

R-142

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

% *Judgment Reserved on: 11.01.2011*
Judgment Delivered on: 13.01.2011

+ **RSA No.203/2003 & CM No.698/2003 (for stay)**

SHRI SAMAY SINGH @ BALI & ANR. Appellants.
Through: Mr.Rajendra Dutt, Advocate.

Versus

SHRI KEHAR SINGH 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.

CM No.699/2003 (u/S 151 CPC)

Allowed subject to just exceptions.

RSA No.203/2003 & CM No.698/2003 (for stay)

1. This appeal has impugned the judgment and decree dated 26.8.2003 which had endorsed the finding of the trial judge dated 22.8.1996 whereby the suit of the plaintiff Kehar Singh seeking permanent injunction had been decreed in his favour.

2. The plaintiff had filed a suit for permanent injunction. Contention was that he is owner in possession of the property marked ABCDEF and the property marked ABHG in the site plan

attached along with the plaint situated in the Ababdi Salahpur Majra, Delhi. The property marked ABCDEF was partly built up and rest is vacant land used by the plaintiff for tying his cattle. Defendant did not own and was not in possession of any land around or in the vicinity of the plaintiff. Defendant with malafidie and ulterior motive threatened to occupy the open portion of the plaintiff's property marked CDEB. In spite of the request, the defendant did not desist from his act; suit was accordingly filed.

3. Defendant had contested the suit. In the written statement, it was contended that the site plan filed by the plaintiff is not a correct depiction of the site. Defendants are in possession, use and occupation of the land marked BEDC in the site plan filed by them.

4. On the pleadings of the parties, the following four issues were framed:

- "1. Whether the plaintiff is the owner in possession of the property in suit described as in para -1 of the plaint ?OPP
2. Whether the portion CDEF as marked in the site plan of the plaintiff is in possession and ownership of the defendants as alleged in para-1 of the written statement, if so, its effect? OPD
3. Whether the Local commissioner's report dated 22.12.1981 is liable to be set aside as alleged in the objection petition? OPP
4. Relief."

5. Six witnesses were examined on behalf of the plaintiff and four witnesses were led on behalf of the defendant. The trial court on the basis of the oral and documentary evidence had decreed the suit of the plaintiff. Apart from the oral evidence, the documentary evidence i.e. the gift deed Ex.PW-5/1 executed by Sarti in favour of Balbir proving the location of the plot as also certified copy of the judgment in case no.3/86 dated 02.8.1996 between one Umed Singh and plaintiff Kehar Singh Ex.P-2 had been relied upon by the trial

court to draw the aforementioned conclusion.

6. In appeal this judgment was confirmed.

7. This is a second appeal. After its admission, the following substantial question of law was formulated on 10.2.2005; it inter alia reads as follows:

“Whether the impugned order dated 26.8.2003 is perverse and vitiated inasmuch as the Trial Court and the Appellate Court have failed to consider the material evidence on record while arriving at their conclusions?”

8. On behalf of the appellant, it has been urged that the site plan has not been proved in accordance with law and as such no reliance could have been placed upon the said document Ex.P-1. Draftsman has not come into witness box. For this proposition reliance has been placed upon AIR 1968 Bombay 112 Sir Mohammed Yusuf & Anr. Vs. D. & Anr. It is contended that the courts below have ignored the cross-examination of PW-6 who had admitted that the disputed portion was in part possession of the defendant. Testimony of PW-3 has not been appreciated. The document Ex.PW-5/1 could not have been relied upon as Balbir Singh has not come into witness box. The site plan proved by the defendant has also been overlooked. The material evidence having been ignored the impugned judgment is liable to be set aside. For this proposition reliance has been placed upon AIR 1988 SC 703 J.B.Sharma Vs. State of Madhya Pradesh & Anr. AIR 1968 SC 466 Smt. Sonawati & Ors. Vs. Sri Ram and Anr. and AIR 1988 SC 1858 Dilbagrai Punjabi Vs. Sharad Chandra.

9. None has appeared for the respondent.

10. The record had been perused. The site plan Ex.P-1 had been

filed along with plaint. It had been proved through the version of PW-1. Submission of learned counsel for the appellant that the draftsman has not been produced into witness box to prove the site plan is of little avail in view of the fact that there is a categorical averment by PW-1 that the draftsman had since expired. In the cross-examination of PW-1 a bald suggestion has been given that the site plan is not as per the site at the spot. This, however, is not sufficient to demolish the document Ex.P-1 as not only has this site plan and the location of the suit property qua this document been proved through the version of PW-1 but the supporting statements of the other witnesses of the plaintiff have also conformed to this site plan. PW-2 Satbir Singh was known to both the parties. He has also endorsed the location of the suit property in Ex.P-1 as also the adjoining properties; so also is the version of PW-3 Hukum Chand who was also known to both the parties. He had deposed that the space marked G in Ex.P-1 is the gali used by the plaintiff. PW-2 and PW-3 had not been suggested that the site plan is not as per the site and as deposed by them. The version of Pw-6 Ram Niwas, the photographer of the location, has also been perused. The cross-examination sought to be highlighted by the learned counsel for the appellant does not in any manner support him. In his cross-examination PW-6 has stated that there is a portion of vacant land in front of the house of the plaintiff and in front of the house of the defendant as well; in the open area the defendant has tied his buffaloes; nowhere PW-6 has stated that the site in dispute is in possession of the defendant. The photograph Ex.PW-6/12 has also been seen. In his cross-examination PW-6 has admitted that the

family members of the defendants are sitting on the bricks and the lower level of the property belonged to the plaintiff. This testimony also does not in any manner advance the case of the defendants. Ex.PW-5/1 was the gift deed proved through testimony of PW-5 Purshotam Lal Bhatia who has produced the record from the office of Sub-Registrar, Kashmere Gate. As per this registered document on 13.11.1964 Sarti Devi had executed the gift deed in favour of her grandson Balbir Singh which is Ex.PW-5/1. Ex.PW-5/1 is a document in urdu but admittedly this document has gifted the property which is adjoining the house of the plaintiff to Balbir Singh. Location of the suit property had been established through Ex.PW-5/1; the boundaries mutated in Ex P-1 matched the boundaries in Ex PW5/1 showing the house of Balbir Singh at Point I. Ex.P-2 is a judgment dated 12.8.1986 passed by the Circle Office in proceedings between the plaintiff Kehar Singh and Umed Singh wherein it has been held that the open portion in front of the plot of Kehar Singh is owned by him and is in possession with him. Both these documents i.e.Ex.PW-5/1 and Ex.P-2 had been relied upon by the Courts below to hold that the preponderance of probabilities were more in favour of the plaintiff than that of the defendant entitling the plaintiff to a decree of permanent injunction.

11. This finding in the impugned judgment reads as follows:

“Undoubtedly, the said document is not between the parties but being judicial pronouncement having evidentiary value more particularly when the appellants relied upon the oral testimonies. It is settled proposition of law that written document shall prevail upon the oral testimony. No only this the registered Gift Deed dated 13.11.1964 as Ex.PW-5/1 also falsify the plea of the defendants of having his house near the suit property. The boundaries of the gifted house marked-I in the site plan Ex.P-1 do not suggest or show any house/property of Shri Man Singh (since deceased). PWs have also

corroborated with each other and fully supported the case of the plaintiff with regard to his ownership in possession. There is no contrary evidence on record. The appellants have failed to prove their case through acid test of truth.

On the basis of re-appreciation of the evidence and pleadings of the parties I am of the considered view that the Ld. Trial Court has rightly arrived at a conclusion that plaintiff (respondent herein) had successfully proved his claim.

I do not find any infirmity in the reasoning of the Trial Court, Delhi, therefore, appeal fails and same is dismissed.”

12. There is no perversity in this finding. This Court is sitting in second appeal and can interfere with the findings of fact only if they are perverse. The judgments relied upon by the learned counsel for the appellant and as noted supra do not apply to the instant scenario.

13. Substantial question of law has been answered accordingly. The appeal is without any merit. Appeal as also the pending application is dismissed.

INDERMEET KAUR, J.

JANUARY 13, 2011
nandan