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IN THE HIGH COURT OF DELHI AT NEW DELHI

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C.M. (Main) No.811 of 2009 & C.M. Appl. No.11566 of 2009

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20.01.2010

P.S. SAWHNEY

.....Petitioner

Through: Mr. S.P. Singh Chaudhary & Mr. Y.R.
Sharma, Advocates.

Versus

GANPAT RAI GUPTA & ANR.

.....Respondents

Through: Mr. N.S. Vasisht & Mr. Vishal Singh,
Advocate for R-1.

Date of Reserve: 15th January, 2010

Date of Order: 20th January, 2010

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

J U D G M E N T

1. By this petition under Article 227 of the Constitution of India, the petitioner has assailed order dated 26th May, 2009 whereby the learned Additional District Judge decided an application under Order XIV Rules 1 & 5 read with Section 151 CPC and made certain amendments in the issues already framed during the pendency of the trial. The contention of the petitioner is that the trial court framed issue No.3 improperly and burden of proof has been wrongly placed upon defendant No.1. The issue No.3 reads as under :-

“Whether the allotment of defendant No.1 in respect of this plot
had not been validly cancelled? OPD-1”

2. It is submitted that burden should have been placed on the plaintiff, who had taken the stand that defendant No.2 club cancelled the allotment of the plot in favour of defendant No.1 and defendant No.1 was informed regarding cancellation.

3. Under Section 106 of Evidence Act, it is specifically provided that a fact in special knowledge of a person has to be proved by that person and onus is on that. The cancellation of allotment was done by defendant No.2 and how it was done, why it was done was also within the special knowledge of defendant No.2. I, therefore, consider that onus of this proving issue No.3 should have been on defendant No.2 instead of defendant No.1 and not on the plaintiff. The plaintiff had merely brought this fact to the knowledge of the court. The onus does not shift on a party bringing a fact to the knowledge of the court unless the party is generally in possession of the evidence to prove the fact but where the evidence is in special knowledge of the defendant, the onus has to be on the defendant. In this case, the cancellation was in special knowledge of defendant No.2. thus, onus should have been on defendant No.2.

4. The other contention raised is in respect of issue No.4. Issue No.4 is as under :-

“Whether the defendant No.1 continued to be in physical possession of the plot. If so, for what period? OPD-1”

5. It is submitted by counsel for the petitioner (defendant No.1 in the court below) that the plaintiff had taken the plea that defendant No.1 had trespassed the property and thus, this onus of trespassing should have been on the plaintiff and defendant No.1 cannot be burdened with the onus of proving his possession.

6. Perusal of order of the trial court shows that the trial court had reframed issue No.2 and in issue No.2, the trial court has specifically framed an issue about forcible possession over the plot on 8th January, 2002 as alleged by the plaintiff and onus has also been put on the plaintiff. However, the defendant in the written statement has taken a stand that he was in peaceful possession and maintaining a nursery and the trespass was

done by some persons on the night intervening 11th and 12th January, 2002. He has denied about his own trespass and has alleged about his continued possession and that is why the trial court framed this issue. The onus has to be on defendant No.1, who has taken stand on his continued peaceful possession.

7. I find no force in the arguments regarding issue No.4. Similarly, the contention is raised by the petitioner regarding issue No.5 and it is submitted that observation of the learned Additional District Judge regarding issue No.5 are self-contradictory. Issue No.5 reads as under :-

“Whether the defendant No.1 had surrendered the allotment of the plot in suit to defendant No.2? OPD-2”

8. It is urged by the counsel that existing issue No.5 must be amended and burden of the same must be placed on the plaintiff. I consider that the burden in respect of issue No.5 should be on the plaintiff in view of stand taken in the pleadings of the parties.

9. The other contention of the petitioner is that some additional issues were requested to be framed by the petitioner and the same were not framed. The learned trial court has observed that all additional issues which were sought by the petitioner were unnecessary and the issues on points of disputes between the parties were covered by the issues already framed. I find no reason to disagree with the order of the learned Additional District Judge.

10. The petition is allowed to the limited extent that onus of proof in issues No.3 & 5 shall be on defendant No.2 and plaintiff respectively. Rest of the petition is dismissed.

SHIV NARAYAN DHINGRA J.

JANUARY 20, 2010
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