

R-250

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

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Judgment reserved on : 26.04.2011

Judgment delivered on : 28.04.2011

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R.S.A.No. 109/2007 & CM No. 5092/2007

RAMESH PRAKASH

.....Appellant

Through: Mr. B.S. Maan, Advocate
Versus

SHRI SUKHBIR SINGH BHATI

.....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.

1 This appeal has impugned the judgment and decree dated 03.02.2007 which had endorsed the findings of the trial Judge dated 07.02.2006 whereby the suit filed by the plaintiff Sukhbir Singh Bhati seeking permanent and mandatory injunction to the effect that the defendant be restrained from interfering and trespassing upon the portion of the property of the plaintiff (measuring 500 square yards and as depicted in green colour) i.e.

property bearing No. C-17/231, Khajuri Colony, Gokalpuri, Delhi (hereinafter referred to as the 'suit property') as also with a further direction that the defendant be directed to demolish the unauthorized construction raised upon a portion of this suit property (114 square yards as depicted in red colour) had been decreed in his favour.

2 The plaintiff along with his wife claimed to be the owner and in exclusive and uninterrupted physical possession of the suit property as also the superstructure raised thereupon. The plaintiff had earlier purchased 200 square yards in the year 1981; this purchase was in the name of his wife. The property had been purchased from the defendant. The defendant had executed a receipt and agreement to sell dated 07.05.1981; physical possession of the suit property had been handed over to the plaintiff and his wife. In 1985, the plaintiff purchased the additional adjacent plot of land measuring 300 square yard along with the superstructure from the defendant; total consideration was Rs.1,20,000/-. An agreement to sell, GPA and receipts were executed by the defendant in favour of the plaintiff; physical possession of the aforementioned 300 square yards of plot along with its superstructure was handed over to the plaintiff and his wife.

The defendant was a colonizer; he used to demarcate plots; prices
RSA No.109/2007

in the locality have gone up. The defendant by illegal designs without any right or interest sought to grab 114 square yards of the aforementioned suit property; he had raised constructions (wall in the northern side) without permission of the plaintiff. Criminal complaint was lodged. In spite of requests, the defendant had failed to vacate the suit property or demolish the said wall. Present suit was accordingly filed.

3 In the written statement, defence was that the plaintiff is not the owner of the alleged portion; he has no locus standi to file the present suit. It was denied that the defendant was colonizer or he had illegal designs upon the property of the plaintiff. The contention of the defendant was that the shops and boundary wall of the defendant were in existence prior to filing of the suit by the plaintiff; the plaintiff was not entitled to any relief.

4 On the pleadings of the parties, the following six issues were framed:-

1. Whether the suit is barred U/s 41(h) of Specific Relief Act? OPD
2. Whether the suit is barred by time against the defendant? OPD
3. Whether the suit has been properly valued for the purpose of court fees and jurisdiction? OPD
4. Whether the plaintiff is the owner of the suit land mentioned in site plan? OPP
5. Whether the plaintiff is entitled for the decree of permanent and mandatory injunctions? OPP
6. Relief."

5 Oral and documentary evidence was led. The agreement to sell dated 07.05.1981 was proved as Ex. PW-1/1; GPA dated 27.12.1984 was exhibited as Ex. PW-1/2; the site plan was proved as Ex. PW-1/3; photographs of the site have been proved as Ex. PW-2/2 to Ex. PW-2/5 showing the alleged illegal construction by the defendant on a portion of the suit property. The defendant had examined himself in defence. DW-2 Dharam Singh was also examined. Issue No. 4 is relevant for the controversy in issue. The trial court had returned the following finding in this context; it read as under:-

“10.The onus of proving this issue was conferred by the court on the plaintiff. In this regard it be mentioned that the plaintiff has claimed himself and his wife to be in possession and owner of 500 square yards of property, now known as C-17/231, Khajuri Colony, Gokalpuri, Delhi-94. In para 2 of his plaint the plaintiff has stated that he had purchased a plot measuring 200 square yards in the year 1981 in the name of his wife from the defendant and the defendant on receiving the sale consideration executed the agreement to sale, receipt etc and also handed over the physical possession of the said plot to the plaintiff and his wife.

Further, in para 3 of the plaint it is stated by the plaintiff that in the year 1985, the plaintiff purchased additional adjacent plot of land measuring 300 square yards alongwith super structure thereon, from the defendant against the total sale consideration of Rs.1,20,000/- and the defendant executed the agreement of sale, GPA, Receipt and handed over the vacant physical possession of the property to the plaintiff and his wife.

The defendant in reply to para 2 of the plaint has merely stated that para 2 is wrong and denied. Such denial is an evasive denial as mentioned in RSA No.109/2007

order VIII Rule 4 of CPC. Further, Rule 5 of the aforesaid order provides that every allegation of fact in plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted. Further, in his cross-examination, the defendant has merely denied that exhibit PW1 /1 & 2 does not bear his signature at point A, B, C, D & E. By such mere denial in the absence of any proof to the contrary, it cannot be said that the said document was not executed by him. In view of the aforesaid, it can be said that the defendant has himself admitted that he has sold a plot of 200 square yards in the year 1981 to the wife of the plaintiff. Thus the document exhibited as exhibit PW1/1 stands proved by virtue of Section 58 of the Indian Evidence Act, 1872 which provides that the facts admitted need not be proved.

As far as reply to para 3 of the plaint is concerned, it be seen that the defendant has stated that this para is not correct and the fact is that the plaintiff took possession of 306 square yards of land with a house on it, as marked in red lines in the site plan filed by the defendant in order to obtain a house loan from his department for which the defendant executed the documents as stated in this para. In this regard it be seen that the defendant has admitted the execution of exhibit PW1/2. The reason for executing this exhibit is stated to be that this document was got executed by the plaintiff on the pretext of taking loan from his department. Here it be mentioned that despite coming into knowledge of this fact, the defendant has taken no steps till date for getting declared this document as null and void. Thus, in the light of the aforesaid it is crystal clear that the exhibit PW1/2 was executed by the defendant in favour of the plaintiff. This exhibit also stands proved being admitted by the defendant. The deposition of the defendant that the documents were executed for an area of 106 square yards is not in consonance with exhibit PW1/2 which provides that an area of 300 square yards has been sold to the plaintiff by the defendant. Here it will not be out of place to mention that the deposition of the DW1 & DW2 is self contradictory. DW1 has deposed that the documents were executed on the pretext of taking loan for the marriage of the daughter of the plaintiff but the DW2 has deposed that the documents were executed for the purpose of taking loan for the construction of the suit property.

11. Beside this, the testimony of the DW1 is not trustworthy. This witness has stated in his written statement that he was not the owner of the 20 bighas of land but in his cross-examination he has admitted being owner of 20 bighas of land. Further, the execution of exhibit PW1/3 is also admitted by the defendant in view para 5 of reply on merits to the plaint of the plaintiff, being not specifically denied by the defendant in his written statement. The contention of the defendant that since no sale deed has been executed by the defendant, no ownership transferred in favour of the plaintiff by exhibit PW1/1 & PW1/2 being hit by Section 54 of the Transfer of Property Act is also not tenable. From exhibit PW1/1 and PW1/2 it is clear that the defendant has undertaken to execute the sale deed in favour of the wife of the plaintiff and the plaintiff as and when the ban on registration shall be removed by the government. In view of this, the law laid down by the Hon'ble Delhi High Court in IMTIAJ ALI V. NASIM AHMED, AIR 1987 Delhi 36, as relied upon by the defendant is not applicable to the present case.

Here it be also mentioned that even though the plaintiff has failed to get the site plan of the suit property exhibited, the site plan filed by the defendant exhibited as exhibit PW1/DX2 also proves the case of the plaintiff. In exhibit PW1/DX2, the defendant admits the possession of the plaintiff in portion shown in the red colour. This shows the enhancement of exhibit PW1/3 on the Eastern Side. It is also clear that the possession of passage of 8 feet width was also given by the defendant vide exhibit PW1/3. Even otherwise the opening of the doors of the plaintiff's property towards the aforesaid 8 feet passage is also shown in exhibit PW1/DX2.

In the light of the exhibit PW1/3 and exhibit PW1/DX2 it can be held that the said 8 feet wide passage is a part of the property measuring 300 square yards as purchased by the plaintiff vide exhibit PW1/2. As far as the remaining 200 square yards of the property is concerned (as purchased by the wife of the plaintiff vide exhibit PW1/1) it be seen that this area admittedly includes four shops but this area does not cover the entire area of 200 square yards as apparent from exhibit PW1/DX2 and exhibit PW1/3. Under these circumstances the only inference which can be drawn is that the area marked E to A1 and F to C1 in exhibit PW1/DX2 is nothing but the remaining part of the aforesaid 200 square yards. With these observations it is held that the plaintiff alongwith his

wife is the owner of the suit land. This issue is, therefore, decided in favour of the plaintiff and against the defendant.”

6 Suit of the plaintiff stood decreed.

7 This was endorsed in the first appeal.

8 The first appellate court after a detailed scrutiny of oral and documentary evidence had corroborated this finding. The relevant extract of the finding of the appellate court reads as under:-

“13. It has been submitted on behalf of the appellant that the document Ex. PW1/1 was not a complete agreement to sell as same was not signed by both the parties and a document cannot be an agreement unless the said document is signed by both the parties and as such ld. Trial Court has erred in relying upon the aforesaid document. It is submitted that ld. Trial Court has also erred in holding that site plan Ex. PW1/DX2 prove the case of the plaintiff although the said document will show that the plaintiff's property and the property of the defendant are separated by the 8 ft. wide passage and are quite different from each other, however, the aforesaid submissions made on behalf of the appellant are devoid of any merits and are contrary to the record as the perusal of the record shows that the ld. Trial Court has dealt with the aforesaid issue at length in the impugned judgment, wherein it has been observed by the ld. Trial Court that the defendant has merely denied that Ex. PW1/1 and Ex. PW1/2 does not bears the signatures and a mere denial in the absence of any proof to the contrary, can not imply that the said document was not executed by the defendant. It has been rightly held by the ld. Trial Court that the document Ex. PW1/-1 stands proved by virtue of Section -58 of Indian Evidence Act. Further the defendant has also admitted the execution of the document Ex. PW1/2 and it has been stated by him that this document was got executed by the plaintiff on the pretext taking loan from his department. It is pertinent to note here that despite being in the knowledge of the execution of the aforesaid document Ex. PW1/2 the defendant has not taken any steps for getting the said document

declared as null and void in case he was aggrieved by the said document. It has also been rightly observed by the Id. Trial Court that the contention of the defendant that no sale deed has been executed by him and as such no ownership has been transferred in the favour of the plaintiff and the contention that the documents Ex. PW1/1, Ex. PW1/2 are hit by Section -54 of Transfer of property Act are also not tenable as from the aforesaid documents Ex.PW1/1 and PW1/2, it is clear that the defendant has undertaken to execute the sale deed in favour of the wife of the plaintiff as and when the ban on the registration is removed. It has been further observed by the Id. Trial Court that the site plan filed by the defendant exhibited as Ex. PW1/DX2 also proves the case of the plaintiff as in the said plan the defendant admits the possession of the plaintiff in the portion shown in red colour and it also shows the enhancement on the eastern side which implies that the possession of the passage of 8 ft. width was also given by the defendant vide Ex. PW1/3. It has been rightly held by the Id. Trial court that in view of the document Ex.PW1/3 and Ex. PW1/DX2, it can be held that the said 8 ft. passage was part of the property measuring 300 sq. yds., purchased by the plaintiff vide Ex.PW1/2.

Further Id. Counsel for the plaintiff has relied upon the case law cited as AIR 1971 SC 1865, AIR 2003 Delhi 120, AIR 1987 Delhi 36, (1998) 9 SCC 719 and 1992 RLR 18 (note) however the aforesaid case law is not applicable in the present case as the facts and circumstances of the present case are different from the facts and circumstances of the cases discussed in the aforesaid case law and in my considered opinion the aforesaid case law is not of any help to the appellant in the present case.

14. It has been submitted on behalf of the appellant that the impugned judgment/decreed dt. 7.2.2006 passed by the Id.Trial Court is against the law and facts on record and is based on conjectures and surmises, however the said submissions made on behalf of the appellant are devoid of any merits as the perusal of the impugned judgment shows that it has been passed on the basis of the proper appreciation of the material on record and is based upon cogent and sound reasoning.

15. It has been further submitted on behalf of the appellant that the Id.Trial Court has not properly appreciated the evidence adduced by the parties, however, the perusal of the record and the perusal of the impugned judgment

shows that the aforesaid contention put forward by the appellant does not hold water as Id.Trial Court has properly appreciated the evidence adduced on behalf of both the parties and after proper appreciation of the evidence, Id. Trial Court has come to just and reasonable conclusions and in my considered opinion, the findings returned by the Id.Trial court are apt and accurate.”

9 These are two concurrent findings of fact returned by two fact finding courts below.

10 This is a second appeal. It has been admitted and on 20.04.2007, the following two substantial questions of law were formulated. They read as under:-

1. Whether the courts below have rightly held that the respondent is owner in possession of the suit property in view of the Photostat documents proved by him, which appear to be legally not admissible in evidence?
2. Whether the suit filed by the respondent, who is not the owner of the suit property, is maintainable?

11 The plaintiff had proved Ex. PW-1/1 which was the agreement to sell dated 07.05.1981 executed by the defendant in favour of wife of the plaintiff; GPA dated 27.12.1984 had been proved as Ex. PW-1/2. Both these documents had been proved through the version of PW-1. It is relevant to state that no suggestion has been given to PW-1 that these documents had not been executed by the defendant or that said documents are false or fabricated. No objection had also been raised on the manner of exhibition of the said documents; such objection not having been

raised at the relevant time, they cannot now be raised in a second appeal. In fact, the defendant had never denied the execution of the aforementioned documents. Specific averment of the plaintiff was that along with these documents the vacant and physical possession of the suit property had also been handed over to him by the defendant. It was on the basis of this oral and documentary evidence which had been examined in detail that the two concurrent findings of fact had been returned by the two courts below.

12 Scope of interference in a second appeal is limited; until and unless a perversity is shown, there is no scope of interference. No such perversity has been pointed out. The impugned judgment suffers from no fault.

13 Substantial questions of law are answered in favour of the respondent and against the appellant. There is no merit in this appeal. Appeal as also pending application are dismissed.

INDERMEET KAUR, J.

**APRIL 28, 2011,
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