

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

% *Judgment Reserved on: 23.02.2011*
Judgment Delivered on: 28.02.2011

+ **RSA No.103/2004 & CM Nos.5533/2004 & 3384/2006**

HOSHIAR SINGH & ORS. Appellants
Through: Mr.Manish Gandhi, Advocates

Versus

OM PRAKASH (NOW DECEASED) THROUGH HIS L.Rs.
.....Respondents
Through: Mr.Lalit Gupta, Mr.Deepak Sahni and
Mr.Deepak Aggarwal, Advocates

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 30.8.2003 which had endorsed the finding of the trial judge dated 30.9.1997 whereby the suit filed by the plaintiff Om Prakash seeking possession of shops bearing No.902 and 902A, Mehrauli in occupation of the defendants had been decreed in his favour.

2. The plaintiff is stated to be the owner of premise No.348, Ward No.VIII, Meena Bazar, Mehrauli, New Delhi. He had purchased this property on 16.9.1975 vide sale deed Ex.PW-1/1. Defendants were stated to be in unauthorized occupation of two shops i.e. shops bearing no.902 and 902/2A, Ward No.VIII, Meena Bazar, Mehrauli, New Delhi which numbers had been allotted by the Municipal Corporation without authority. Defendants in spite of requests failed to vacate the suit property. Suit was accordingly filed.

3. In the written statement, it was contended that the ownership of the plaintiff was denied. Plea of adverse possession had been set up by the defendants.

4. On the pleadings of the parties, the following four issues were framed. They read as follows:

1. Whether the property in suit bears municipal No.348 (old) and 902/1 (new) Ward No.VIII Mehrauli and is owned by the Plaintiff? If so its effect? OPD
2. Whether Nain Singh has become owner of suit premises by adverse possession? If so its effect? OPD
3. Whether the suit is within time? OPP
4. Relief.

5. Plaintiff had examined seven witnesses; three witnesses had been examined on behalf of the defendants. PW-1 Om Prakash was the plaintiff himself. He had proved certified copy of the sale deed dated 16.9.1975 as Ex.PW-1/1; the site plan depicting the location and the identity of the suit property was proved as Ex.PW-1/2. PW-2 Islamuddin was an attesting witness to the sale deed. In his cross-examination he has stated that blacksmiths are in occupation of the suit land since about 40 years. PW-4 was the clerk from Mehrauli Zone, MCD. His testimony had been adverted to as the vehement contention of the appellant is that he had brought the record of the property No.901 and 902A and not of 902 which is the property in dispute; his testimony has to necessarily discarded. PW-5 was also Assistant Zonal Inspector of MCD. He had also brought the summoned record. His deposition is to the effect that Om Prakash is the owner of property no.902/1-2. PW-7 was the brother of the plaintiff. He had in his deposition explained that the old number of the property was 348 and the present number is 902/1; it was denotified by the Custodian of the Evacuees by orders

Ex.PW-1/2 and Ex.PW-1/3. Per contra the defendants had produced three witnesses in defence of whom defendant no.1 examined himself as DW-1 . He had deposed that he is in possession of the suit property since 1947; muslims were occupying this property who have since fled to Pakistan. He has become the owners by adverse possession. DW-2 and DW-3 had also supported this version. The solitary document of the defendants was Ex.DW3-/1 which was a licence of the blacksmiths of the year 1961-62. The contention of the appellants/defendants is that even as per this document, the defendants are in continuous, open and adversarial possession since 1961-62. Suit filed in the year 1978 was barred by time.

6 The trial judge had decreed the suit of the plaintiff for possession. Relief of permanent injunction had been decreed. Title of the plaintiff to the suit land had been proved. Plea of adverse possession set up by the defendants had not been proved.

7 These findings were endorsed by the first appellate Court.

8 This is a second appeal. It has been admitted and on 15.11.2007 the following substantial question has been formulated:

“Whether on the evidence on record appellants have satisfied the ingredients of adverse possession on the plea that at the time of partition some Muslim abandoned the property and the same was occupied by the appellants who even effected constructions thereon without any hindrance or obstacle.”

9 Thereafter on 21.2.2011 an additional substantial question of law has been formulated; it reads as follows:

“Whether the findings in the impugned judgment dated 30.8.2003 qua the ownership and the identification of the suit property is a perverse finding? If so, its effect ?”

10 On behalf of the appellants, it has been urged that the

ownership of the suit land has not been proved. Attention has also been drawn to the sale deed dated 14.4.1938 Ex. PW-6/1 executed by LRs of Haji Abdul Karim in favour of the plaintiff wherein the municipal number has been mentioned as 253. It is pointed out that in the sale deed Ex.PW-1/1 (acted upon by the plaintiff) the municipal number of the property has not been mentioned; the boundaries as reflected in Ex.PW-1/1 do not match with the boundaries as contained in the compromise decree dated 08.02.1968 passed by the Calcutta High Court. This decree dated 08.2.1968 had in fact decreed a family settlement which requires a compulsory registration as no transfer of immovable property could be effected without such a registration. It was hit by bar of Section 17 and 49 of the Registration Act. To support this submission reliance has been placed 1993 RLR 462 Jaidev Singh Vs. Sujan Singh. It is pointed out that identification of the suit land has also not been established; in the sale deed Ex. PW-6/1 reference has been made to municipal No.253 whereas the contention of the plaintiff is that the municipal number was 348; when and how municipal number 348 had thereafter changed to municipal no.902 and to 902/A and has not been explained or answered by the plaintiff; in the absence of the correct identification of the suit land a decree could not have followed in favour of the plaintiff. The plea of adverse possession had also been illegally rejected by the Courts below. Attention has been drawn to versions of PW-2 wherein he had admitted that blacksmiths are in possession of suit land since last 40 years. It is pointed out that this deposition of PW-2 was effected on 24.9.1986 meaning thereby that the plaintiff himself had admitted the possession of the defendants in the suit land

since 1946-47. The suit filed in the year 1978 was clearly barred by limitation. Reliance has been placed upon 1997 I AD SC 534 Kalika Prasad Vs. Chhatrapal Singh (dead) to substantiate this plea that the defendants had perfected their title by prescription and they cannot be now ousted.

11 On behalf of the respondent, it is submitted that the judgment of the two Courts below suffer from no infirmity and the title of the plaintiff stand proved. There is no confusion on the identification of the suit property. Plea of adverse possession set up by the defendants was rightly dismissed as there was no evidence before the court to establish this plea.

12 This Court is a second appeal Court. It has to answer the aforementioned substantial questions of law.

13 Suit property was originally owned by Haji Abdul Karim. He had purchased it on 14.4.1938 vide sale deed Ex. PW-6/1 from Manik Chand. The boundaries mentioned herein reads as follows:

“North - Wall of House of heirs of Rai Chhunna Mal Saheb

Sahu

South - Open Land – Rai Bahadur Lala Sri Kishan Dass Saheb

Sahu

East - Land of passage and Gate of House Chowkidar and

Mehrabdar, Chhjali Sankeen and Nali and passage,

one Mori Khassi with land connected with the House upto passage.

West- the land of Thorough Passage, Five Gates of

Shops, Platform with Sankeen Stones with Chhajja

& Kathera with Two Wooden Doors constructed on t

he Platform, Five Mories, Wooden Verandah and Five

Chokhats and Wall of Chhunna Mal Sahen babat

Khanja.”

14 Municipal number is 253. After the death of Abdul Karim on 10.07.1957 (page 4 of the settlement) his legal heirs had entered into a family settlement which has been recorded by the Calcutta High Court on 08.2.1968 (page 721 of the first appeal court record). As per this family settlement the property had devolved upon his three grand children namely Ikhlas Ahmed, Mumtaz Begum and Noorjahan (children of his pre-deceased daughter Amtulla). Page 18 of this decree describes the property number as 348 situated at Meena Bazar, Mehrauli where reference has been made to the earlier title deed dated 14.4.1938; No. 348 is thus traced back to No. 253. In this decree the boundaries of the suit land had been described as follows:

“North	-	Land of Chhunna Mal
South	-	Land formerly belonging to Mohd. Yusuf Paiwalay.
East	-	By Road
West	-	Main Road.”

15 Such a family settlement which only acknowledges the pre-existing right of the family members does not require registration. This has been held in the judgment of Jaidev Singh (supra) relied upon by the appellant.

16 Plaintiff Om Prakash vide registered sale deed dated 16.09.1975 Ex.PW-1/1 had purchased five shops and a Khan having an area of 5031 sq. feet as per the plan attached along with from the legal heirs of Abdul Karim. The boundaries of the land purchased by the plaintiff and as mentioned in Ex. PW-1/1 read as follows:

“North	-	Property of Shri Chhunna Mal
South	-	Shri Om Prakash
East	-	Darshan Devi
West	-	Main Road”

17. The site plan Ex. PW-1/2 attached along with Ex.PW-1/1 has been described as a plan of premises No.348, Ward no.VIII, Meena Bazar, Mehrauli. The disputed portion had been depicted in red colour. It is bounded as follows:

“North	– Property of Chhunna Mal
South	-Others property
East	-Property purchased by Smt. Darshna Devi
West	-Main road”

18. In para 1 of the plaint, the plaintiff has categorically averred that he was owner of the premises bearing No.348, Ward-VIII, Meena Bazar, Mehrauli, New Delhi which has been allotted a new number. His contention is that the defendants are in unauthorized occupation of the two shops i.e. shops No. 902 and 902/2A. PW-5 on the basis of the summoned record proved that Om Prakash is in fact the owner of the disputed property i.e. of municipal No. 902/1-2. Identity of the suit property has also been clarified by PW-7; who has deposed that the earlier number of the suit land was number 348 and the present number is 902/1. These depositions clearly establish that the suit land which was earlier having No. 253 become No. 348 and thereafter was renumbered as 902/1-2. These were two parts of 902; i.e. 902 & 902A or may be read as 902/1-2.

19. The boundaries as depicted in Ex.PW-6/1; the compromise decree dated 08.02.1968 of the Calcutta High Court and in the subsequent sale deed Ex. PW-1/1 and the site plan Ex. PW-1/2 also all match with one another. On the North is the house of Rai Chhunna Mal; on the South is others property; on the West is the main road. This was (prior to 1975) the disputed property which

has since been purchased by the plaintiff. On the East is the property of Darshan Devi who had purchased it subsequently; earlier on the eastern side there was a road/land passage/nali.

20 The ownership and identification of the suit land has thus been established through this chain of successive oral and documentary evidence. Testimony of PW-1, PW-5 and PW-7 had further corroborated this documentary evidence. There is no confusion qua these issues. The additional substantial question of law is answered in the negative i.e. against the appellant and in favour of the respondent.

21. The claim of adverse possession set up by the appellants/defendants was not substantiated. The onus to discharge this issue was on the defendants. DW-1 had reiterated on oath that he is in possession since 1947; earlier this land was occupied by muslims who had fled to Pakistan, however, the only document which he could produce was Ex. DW-3/1 which was his licence evidencing his work as a blacksmith in the suit land since the year 1961-62. DW-1 in his cross-examination had admitted that electricity and water connection had been taken in the name of DW-2 Nain Singh in the year 1955 and 1968; no such document was produced. DW-1 had further stated that the house tax was paid by his elder brother DW-2 but no such house tax receipts were also produced. The impugned judgment had noted these facts. It had noted that no documentary evidence including house tax receipt, ration card electricity and water bills of the suit premises had been produced by the defendants to set up their claim of adverse possession. This fact finding had been returned in the impugned judgment while disposing of issue no.2. The impugned

judgment had endorsed the finding of the trial judge. This was after a re-appraisal and scrutiny of the oral and documentary evidence. After a careful examination of this oral and documentary evidence this finding was arrived at. At best this was a possession; mere possession does not mature into an adverse possession. To establish the plea of adverse possession, the possession must be open, peaceful, uninterrupted and hostile qua its true owner. None of this has been established by the defendants. This finding in no manner can be said to be perverse; it calls for no interference.

22 Ex.PW-1/3 is an order dated 22.11.1955 passed by the Assistant Custodian describing this suit property as 'Khandhar' and was declared as an evacuee property. Ex.PW-1/2 is the order dated 30.4.1959 passed by the Assistant Custodian denotifying this property where again it has been referred to as a 'Khandhar'. The denotification was in favour of Abdul Karim; property was released as an evacuee property on 11.7.1957. Plaintiff had thereafter purchased this property on 16.9.1975 vide Ex. PW-1/1 from the legal heirs of Abdul Karim. Suit had been filed in 1978 i.e. within three years of the purchase of this property. It was within limitation. The additional substantial question of law formulated on 15.11.2007 is also answered against the appellant and in favour of the respondent.

15. There is no merit in the appeal. The appeal as also pending applications are dismissed.

FEBRUARY 28, 2011

INDERMEET KUAR, J

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