

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

% *Judgment Reserved on: 18.01.2011*
Judgment Delivered on: 21.01.2011

+ **RSA No. 220/2003**

CHANDER BHAN SINGH Appellant
Through: Mr. N.S. Dalal, Advocate

Versus

SMT. BHAGWANI DEVI Respondent
Through: Mr. B.P. Gupta, 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.

1. This appeal has impugned the judgment and decree dated 05.07.2003 which had endorsed the findings of the trial Judge dated 22.10.1994 whereby the suit filed by the plaintiff Bhawani Devi seeking possession and injunction of the suit property i.e. 'mark A' as described in the site plan appended along with the plaint in Village Ranhaula, Delhi had been decreed. A decree of

mandatory injunction had also been prayed for with a direction to the defendants to dismantle the three feet boundary wall illegally constructed upon the said property by them. It was alleged that the plaintiff along with her nephews were jointly owing land in Khasra No. 98, Village Ranhaura, Delhi. On 12.08.1971, she had executed a sale deed transferring and conveying to the defendants 18 bighas 5 biswas of agricultural land comprised in the aforementioned khasra. The plaintiff had not transferred the residential house of which possession had now been claimed by her. It was stated that the plaintiff continued living in her house; in July, 1972 she had again gone to her village; in her absence, the defendants had forcibly occupied the said house. In June, 1980 they had illegally constructed a wall of three feet around the house. Present suit was accordingly filed.

2. In the written statement, the defendants have stated that the present suit is barred by res-judicata as earlier suit decided vide judgment and decree dated 08.04.1980 was on the same issue; matter could not be reagitated. The entire property as described in the sale deed dated 12.08.1971 had been sold to the defendants. The defendants were in possession of the suit land in their own right.

3. On the pleadings of the parties, following five issues were framed:-

1. Whether the plaintiff is entitled to recover possession of the house marked A from the defendants? OPP

2. Whether the disputed house, Gitwar and Gher was transferred by the plaintiff to the defendants vide the sale deed dated 12.08.1971 and if so to what effect? OPD

3. Whether the plaintiff is entitled to permanent injunction as well as mandatory injunction as alleged in the plaint? OPP

4. Whether the suit is barred under the principles of res-judicata as alleged in the WS? OPD

5. Relied.

4. On the basis of oral and documentary evidence led before the trial Judge, suit of the plaintiff was decreed. The issue of resjudicata was decided against the defendants as the defendants had failed to produce the certified copies of the pleadings and the judgment on which the earlier suit was founded. The Court held that the use of word 'land' in the various paragraphs of the sale deed i.e. paras 1, 3, 4, 6 & 7 was decipherable of the intention of the executor to sell only the land and not to sell the Gitwar/house; the suit of the plaintiff was decreed.

5. This judgment of the trial Judge was reaffirmed in the impugned judgment.

6. This is the second appeal. It was admitted and following substantial questions of law were formulated on 06.11.2008:-

“Whether the courts below have correctly construed the sale deed Ex.D-1 dated 12.08.1971 as having sold only the agricultural land to the defendant/appellant and not the other properties mentioned therein?”

“Respondents submits that the respondent No. 1 died on 08.09.2004. He states that in addition, appellant No. 2 also died on 09.05.2005 and that therefore the appeal has abated. This question will also be examined at the time of final disposal of the matter.”

7 Both these questions have to be answered.

8. Counsel for the respondent has further pointed out that the appeal stands abated as appellant No.2 has expired on 09.05.2005; respondent No. 1 has also expired on 08.09.2004. Admittedly no application to bring on record the legal representative of either appellant No. 2 or respondent No. 1 has been filed; appeal stands abated in toto. For this proposition

reliance has been placed upon AIR 1963 SC 553 titled Ram Sarup Vs. Munshi & Others.

9. The second question shall to answered by this Court first : i.e. as to whether the cause of action survives or whether it had abated on the death of appellant No. 2 and respondent No. 1 on the dates aforenoted.

10. The present suit was a suit for possession and injunction. The plaintiff was Smt. Bhagwani Devi. After her death, her legal representatives were brought on record; one of her legal representative Rohtash i.e. respondent No. 1 had died on 09.05.2005. Out of three defendants, Mr. Prem Singh i.e. appellant No. 2 had expired on 08.09.2004.

11. The averments made in the plaint are that the defendants had forcibly and wrongfully occupied her house; in the year 1980, they had illegally constructed a three feet wall in the Gitwar. Inspite of the legal notice, the defendants had failed to handover the possession of the suit property to her. From these averments made in the plaint it is clear that the plaintiff had made a joint claim against all the defendants. The claim of the plaintiff was not a distinct claim against each of the defendants; it was common.

12. In the case of Babu Sukhram Singh (Supra), where the plaintiff had made a joint claim against all the defendants and where one such defendant has died on the failure to bring on record the legal representative of the deceased, the Supreme Court had held that appeal had abated in toto.

13. In the judgment of the Supreme Court reported in (1962) 2 SCR 636 Sri Chand & Ors. vs. Jagdish Pershad Kishan Chand & Ors., a bench of the Supreme Court had laid down the tests to determine as to when and under what circumstances an appeal would abate on the death of one party. It inter alia held as follows:

“The test to determine this has been described in diverse forms. Courts will not proceed with an appeal:

when the success of the appeal may lead to the Court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent;

when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court and

when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed.”

14. In the instant case the prayer clause in the plaint shows that the relief claimed against all the defendants was common; it

was not divisible; it was based on the submission that the defendants had illegally and forcibly occupied the property of the plaintiff; thereafter they had built a three feet boundary wall around the Gitwar, the prayer was that the defendants should be directed to handover the suit property to the plaintiff. The result of death of appellant No. 2 Prem Singh is that even if a decree is passed against the remaining appellants, it would be ineffective and unexecutable; it could not be executed against the legal representatives of appellant No. 2 in the absence of their not having been brought on record. Applying the ratio as laid down by the Supreme Court in Sri Chand (Supra), it is clear that the appeal stands abated as a whole.

15. In view of the finding on the second question which had been framed by this Court, the appeal having abated in toto, no occasion arises to deal with the first question which question was on the merits of the appeal.

16. The appeal is disposed of on the above terms.

INDERMEET KAUR, J.

JANUARY 21 , 2011

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