

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

% *Date of Judgment : 27.09.2010*

+ **RSA No.169/2007 & C.M.Appl.8676/2007**

RAJ KISHORE

.....Appellant
Through: Mr.V.B.Andley, Sr.Adv. with
Mr.Rajinder Mathur, Advts.
Versus

SHYAM SUNDER SHARMA

NOW REPRESENTED BY

RAMESH CHAND SHARMA

.....Respondent
Through: Mr.Suryakant Singh, 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. The judgment impugned is the judgment and decree dated 30.5.2007. This judgment and decree had endorsed the finding of the trial judge dated 29.4.1995 whereby the suit for possession filed by the plaintiff/respondent had been decreed.

2. This is a second appeal. The substantial questions of law have been formulated on page 36 of the paper book. They are 11 in number. They all border on the proposition that Sona Devi, the successor-in-interest of the defendant/appellant Raj Kishore had died leaving behind a duly probated registered will dated 16.7.1981, by virtue of which she had adopted Gopal. Gopal in terms of this will being the adopted son of Sona Devi had become a tenant of the plaintiff having inherited this tenancy; as such the findings of the two courts below that the plaintiff Shyam Sunder

Sharma was entitled to a decree of possession was an illegality; the aspect of the tenancy having been inherited by Gopal who was the legally adopted son of Sona Devi had not been considered; the gamut of the aforestated arguments have been formulated in the aforesaid 11 substantial questions of law which find mention in the body of the appeal.

3. A suit for possession and recovery of Rs.30/- had been filed by the plaintiff Shyam Sunder Sharma against Raj Kishore. The case of the plaintiff was that Sona Devi was a tenant with the plaintiff. The suit property comprised of two kothas and one dalan situated on the first floor in property no.3361, Kucha Kashgari, Bazar Sita Ram, Delhi at the rate of Rs.6/- per month. The tenancy commenced from the first day of each calendar month; it was for residential purpose; tenancy was terminated vide notice dated 29.5.1981 with effect from 30.6.1981. Sona devi died on 1.7.1983; she had no legal heir. Defendant Raj Kishore was stated to be living with Sona Devi. After the demise of Sona Devi he had no right to live in the suit property; he had become an unauthorized occupant; suit for possession was accordingly filed.

4. In the original written statement, the case of the defendant was that tenancy of Sona Devi was not validly terminated and notice was not served upon her. Subsequently, his written statement was amended. In the amended written statement he had raised a plea that the tenancy of Sona Devi was inherited by Gopal whom she had adopted, in terms of his registered will dated 16.7.1981.

5. Trial judge had framed eight issues. All the issues were decided in favour of the plaintiff and against the defendant. There

was no bar either of Section 19 of the Slum Area Act, 1971 or of Section 50 of Delhi Rent Control Act, 1958. Gopal was held not to be a necessary party. Tenancy of Sona Devi was validly terminated.

6. Issue no.7 is relevant for decision of this appeal. The finding on this issue is inter alia recorded as follows:

“Issue No:7(OPP)

The case of the plttf is that the deft is an unauthorized occupant of the premises since Sona Devi the tenant had expired leaving behind no heirs of her own. Admittedly the defts had been living with Sona Devi whose tenancy had been terminated during her life time and hence he has no right to remain in the possession of the premises and is liable to give the possession of the same to the plttf.

The case of the deft is that he is the legal heir of Sona Devi who was the tenant of the premises. The deft has raised the plea that his son Master Gopal had been duly adopted by Smt. Sona Devi during her life time and he is fully entitled to reside in the suit premises and is also entitled to the protection under the DRC Act being the heirs of Lt. Smt. Sona Devi. The perusal of the record shows that the defts has filed as many as three written statements which were amended from time to time. In his 1st WS he has not allowed any adoption of his son but had in fact taken a plea that he was the son of Smt. Sona Devi. Later on after the amendments he alleged that adoption of his son Gopal. However, for the purposes of the present case it is only the last WS filed by the defts which is relevant.

The case of the plaintiff is that the adoption of the Gopal has not been proved in accordance with law and admittedly no adoption deed was executed and even the wife of the deft has not been produced as witness to prove the various adoption ceremonies. I have gone through the evidence on record. DW1 has in his testimony stated that his son was adopted by Sona Devi and the only documentary evidence produced on record is the copy of the will of Smt. Sona Devi where in she has stated that she has adopted Gopal who was at that time one year old. This will has been executed on 16/7/89 and as per the documents on record there is a presumption that the notice of the plaintiff terminating the tenancy of Sona Devi had been served upon her prior to that and as per the date on the regd. A/D which was only end of May, 81 i.e. 30.5.81. The only evidence placed on record to prove the adoption is the testimony of Dw2 who has contradicted the Dw1. According to Dw2 at the time of adoption ceremony in the year 1980 Gopal was 5/6 years old. However, Dw1 has stated that Gopal was born in the year 1980, hence I am not inclined to rely upon the testimony of Dw2 to that extent.

The defendant has also produced Rajinder Kumar as Dw2 who has in his testimony stated that he use to take tuitions from Sona Devi but in his cross-examination the

witness has stated that he had been told this fact to the deft and is also unable to tell the names of other children who use to take tuitions with him. He has though mentioned the name of the counsel for the plttf as one of the students who used to take tuitions but in his cross examination the witness has not told his correct age and year and also unable to tell the year of the birth of the counsel. In my view Dw3 has purposely not stated this since he had earlier stated that the counsel for the plaintiff and he were of the same age group and later on when asked about his date of birth he has not stated his correct age. I am not inclined to rely upon the statement of DW2, on the grounds that he is not a trustworthy witness.

The counsel for the deft has also placed on record the copy of the probate obtained from the court of District Judge, Delhi on the basis of will of Smt. Sona Devi however, the counsel for the plttf has objected to the same. Probate is a public document and this court can always looking this documents for the purposes of corroboration.

The deft has also not produced his wife as witness to prove the adoption ceremony. There is no adoption deed on record and the deft has failed to show that the ceremony of the adoption has taken place and hence I hereby hold that the Gopal is not duly adopted son of Smt.Sona Devi and that in view of the earlier findings there has been a valid termination of tenancy of Smt.Sona Devi and the defendant is in authorized possession of the premises. This issue is decided in favour of the plaintiff and against the deft and I hereby hold that the plaintiff is entitled to the decree for possession.”

7. This finding of the trial judge was endorsed by the first appellate court vide the impugned judgment and decree.

8. Learned counsel for the appellant has vehemently urged that the findings of the courts below are a perverse finding. The minor variation in the testimony of DW1 and DW2 was not by itself sufficient to discard their version and to endorse a finding that Gopal had not been validly adopted by Sona Devi. Attention has been drawn to Section 5, 6, 10 & 11 of the Hindu Adoption and Maintenance Act (hereinafter referred to as HAM Act). It is pointed out that the finding of the trial judge that the wife of the defendant had not been produced or there being no adoption deed to evidence the ceremony of adoption is perverse findings in view of statutory provisions as contained in Section 8 and the proviso of Section 11 of the HAM Act. It is pointed out that the provisions of

Section 8, 9 and 10 had been adequately met and in fact this is an undisputed position; as per the proviso of Section 11 no formal adoption ceremony of “datta homam” is also necessary. The courts below have erred and have given a perverse finding while dealing with this issue. Even otherwise, the will of Sona Devi was a probated will. It is a judgment in rem and binding on one and all. In these circumstances, the legality of the adoption also could not have been questioned. It has lastly been pointed out that the letting out purpose i.e. the purpose for which the suit property had been let out had also not been detailed; all these are substantial questions of law.

9. Arguments have been countered by learned counsel for the respondent.

10. Present suit is a suit for possession and claim of Rs.30/-. Para 1 has specifically recited that the tenancy of Sona Devi is for a residential purpose and the premises was always being used for herself. This last submission of learned counsel for the appellant is answered accordingly.

11. It is not in dispute that will is a probated will. In AIR 2008 SC 295 Basanti Devi vs. Raviprakash Ramprasad Jaiswal, the Supreme Court had held that the Probate Court, undisputably, exercises a limited jurisdiction; it is not concerned with the question of title. In (2008) 4 SCC 300 Krishan Kumar Birla vs. Rajender Singh Lodha & Ors., it has been reiterated by the Supreme Court that the question of title and the construction of a will relating to the right, title and interest of any person are beyond the jurisdiction of the probate court.

12. The defence set up by the defendant that Gopal had been adopted by Sona Devi was raised for the first time in the amended written statement; this had to be established by cogent evidence; evidence was adduced in the form of two witnesses i.e. DW-1 and DW-2; the courts below chose to disbelieve the said witnesses as they have given contrary versions and as has been noted in the finding of the trial court herein reproduced above. Versions of DW1 & DW-2 on the date of birth of Gopal; he having been born in the year 1980; adoption ceremony having taken place in 1980; DW-2 deposing that Gopal was six to seven years old at the time of the adoption ceremony was an evidence which was in conflict and contrary to DW-1 which had destroyed the credibility and veracity of both the defence witnesses constraining the courts below to disbelieve these versions.

13. In no manner can it be said that these findings are perverse or that they call for an interference in a second appeal. They do not raise any substantial question of law.

14. The Supreme Court time and again has reiterated that even if there is an erroneous finding given by the Courts below or the evidence which has been adduced before the Courts below is insufficient, the sufficiency of the evidence cannot be gone into by the second appellate court; the second appellate court cannot chose to interfere even if the second appellate court would have arrived at a finding different from the two courts below on the same set of evidence. In AIR 1999 SC 2213 Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar the Supreme Court has held that in a case where from a given set of circumstances two inferences are possible, the one drawn by the lower appellate

court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court or was based upon inadmissible evidence or arrived at without evidence. This is not the case in the instant scenario.

15. The impugned judgment had examined the evidence both oral and documentary in deep detail; it found no reason to differ from the trial court; in this exercise of its fair and judicious discretion, it had dismissed the first appeal.

16. Contentions urged before this court have already been delved into; this not a second fact finding court. There is no merit in the appeal; appeal as also the pending application is dismissed in limine.

INDERMEET KAUR, J.

SEPTEMBER 27, 2010

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