

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

% Date of judgment: 1st July, 2010

+ **RSA 120/2010**

M/S SHANTI SWAROOP KRISHAN LAL & CO Appellant
Through: None.

versus

SH.BADRI PRASHAD SHARMA Respondent
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. (Oral)

CM No.11321/2010(u/S 151 CPC for exemption)

Allowed subject to just exceptions.

RSA No.120/2010 & CM No.11320/2010 (u/S 151 r/w O.41 CPC for stay)

1. This is a second appeal preferred against the order/judgment passed by learned Additional District Judge who vide his order dated 22.12.2008 had endorsed the finding of the learned Civil

Judge dated 13.10.2008 dismissing the suit of the appellant.

2. Briefly stated the facts are that the appellant/plaintiff had filed a suit for specific performance seeking a direction against the respondent/defendant to perform his part of the contract in terms of an Agreement to Sell, General Power of Attorney and Affidavit dated 10.11.1995 whereby the defendant had agreed to sell two of his properties bearing no.H-1592 and H-1593, J.J.Colony, Jahagirpuri in favour of the plaintiff. Plaintiff and the defendant had business dealings with one another. Defendant owed a sum of Rs.1,20,000/- to the plaintiff. Plaintiff had paid another sum of Rs.1,00,000/- vide cheque dated 10.11.1995 to the defendant. The total amount due and payable by the defendant was thus Rs.2,20,000/-. Defendant had executed the aforementioned documents dated 10.11.1995 i.e. an Agreement to Sell, a General Power of Attorney and an Affidavit in favour of the plaintiff whereby he had agreed to sell the aforementioned two properties to the plaintiff, in case he was unable to honour his commitment to make payment of Rs.2,20,000/- with the interest @18% per annum within six months from the said date. Since the defendant had failed to honour his commitment the plaintiff had filed a suit for specific performance.

3. In his written statement the defendant had denied the averments made in the plaint; he had disputed the contract between the parties; his submission was that the documents relied

upon by the plaintiff were forged and fabricated; defendant was not the owner of the any of the said properties; as such the question of sale of the said properties in favour of the plaintiff did not arise.

4. Eight issues were framed by the trial court. The first four issues were decided in favour of the plaintiff. Issue no.5 was the crucial issue. Trial court had held that the suit for specific performance had been filed in respect of properties bearing no. H-1592 and H-1593, J.J.Colony, Jahangirpuri whereas the documents executed between the parties i.e. Agreement to sell, General Power of Attorney and Affidavit all related to property bearing no. H-192 and H-193, J.J. Colony, Jahangirpuri. Trial court had noted that if this was a typographical error as had been averred by the plaintiff it would have found mention at only one or at best two places but all the three documents at several places had referred to the properties as property bearing no.H-192 and H-193; thus holding that this cannot be a typographical error. Trial court had placed reliance upon the provisions contained in Sections 91 and 92 of the Indian Evidence Act and held that since the documents had to be read over and above the oral testimony the suit of the plaintiff was not maintainable and was accordingly dismissed.

5. In first appeal the Additional District Judge endorsed the

findings of the trial court. The witnesses examined before the trial court were dealt with in detail. They were four PWs. The relevant documents i.e. the Agreement to Sell was proved as Ex.PW-1/8, General Power of Attorney was proved as Ex.PW-1/9 and the Affidavit was proved as Ex.PW-1/10. The appellate court had further noted that these documents had been executed on 10.11.1995; the subsequent legal notices dated 13.5.1996 (Ex. PW-1/13) and 5.6.1996 (Ex.PW-1/20) had also made reference to the properties as property bearing no.H-192 and H-193, J.J. Colony, Jahangirpuri, Delhi. It had rightly been concluded by the appellate court that this could not have been an accidental slip or omission as there was no reason why at several places in the documents Ex.PW-1/8, Ex.PW-1/9 and Ex.PW-1/10 the properties were described at all places as property no.H-192 and H-193, J.J. Colony, Jahangirpuri and even in the subsequent legal notices Ex.PW-1/13 and Ex.PW-1/2 they were again described in the same fashion. Reliance upon the provisions of Sections 91 and 92 of the Evidence Act had been affirmed.

6. None has appeared for the appellant in spite of the matter having been called twice over. The memo of appeal and the question of law formulated in sub para (k) has been perused. The documents on which the claim of the plaintiff was based all make reference to the property as property no. H-192 and H-193, J.J.

Colony, Jahangirpuri, Delhi. Section 92 of the Evidence Act 1972 specifically excludes the evidence of oral agreement where there is a contract in writing. If there was a document in writing which is admittedly so between the parties and which documents are not disputed, the said document have to be read over and above the oral evidence which is sought to be led by a party and which is contrary to the terms of the said document. In such a contingency oral evidence is inadmissible to explain or vary the terms of the written contract. Intention of the parties has no doubt to be ascertained from the documents itself. In this case the documents on which the claim of the plaintiff has been based are clear and unambiguous; they all at various places describe the property as H-192 and H-193, J.J. Colony, Jahangirpuri, Delhi and so also the legal notices which had been sent by the plaintiff to the defendant. Suit has been filed seeking a specific performance of a contract relating to property bearing no.H-1592 and H-1593, J.J. Colony, Jahangirpuri, Delhi. There is a clear difference in the number and description of the property and the pleadings in the plaint are contrary and in conflict with the documents.

7. Both the courts below have given concurrent findings of fact which this court sitting in second appeal is unable to interfere with. It is a settled position at law that if the findings of fact are based on evidence which even if the second appellate court feels

has not been appreciated in the correct perspective it cannot be interfered with. It is also not the case of the appellant that the findings of the trial court are vitiated for the reason that any material evidence has been ignored or that the finding is based on no evidence or that the finding is vitiated by any error of procedure. Scope of interference by this court is limited in view of the parameters contained in Section 100 of the CPC in as much as the well settled position at law is that it is not open to any party to lead oral evidence when there is a written instrument containing the terms of the contract. Thus has been reiterated by the Supreme Court in AIR 1996 SC 2025 Tamil Nadu Board and Anr. vs. N. Raju Reddiar and Anr.

8. No question of law much less any substantial question of law has been raised in the present appeal. The appeal as also the application are dismissed.

INDERMEET KAUR, J.

JULY 01, 2010
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