 17.12.1984 he had applied to the DDA for mutation of the subject matter of the property in his name on the basis of the aforementioned probated will; this is evident from paras 1 and 2 of the plaint. Cause of action had accrued at best on 17.12.1984. Suit had been filed after eight long years i.e. on 7.4.1992. It was barred by limitation. Findings of the first Appellate Court on this issue are contained in paras 11 And 12; they call for no interference.

12. A series of letters/correspondence had been exchanged between the parties. These are admitted documents. On 24.11.1988 (Ex.PW-1/2) the defendant had asked for a list of eight documents from the plaintiff which were:-

1. Certified copy of Will left by the allottee.
2. Death Certificate of the allottee in original.
3. Affidavit disclosing particulars of the legal heirs whom the allottee had survived.
4. No objection of the legal heirs regarding mutation of the interest of the deceased in favour of the legatee(s).
5. Affidavit from the legatee declaring that the property in question had not passed on to him during the life time of the Testator and no sale agreement/agreement for construction etc., had been executed by the Testator in his/her favour, nor any GPA/SPA had been executed in his/her favour, nor in favour of a person nominated by him.
6. Legatee may be asked to produce certified copy of assessment order of income tax and house tax receipt showing the name of the person in whose name the property is being assessed.
7. An undertaking from the applicant/legatee to the effect that if at any stage it is found out that the property had passed on to the legatee during the life time of the Testator, then it will be deemed to be a case of misstatement of facts, misrepresentation or fraud and the mutation in his/her favour shall stand terminated and the property shall automatically vest into the Lessor.

8. Indemnity Bond from the legatee duly registered with the Sub-Registrar.

On 17.2.1989 (Ex.PW-1/1) documents mentioned at serial no.5,6 and 7 therein i.e. an undertaking from the applicant/legatee, duly registered indemnity bond; application under the Urban Land (Ceiling & Regulation) Act, 1976 along with the required affidavit, the affidavit as detailed in serial no.11 as also the conveyance deed of mortgage permission had been sought as additional documents from the plaintiff.

13. Plaintiff's case was that on 15.6.1989 he had submitted certain documents. Thereafter on 23.8.1989 further documents were again sought by the department from the plaintiff (letter not on record). On 11.10.1990 vide Ex.DW-1/1 the defendant had asked for the following document:

- "1. Certified copy of letter of administration and the Will.
2. Certified copy of assessment order and House Tax receipt.
3. Fresh undertaking regarding property attested by Notary public with two witnesses.
4. Passport size photo, three specimen signature duly attested by class-I officer and attested photo copy of ration card."

This letter is admitted. It had, however, not been averred by the plaintiff in his plaint; he had referred to the other aforementioned correspondence but deliberately chose to omit this letter. In para 4 of the legal notice dated 19.3.1990, the plaintiff has stated that the documents sought for by the department in terms of the letter dated 23.8.1989 are uncalled for documents meaning thereby that the plaintiff had admitted that these documents had not been furnished by him to the department. In para 4 of the plaint, it was

stated that the proformas required to be filled up by him were not required to be furnished as the plaintiff had already obtained a probate in his favour.

14. The stand of the department in the written statement all along was that the necessary documents had not been furnished by the plaintiff; this has specifically been stated in paras 3 and 4. On oath DW-1, the UDC from the department had reiterated this version. He had deposed that pursuant to the letter dated 17.2.1989 plaintiff had submitted certain document with his letter dated 15.6.189. On 23.8.1989 he was again requested to furnish documents which included an affidavit stating the list of the legal heirs of the deceased, their names and relationship. DW-1 had further deposed that in terms of the letter Ex.DW-1/1 the documents sought for had not been furnished. In his cross-examination, he had reiterated that the mutation of the property was not made by the department for the want of documents; details of which has been mentioned in Ex.DW-1/1.

15. In Gurshaney case (supra) the policy of the DDA dated 26.7.1988 (proved before the trial Court as Ex.DW-1/P-1), dealing with 50% unearned increase to be paid in cases of wills left by deceased allottees had been detailed as also the guidelines. Para 7 of the said judgment had detailed the documents which the department in terms of this policy required from the allottees before their case could be processed. In para 8 of this judgment the Court had categorically held that merely because letters of administration had been granted to a party it could not preclude the Department from holding an enquiry into the true nature of the transaction; the testamentary court while granting probate or

letters of administration does not normally in uncontested matters considers the motive behind the execution of a testamentary instrument; probate does not confer title of property; it merely enables the administration of the estate of the deceased; it is always upon to a person to dispute title even after a probate had been granted.

16. The policy and the rationale of the guidelines as laid down in Ex.DW-1/P-1 inter alia reads as follows:

“The rationale behind the formulation of its policies and guidelines issued by DDA is to curb illegal transactions in favour of persons not of blood relations of the allottee, being practiced rampantly and the property being transferred by an under hand sale in the garb of Will and power of attorney etc. DDA has formulated a policy that in such cases the department would ask for 50% of unearned increase in the value of property. It is always open to appellants to inquire whether an alleged Will is in actuality a sale in the garb of Will in total disregard of the policy decision of the authority. Merely because Probate/Letters of Administration are granted would not preclude DDA from so inquiring. It must be grasped that DDA has been given no notice of the testamentary proceedings. Therefore, it would have no right to appear or oppose such proceedings. As already said, DDA is a creature of the Statute and any policy decision or guidelines formulated by such authority will have a binding effect on the parties, in absence of rules to the contrary.

17. It is clear that it was well within the right of the department to ask the plaintiff to furnish documents to them in order that the necessary enquiry could be entailed by them to find out as to whether the will probated in favour of the plaintiff was a genuine document or was it only a cloak to cover a sham transaction. In the absence of the necessary documents this enquiry could not be carried out by the department. This is evident from the correspondence/letters exchanged between the parties. This documentary evidence coupled with the pleadings in the written

statement and the oral testimony of DW-1 has established this factum.

18. Judgment of the single Bench of this Court reported in K.K. Shrivastava (supra) is distinct. This was a writ petition where the demand of unearned increase by the DDA on the petitioner was the subject matter of challenge. From the perusal of this judgment, it is apparent that the necessary documents sought for by the department had been furnished by the petitioner. On 29.12.2004, Vice Chairman of the DDA had passed an order taking a view that unearned increase should be levied on the petitioner. Para 15 of the judgment clearly states that an enquiry had been conducted by the department which was pursuant to the directions of the Division Bench of the Court; thereafter the unearned increase was levied upon the petitioner. The "enquiry" envisaged four distinct stages; i.e. from the gathering of facts, analysis of the same; affording an opportunity of being heard; and giving a reasoned decision. The contention of the learned counsel for the department that in this case the enquiry had stopped at the first stage itself i.e. at the stage of gathering of facts as in spite of repeated correspondence the plaintiff had failed to furnish the requisite documents is a forceful contention and cannot be ignored. Further in this case during the pendency of the writ petition under orders of the Court petitioner had filed additional documents to further assist this enquiry. It was in these circumstances that it was held that the findings of the enquiry were vitiated; DDA had been directed to mutate the property in favour of the said petitioner. Facts of the said are distinct and inapplicable.

19. Powers of a Second Appellate Court are contained; it has to act within the parameters and the guidelines as circumscribed under Section 100 of the Code of Civil Procedure. It is not a fact finding Court. It is not a Court who can take additional facts on record. It is only substantial questions of law which have to be answered. These substantial question of law as aforementioned had been formulated on 2.3.2007.

20. In view of the aforementioned discussion, they are answered as follows. The finding in the impugned judgment on the point of limitation calls for no interference. Article 58 of the Limitation Act is applicable. Suit is time barred. As such the question of payment of unearned increase by the appellant does not arise. In fact the demand of unearned increase was never made upon the plaintiff; in the absence of the requisite documents not having been furnished by the plaintiff to the defendant, the necessary enquiry to determine whether the probated will on the basis of which the plaintiff claimed mutation of the suit property was a sham or a genuine document could not be concluded. Suit of the plaintiff was rightly dismissed. Substantial questions of law are answered accordingly.

21. There is no merit in the appeal. It is dismissed.

INDERMEET KAUR, J.

SEPTEMBER 21, 2010
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