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

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Date of Judgment: 27.01.2011

+ **RSA No.25/2010**

SARITA KHANNA Appellant
Through: Mr. S.K. Duggal, Advocate.

Versus

DEVINDER SINGH & OTHERS Respondent
Through: Mr. B.D. Kaushik, 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 01.01.2010 which has endorsed the findings of the trial Judge dated 28.04.2006 whereby the suit filed by Devinder Singh against six defendants of whom the contesting defendant was Sarita Khanna (defendant No. 1) seeking declaration and permanent injunction to the effect that the decree dated 03.05.2000 passed in Suit No. 220/1998 was obtained by fraud and collusion were decreed. Suit No. 220/1998 was a suit filed by Sarita Khanna (defendant No. 1) against Rameshwari Devi widow of Chellu Ram and other legal heirs including her sons who had been arrayed in the present suit as defendants No. 3 to 6.

2 The plaintiff is stated to be the owner and in possession of land measuring 209 square yards bearing No. 97-98 being a part of Khasra No. 13, Qilla No. 26/1, Village Khureji Khas, New Delhi. He had purchased this property from Ram Niwas Aggarwal (defendant No. 2) vide sale documents i.e. GPA, Agreement to sell, Will, Affidavit, Possession letter receipt all dated 31.08.2001 (Ex. PW-1/A to Ex. PW-1/F) for a sum of Rs.1,80,000/-. Ram Niwas Aggarwal vide similar documents Ex. PW-1/G to Ex. PW-1/K had purchased this suit premises from Desh Raj on 21.10.1999. Desh Raj had in turn purchased this suit land on 15.06.1984 vide documents Ex. PW-1/L to Ex. PW-1/M from Prem Pal Arora. Prem Pal Arora had purchased the suit land from Jai Pal vide documents Ex. PW-1/P to Ex. PW-1/Q on 02.01.1973. Jai Pal had in turn purchased this suit land from the earlier predecessor Ratan Lal Gupta on 07.11.1966 vide documents proved as Ex. PW-1/R to Ex. PW-1/S. Further contention was that Ram Niwas Aggarwal had purchased this suit property from Aflatoon and Harpal on the basis of an agreement to sell dated 26.02.1966 who were the recorded owners in the revenue record. In 1984, Prem Pal Arora had permitted Chellu Ram who was the father of defendants No. 3 to 6 and their mother Rameshwari Devi to look after the suit property. This arrangement continued up to 2001 when the defendants were asked to vacate the suit property. The defendants had assured Ram Niwas Aggarwal (defendant No. 2) that they will vacate this suit property within three months. On 31.08.2001, the plaintiff had become the owner of the suit property in terms of Ex. PW-1/A to Ex. PW-1/F which had been executed in his favour by Ram Niwas Aggarwal. The plaintiff also took physical possession of the suit

property. The plaintiff was informed by defendants No. 3 to 6 that on an earlier date i.e. 24.08.2001, defendant No. 2 along with the Court Bailiff had gone to take the possession of the suit property but it was resisted. It was then the plaintiff learnt that defendant No. 1 Sarita Khanna had filed a suit bearing No. 220/1998 for recovery of the suit property against defendants No. 3 to 6 wherein on 03.05.2000 Rajesh (defendant No. 3) had made a statement on behalf of himself and his other legal representatives to vacate the suit property whereupon the suit of defendant No. 1 Sarita Khanna i.e. Suit No. 220/1998 had been decreed. It was in pursuance of this decree that Sarita Khanna had sought execution and gone to the suit premises on 24.08.2001 for delivery of the suit property. It is contended that this decree dated 03.05.2000 has been obtained by fraud and the present suit has been filed seeking a declaration to the said effect.

3 Defendant No. 1 was the only contesting defendant. Her contention was that the present plaintiff i.e. Devinder Singh had sought to be impleaded himself under Order 1 Rule 10 of the Code of Civil Procedure (hereinafter referred to as the 'Code') in Suit No. 220/1998 but his application was dismissed. Thereafter, even in the execution proceedings pursuant to the decree dated 03.05.2000, the plaintiff had filed objections. It is submitted that the documentary evidence on the basis of which the plaintiff is claiming ownership in the suit property are forged and fabricated; this is a collusion between the plaintiff and defendants No. 2 to 6 who wish to oust the defendant No. 1 who is entitled to the suit property in terms of the decree dated 03.05.2000 which had been passed in her favour.

4 The trial Judge had framed the following seven issues:-

- 1. Whether the defendant has obtained the decree dated 03.05.2000 in suit No. 220/1998 by fraud and collusion and therefore, be declared as null and void? OPP*
- 2. Whether the plaintiff is without any right and interest in the suit property? OP D1*
- 3. Whether the plaintiff is owner of the suit property in view of decree dated 03.05.2000 in suit No. 220/1998? OPP*
- 4. Whether the suit is without cause of action? OP D1.*
- 5. Whether the plaintiff is without possession of the suit property? OP D1*
- 6. Whether the plaintiff has come to the court with clean hands? OP D1*
- 7. Relief.*

5 Oral and documentary evidence was led. On the basis of said oral and documentary evidence, the Court had decreed the suit of the plaintiff and had held that the decree dated 03.05.2000 passed in Suit No. 220/1998 is null and void. Chain of documentary evidence adduced by the plaintiff had inspired confidence. The contention of the defendant No. 1 that he had purchased this suit property from Tara Chand had not been proved. The Court had noted that defendant No. 1 was not able to produce Tara Chand. Tara Chand had in fact been produced as a witness by defendant No. 2 and examined as DW-6. His contention was that he was never the owner of the suit property and he does not know defendant No. 1 Sarita Khanna; contention of defendant No. 1 that she had purchased this property from Tara Chand was refuted.

6 Defendant No. 3 i.e. Rajesh had also been examined as DW-5. He had deposed that he along with his father, mother and siblings had been permitted to stay in the suit property by Prem Pal Arora. He had deposed on 03.05.2000 in Suit No. 220/1998 he had made a statement before the Court on the asking of one Kuldeep Kumar under coercion. Police complaints were made on 12.06.2001 and 28.06.2001 to the said effect.

7 All these facts had been adverted to by both the courts below which are the two fact finding courts. The plaintiff had been able to adduce documentary evidence to establish his ownership and title to the suit property. The plea of defendant No. 1 that she had purchased this property from Tara Chand was disbelieved in view of the clear and categorical version of Tara Chand who was examined as DW-6. Even otherwise, there was no documentary evidence led by defendant No. 1 on this issue. Both the courts below had held that the decree dated 03.05.2000 had been obtained by collusion and was liable to be set aside.

8 This is a second appeal. It is yet at its admission stage. On behalf of the appellant, it has been vehemently urged that a substantial question of law has arisen as DW-5 Rajesh (defendant No. 3) and DW-6 Tara Chand had deposed against the interest of defendant No. 1; defendant No. 1 had every right to cross-examine both DW-5 & DW-6 which opportunity had not been given to him and this has raised a substantial question of law. Lengthy arguments on this issue have been addressed. For this proposition, reliance has been placed upon AIR 1978 Punjab & Haryana 319 Sadhu Singh Vs. Sant Narain Singh Sewadar & others and AIR

9 There is no dispute to this proposition. Section 138 of the Evidence Act provides a right to an adversary party where the party arrayed as a defendant in the suit had taken a contradictory stand on a relevant and material issue; then the adversary party is entitled for right of cross-examination. This right had been given to the appellant/ defendant No. 1 and this is clear from the record. DW-5 had been examined in the trial court on 15.04.2005. On that date, the counsel for defendant No. 1 was not present and as such inspite of opportunity having been afforded to defendant No. 1, he did not cross-examine DW-5. Thereafter, an application to the said effect was filed which was dismissed on 04.05.2005. Admittedly no review or appeal had been filed against the order dated 04.05.2005. DW-6 Tara Chand was examined on 04.05.2005. On the said date, an application had been filed by the present appellant/ defendant No. 1 seeking opportunity to cross-examine Tara Chand. His application was dismissed on 04.05.2005. He was not aggrieved by the order; that is the reason why he did file any review or appeal against the said order. Even in the grounds of appeal filed before the first appellate Court, it was never his grievance that he had not been permitted to cross-examine Tara Chand.

10 These pleas cannot be raised at the second appeal stage. This Court is not a third fact finding Court. The evidence had been concluded in the court below and inspite of opportunity having been afforded to defendant No. 1 to cross-examine DW-5, he did

not avail this opportunity. Qua DW-6 although his application was dismissed on 04.05.2005 which was the same day on which DW-6 was examined in chief, yet the fact that he did not seek a review or file appeal against the order shows that he was not aggrieved by the said order. This was also the reason why this was not a grouse in the grounds of appeal filed by him before the first appellate court. No other argument has been urged.

No substantial question of law has arisen. Appeal is dismissed.

CM No. 2383/2010 (for stay)

Since the main appeal has been dismissed, this application has become infructuous.

INDERMEET KAUR, J.

JANUARY 27, 2011
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