

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

% *Judgment reserved on : 18.5.2011*
Judgment delivered on : 23.05.2011

+ **R.S.A.No. 48/2008 & CM No. 2406/2008**

SHANTI DEVI & ORTHERS**Appellant**

Through: Mr.G.P. Thareja, Advocate.

Versus

LAXMI DEVI & OTHERS**Respondent**

Through: Mr. Pradeep Dewan, Sr.
Advocate along with Mr. Rajiv
Samaiyar, 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 01.12.2007 which had reversed the finding of the trial judge dated 21.07.2005. Vide judgment and decree dated 21.07.2005, the suit filed by the plaintiff Sh. Kailash Nath Shukla (now being represented through his LR's- Laxmi Devi & Ors.) seeking possession of the suit property (i.e. 221 sq. yards of land bearing

plot nos. 108-109-110 in Khasra no. 53/25 situated at Guru Ram Dass Nagar, Delhi 32 (depicted in red colour in the site plan) had been dismissed. Impugned judgment had reversed this finding; suit of the plaintiff stood decreed.

2. The plaintiff claimed himself to be the owner of the aforenoted suit property. It was bounded as follows:-

North-plot nos. 105-106-107 (now a street)

South-plot nos. 111-112-113

East-Road

West-Street

3. The contention of the plaintiff was that he had purchased these said pieces of land from Dr. Balwant Singh , the sole Proprietor of Harmender Collonisation Board, vide a registered sale deed dated 25.09.1956 (Ex. PW 1/1); possession of the same was handed-over to him on the same date. Plaintiff constructed one room and a boundary wall therein. He was in service with Bharat Heavy Electricals Ltd (BHEL), Haridwar where he was living with his family. He had a intention to return to Delhi permanently; on his return, he was surprised to find that the

defendants were in illegal possession and occupation of the suit land; unauthorized construction was also raised by them; in spite of requests, the suit land was not handed-over to him. Present suit was accordingly filed.

4. Defendants contested the suit. It was stated that the plaintiff had no right, title or interest in the suit land. Preliminary objection about limitation had been taken; in para 5 it was contended that the defendants have nothing to do with plot nos. 108-109-110 which is owned and possessed by some other person; plaintiff is not the owner of the said plots;; it was denied that on the North side of the plot nos. 108-109-110, there is a street. It was contended that an earlier suit filed by the plaintiff against Ram Chander (predecessor in interest of the defendant) had also been dismissed.

5. On the pleadings of the parties, the following 11 issues were framed:-

1) Whether the suit is barred by limitation?

2) Whether the suit is barred by res judicata?

3) Whether plaintiff has no locus standi to file the present suit?

- 4) Whether the plaintiff has no cause of action to file the present suit against the defendant?*
- 5) Whether the suit is not properly valued for purposes of court fees and jurisdiction?*
- 6) Whether plaintiff is owner of plot No. 108,109,110 in Khasra no. 53/25 measuring 221 sq. yards at Guru Ram Dass Nagar?*
- 7) Whether the defendant has taken over forcible possession of the plots no. 108,109,110?*
- 8) Whether the location and number of plots no. 108,109 and 110 have been wrongly mentioned by the plaintiff in the site plan?*
- 9) Whether the plaintiff is entitled for possession of these plots?*
- 10. Whether the defendants are in possession of plots no. 105,106 & 107?*
- 11. Relief.*

6. Oral and documentary evidence was led.

7. Trial court was of the view that the suit was within limitation. This finding was returned in favour of the plaintiff.

However, on merits, the suit of the plaintiff was dismissed. Ex. PW 1/1, PW 5/1 , DW 1/1, DW 5/1, DW 6/2 and DW 7/2 had been adverted to hold that there was nothing on record to show that plot noss. 105-106-107 had merged with the gali; suit of the plaintiff stood dismissed.

8. In appeal, this finding was reversed. The impugned judgment had decreed the suit of the plaintiff.

9. This is a second appeal. It had been admitted and on 19.01.2010, the following substantial question of law was formulated:-

1) Whether the findings of the Appellate Court are perverse and not based on sound principle of appreciation of evidence and law?

2) Whether the Courts below adopted right approach while coming to the conclusion that suit of the respondent was within the period of limitation?

10. On behalf of the appellant it has been urged that the impugned judgment suffers from a perversity; it has reversed the finding of the trial judge which was based on cogent and coherent documentary evidence on mere surmises and conjectures;

documentary evidence has to be read over and above the oral testimony of the witnesses. Attention has been drawn to the sale deed executed in favour of the plaintiff qua suit plot nos. 108-109-110; attention has also been drawn to the testimony of PW-5 (purchaser of plot nos. 111-112) wherein he had admitted that on the north side of this property purchased by him, there is property no. 109 and 110; it is pointed out that PW -5 had admitted that on plots bearing no. 111 and 112, the Punjab National Bank exists. It is pointed out that even in the memo of parties, the address of defendant no. 2 has been depicted as plot nos. 105, identity of the suit land of the defendant has been recognized by the plaintiff; it is also difficult to imagine that this plot which is 21 ft in width could have been merged with the gali which is only 16 ft in width. Attention has been drawn to Ex. PW 8/1 dated 14.11.1968, which is a house tax demand letter issued to Ram Chander (predecessor in interest of the defendant) as also Ex. PW 8/2 dated 10.08.1970 evidencing payment of house tax by Ram Chander substantiating the submission of the appellant that this suit land existed in the year 1970. The impugned judgment returning a finding in favour of the plaintiff on limitation is also a perversity. It is pointed out that the suit has been filed by the plaintiff on 18.04.1983, limitation would have commenced at best from 14.11.1968; when

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Ex. DW 8/1 had been served upon the defendant or latest by 10.08.1970 (Ex PW 8/2) when the defendant had paid the house tax. Suit was filed after a delay of 12 years i.e. on 18.04.1983, it was time barred. Impugned judgment had not dealt with this submission of the learned counsel for the appellant. This has also raised a substantial question of law.

11. Arguments have been rebutted. It is pointed out that on no score does the impugned judgment call for an interference. The suit is within limitation; attention has been drawn to the averments in the plaint as also the testimony of DW-1 wherein he had admitted that when he had purchased the suit land, there was nothing constructed thereon meaning thereby that when he had purchased his property on 22.04.1971 (Ex. DW 1/1), it was vacant land; contention being that the unauthorized construction was raised by the defendant admittedly after 22.04.1971; suit filed on 18.04.1983 was within a period of 12 years and thus within time. On merits also, attention has been drawn to the testimony of DW-2, DW-3 and DW-8; it is pointed out that land, in fact, has since been acquired and the compensation has been received by the defendant; impugned judgment does not call for any interference.

12. Record has been perused. Court shall answer the query on limitation although this has not been formulated as substantial question of law. Nevertheless it is the duty of court to go into the question of limitation in view of the mandate of Section 3 of the Indian Limitation Act, 1963. This question had been answered by the Trial Judge in favour of the plaintiff while disposing of issue no. 1. The grounds of appeal pressed before the first appellate court show that this contention was never pressed; limitation was never an argument urged before the first appellate court. This being a mixed question of law and fact and a second appellate court not being the third fact finding court it is de-barred from delving into facts. Be that as it may; testimony of PW 1 clearly shows that at the time when he had purchased this plot (i.e. on 22.04.1971), there was no construction thereon meaning thereby that the construction was admittedly raised hereinafter i.e. after 22.04.1971;. Suit filed on 18.04.1983 was well within the period of 12 years. This has been correctly appreciated by the trial judge. Finding on limitation as returned by the trial judge does not call for any interference. Suit was within limitation.

13. On merits also, this court is not inclined to interfere with the findings of fact arrived at in the impugned judgment. The issues

framed had been adverted to. Impugned judgment had correctly noted that the provisions of Section 110 of the Indian Evidence Act are not applicable to the facts of the present case. Section 110 of the Indian Evidence Act reads as follows:-

“110-Burden of proof as to ownership- When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”

14. Plaintiff had averred that he is the owner of plot nos. 108-109-110; his possession had been illegally usurped by the defendant who had raised an unauthorized construction thereon; suit for possession had accordingly been filed by the plaintiff. Applicability of Section 110 of the Indian Evidence Act was clearly excluded. It had no application.

15. Ex. PW 1/1 is the registered sale deed dated 25.09.1956 qua plot nos. 108-109-110, the boundaries noted in the sale deed read as follows:-

- 1) North side -shop no. 105-106-107.
- 2) South side- plot nos. 111-112 and 113.

3) East side -road of colony.

4) West side -gali.

16. Plaintiff had specifically averred that the possession of the plot had been handed over to the plaintiff. Defendant is claiming his title of plot noss. 105-106-107 vide sale deed Ex. DW 1/1. The boundaries shown in the said sale deed read as under:-

1) North side -road of the colony.

2) South side- plot noss. 108-109 and 110.

3) East side- bazaar.

4) West side- road of the colony.

17. PW-5 is the purchaser of plot noss. 111 to 113. He had admitted that he had purchased this plot vide registered sale deed Ex. PW 5/1 on 28.10.1971; on the North- is property no. 109-110; on the south- property no. 117-118; on the east- is the road; on the west- is the plot noss. 113-114; on plot nos. 112 and 113, Punjab National Bank exists i.e. on his plots. Plaintiff had purchased this piece of land (plot nos. 108-109-110) vide Ex PW 1/1. There is no dispute to this document. Issue before the court was whether the land in possession of the defendant were the plots of the plaintiff (plot nos. 108-109-110) or whether it was the plot of the

defendant which he had purchased in his own right i.e. plot nos. 105-106-107. The identity of the suit land was the crux of the dispute before the court below.

18. Disputed plot is Plot nos. 108-109-110. DW-2 had admitted that the Punjab National Bank is adjacent to the disputed plot but he could not tell the number; it may be property no. 108-110. DW-3, in his cross-examination, had admitted that plot nos. 105-106-107 had been acquired by the DDA; DW-8, the Inspector of the Geeta Colony, had produced the record including the notice dated 14.07.1968 Ex. DW 8/1 (received by the predecessor in the interest of defendant) pertaining to property no. 105-106-107. In his cross examination, DW-8 had admitted that the record of this property (property no. 105-106-107) is only up to the year 1984, there is no survey conducted after that and no assessment has been made because the said plots i.e. plot nos. 105 to 107 had become the part of the street.

19. The vehement contention of the learned counsel for the respondent/plaintiff is that these plots i.e. plot nos. 105-106-107, after 1984 had, in fact, merged into the street and that is why there is no survey report of MCD qua this suit land after 1984; it had become the part of the public street. This submission of the

appellant has considerable force. It is also relevant to state that the plaintiff Kailash Nath Shukla had filed an earlier suit (Ex. PW 2/1) seeking perpetual injunction wherein in para 1, he had stated that he had purchased suit plot nos. 108-109-110 from one Balwant Singh; in the corresponding para of the written statement, it was admitted that the plaintiff is in possession of plot nos. 108-109-110). This written statement had been filed on 21.11.1968 meaning thereby that the possession of the suit land (plot no. 108 to 110) qua the plaintiff stood admitted by the defendant at that time. In the present plaint also, the plaintiff in para 5 has specifically averred that the defendant had raised an illegal construction in his plot (plot nos. 108-109-110); in the corresponding para of the written statement, it was stated that the defendants had nothing to do with the aforementioned plots which are owned and possessed by some other person. The identity of the suit land had not been disputed.

20. Finding returned in the impugned judgment is as follows:-

"Before proceeding further, certain facts have to be noticed which have very important bearing upon the matter. The property in question formed part of land admittedly owned by one Dr. Balwant Singh who was a colonized and

the proprietor of M/s Harminder Colonization Board, Delhi. The colony developed by him was unauthorized. This is evident from the letters sent by DW2 Sh. Bir Dutt to the original Plaintiff and exhibited as Ex. DW 2/P1 and DW 2/P2. Thirdly, no site plan have been issued by Dr. Balwant Singh proprietor of M/s Harminder Colonization Board, Delhi at the time of execution of the sale deed (as deposed by PW 1 Shri. Kailash Nath and the fact that no original site plan has been filed by the defendant no. 1 as having been issued to Smt. Sohan Devi by Dr. Balwant Singh alongwith sale deed dated 1.12.1955). It is also noted that no area plan has been filed on the record or produced.

What is to be gathered from these facts is that Dr. Balwant Singh owner of vast tracts of land developed a colony in village Khureji by the name of Guru Ram Dass Nagar, demarcated plots and sold them to various person including Smt. Sohan Devi in 1955 and the plaintiff on 24.09.1956, the layout of the colony was not approved at the time the colony had been demarcated by Dr. Balwant Singh, this is apparent from the communication of DW 2 to the plaintiff dated 15.01.1976 (Ex DE2/P2) where it has been recorded that the colony had been declared as unauthorized but

the Government of India, Ministry of Work and Housing in their report for the year 1971-72 had published that the regularization plan of the colony had been approved and that they were still fighting for approval. Therefore, upto the year 1976 there was no approved area plan for the colony. The non issuance of site plan alongwith sale deed has clearly created confusion as in other places in Delhi where colonizers said plots, according to them in sequence of various sizes and measurement to various persons, but facing shortage of ..at site upon actual measurement and physical demarcation.

In the present case the plaintiff has admitted that the site plan had been given to him by Dr. Balwant Singh and the same is Ex. PW 1 / 2. This site plan signed by Dr. Balwant Singh sanctioning construction has been first signed on 16.12.1957. Thereafter, it has been attested by him on 19.02. 1969. The defendants as noticed above have not produced such attested site plan issued to Smt. Sohan Devi. If nothing else this fact would reveal that the demarcation of land at site had taken place at different points of time and therefore, the exact position at site was possibly not known till actual possession and demarcation had taken place even in the present case.

While the plaintiff Shri. Kailash Nath has deposed that he had taken the possession of the land in 1956 itself there is no such evidence on behalf of Smt. Sohan Devi. The defendants have claimed their title from Shri. Ram Chander who came on the scene vide sale deed of the year 1966. By then the confusion had clearly arisen for it led to the first round of litigation between the plaintiff and the owners of plot no. 105,106 and 107. Ex PW 2/1 is the amended plaint filed by Shri. Kailash Nath Shukla through his attorney against Shri. Ram Chander seeking perpetual injunction against the defendant restraining the defendant from trespassing upon the room and plot built thereupon belonging to the plaintiff Shri. Kailash Nath Shukla bearing plot no. 108,109 and 110 measuring 221 sq. yards. Shri. Ram Chander had filed his written statement which is Ex. PW 2/2 dated 21.11.1968 . It may be mentioned that the suit was originally filed on 11.10.1968 and amended on 14.02.1969. In this written statement despite the preliminary objections being raised that the plaintiff was not in possession of the room and that the suit was not maintainable, in para no. 1 on merits Sh. Ram Chander admitted 'that the plaintiff is in possession of plot no. 108,109 and 110.'. In para no. 2 he has stated that the defendant was the purchaser of plot no. 105, 106 and 107 and was in possession of these plots from the time of sale

and was not trying to trespass into the plot no. 108, 109 and 110. He claimed that the room was build on his plot and was in the possession of the defendant. Yet, he made a statement upon which, vide Ex. PW 2/3, the suit was decreed in favour of the plaintiff and against the defendant. Ram Chander restraining him from trespassing upon the plot of land bearing no. 108, 109 and 110. This restraint order was issued on 1969.

That suit would not have ended in favour of the plaintiff there in who was the original plaintiff in this case, had not the plaintiff retained his possession on the plots. Therefore, it has to be concluded that on 01.03.1969, the position stood cleared that the plaintiff's plots 108,109 and 110 existed at site and the plaintiff was in its possession at that time. It is important to note that the special attorney of Kailash Nath Shukla was none other than the original colonizer Dr. Balwant Singh.

The house tax records brought on record by the defendants do not help the defendants. That notice is dated 12.11.68. The suit for perpetual injunction already stood filed by them. In fact the written statement was filed on 21.11.1968 admitting the existence of the plots 108,109 and 110. The house tax record may show that service had been ejected upon Ram Chander through

his son, but it cannot be over looked that the suit for injunction was filed to restrain trespass. The service of notice will not help the defendants also because no contemporaneous proof has been furnished to above that the 2 sets of plots did exist at site. Rather, it is clear that only one set existed, in respect of which the defendants come into possession in 1971-72.

This is proved from the document placed by the defendant themselves which is a suit filed for declaration and injunction by the original colonizer Dr. Balwant Singh against not only Ram Chander but also the original defendant no. 1 in this case Sh. Jagan Nath and the original purchaser Smt. Mohan Devi. This suit was filed for declaration and injunction on the ground that the original purchaser of plot nos. 105,106 and 107 who had transferred the property to Ram Chander and which was transferred by Ram Chander to Jagan Nath had violated the terms and conditions of the original sale relating to the consent to be obtained from Dr. Balwant Singh before construction on the land. This suit was filed on 21.03.1972 alleging that the defendant no. 3 there in that is Jagan Nath had begun construction without getting the plan approved and passed by the plaintiff. It is therefore clear that till 21.03.1972, Dr. Balwant Singh had not

sanctioned construction on any plot of land, in contrast to the possession of the plaintiff who has placed on record the site plan issued by Dr. Balwant Singh as Ex. PW 1 / 2 mentioning construction in the year 1957. Dr. Balwant Singh no doubt, mentioned that he had said plot no. 105,106 and 107 to Mohan Devi who had said it to Ram Chander and from whom Jagan Nath had purchased the property. But the question is not regarding the sale deed but the existence of the plots sold at site. It is not enough that plots that had been numbered 105,106 and 107 had been sold by the original colonizer but that the plots had actually been handed over to the purchaser and demarcated at site. The plaintiff has been able to prove through the said plan Ex. PW 1 /2, the suit for injunction and the orders there on being Ex. PW 2 /2 to 4 that his plot actually existed at site. The defendants on the other hand have not been able to establish the existence of two sets of plots one which they admitted existed and was in possession of the plaintiff in the year 1968-69 and one which has remained in their possession. Rather their case is that the plots which are in their possession had continued from the time of Ram Chander and that Ram Chander had been in possession of the plots at sit. But this is not borne out factually. It is apparent from the material on record that one set of plots had been last. They

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may have existed on paper but were not available at site. This has occurred on account of the planned development of plots but it appears that Dr. Balwant Singh sought to maintain some control by asking all purchasers to seek his approval and sanction before raising construction at the site. When Ram Chander occupied the plot at site Dr. Balwant sued him. Thereafter there could have been no plot which Ram Chander could have transferred at site to the defendants. Ram Chander admitted existence of plot no. 108 to 110 in the year 1968. These plots could not have got lost thereafter. On the other hand it is clear that the plots number 105 to 107 were not available at the spot. It is only one set of plots that have been occupied and for which there has always been disputes from 1968.

That the plots that have been lost are plot number 105 to 107 is clear from the fact that the plot of the Punjab National Bank is admittedly where it ought to be that is on plot nos. 111 to 116. The defendants have tried to wash their hands off claiming that they were not concerned with the question as to where the property belonging to the plaintiff had disappeared. That is taking a simplistic view. Merely because a gali exists to the North of the property in question there is no basis to hold that the plots

105 to 107 and not 108 to 110. The plots may have been lost in the gali not subsequent to demarcation but during demarcation, the colonizer had no doubt planned for houses in sequence from 102 to 110 this and more. But planning requires provision for streets and public utilities. When it is not the case that houses have shifted location from the southern side as it is admitted that the bank is located at the correct site at plot nos 111-116, a plot in between cannot be said to have been lost during demarcation of property at site. This argument of the Ld. Counsel for the defendant that had the plot been swallowed by the gali some land would have remained since plot was wider than the gali is therefore misconceived. Had such plots existed at site his contentions would have had some worth. Why the entire dispute has taken place is only because one set of plots apparently sold by Dr. Balwant to one Sohan or (Mohan) Devi never existed at the spot after site demarcation and sanction of construction by Dr. Balwant Singh. The mere existence of plots numbered 102 across the gali and the description of a gali in the North side, these circumstances will not be of any use, were the plots 105-107. This circumstance alone will not lead to the inference that the plots existing at site were plots 105 to 107. The original colonizer intended a gali between the two blocks one ending with house no.

102 to 104 and one beginning with houses 106 onwards. However, unfortunately, it appears that the plots 105 to 107 could not be demarcated unless carved out in the gali itself. If this had not been so, there would have been no dispute between the parties as encroachment and amalgamation of plots is one thing and whole sale take over and supplanting is quite another.

On the basis of the evidence that has come on record therefore the only conclusion that could be drawn is that the plots at site are plot nos. 108,109 and 110 and not plot nos. 105, 106 and 107. Therefore irrespective of the fact that the defendants had purchased plot nos. 105,106 and 107, the right to the possession of the plots at site is that of the plaintiff and now his Lrs. Therefore, the plaintiffs/appellants are entitled to receive back the possession of the plots from the defendants who are in occupation of the same. The suit of the plaintiff (Now LRs) ought to have been decreed by the Ld. Trial Court. The appeal is therefore accepted. The impugned judgment and decree of the Ld. Trial Court dated 21.07.05 is set aside. The plaintiff (now through Lrs) is granted a decree of possession in respect of 221 sq yards of land presently

described by them as plot nos. 105,106 and 107 but have been found to be actually plot nos. 108,109 and 110 situated in Guru Ram Dass Nagar, Delhi-110032 out of Khasra no. 63/25 as shown in red in the site plan.”

21. In no manner can it be said to be perverse. It had appreciated the documentary and oral evidence in the correct perspective to reverse the finding of the trial judge.

22. The substantial questions of law formulated on 19.01.2010 are accordingly answered against the appellant and in favour of the respondent.

23. Appeal is dismissed.

INDERMEET KAUR, J.

MAY 23, 2011
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