

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

% *Judgment Reserved on: 18.02.2011*
Judgment Delivered on: 22.02.2011

+ **RSA No.16/2005 & CM No.10987/2009**

SH. GAJA NAND SHARMA & ANR. Appellants
Through: Mr.Dinesh Garg, Advocate.

Versus

SH NIRANJAN LAL & ANR. Respondents
Through: Mr.R.D.Sharma, 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?
3. Whether the judgment should be reported in the Digest?

INDERMEET KAUR, J.

1. This appeal has impugned the judgment and decree dated 04.12.2004 which had endorsed the findings of the trial Judge dated 27.07.2004 whereby the suit filed by the plaintiff seeking mandatory and permanent injunction against his two brothers and one sister had been decreed in his favour.

2. The case of the plaintiff is that he is the exclusive owner of the property bearing No. A-1/15, Krishan Nagar, Delhi-110051 measuring area 42 ½ square yards and 45 square yards depicted in the site plan. This property was originally owned by their father Ram Chander who had received it in partition from his brothers in terms of a decree passed on 04.01.1982 in suit No. 49/1981 titled 'Onkar Nath Vs. Ram Chander & another'. Ram Chander had died

on 19.11.1982. After his death, the property devolved upon the
RSA No.16/2005

plaintiff qua his 1/3rd share as their sister had relinquished her share in favour of her brothers. Plaintiff and defendants No. 1 & 2 had entered into a memorandum of partition dated 12.12.1984 whereby it had been agreed that two shops as shown in red colour and yellow colour in the site plan (Annexure 'B') of premises bearing No. A-1/15, Krishna Nagar, Delhi (which is in occupation of defendants No. 1 & 2) would be vacated by them and peaceful possession of the same would be handed over to the plaintiff on or before 01.01.1993. However this compromise was not adhered to. Suit was accordingly filed.

3. The defendants filed their written statements. Contention was that the property had not been partitioned; the site plan was objected to. It was stated that the parties had agreed that they would continue to remain in the portions which were under their possession; the defendants would be permitted to retain the possession of the shops from where they were carrying on their business. It was submitted that the plaintiff had deliberately withheld two receipts of ₹20,000/- and ₹15,000/- executed by the plaintiff & defendant No. 2 as also further receipts of the same amount executed between the plaintiff and defendant No. 1 which were qua these three shops which were in possession of the plaintiff and defendants No. 1 & 2 respectively; in terms of these receipts it had been agreed that the properties had been sold to one another. Suit was liable to be dismissed.

4. The following issues were framed by the Court:-

- "1. Whether the plaintiff has no locus standi to file the present suit? OPD
2. Whether the plaintiff is entitled to decree of mandatory injunction as prayed for in the suit? OPP
3. Whether the plaintiff is entitled to the decree of permanent

injunction as prayed for in suit? OPP

4. Relief.”

Thereafter an additional issue was also framed:-

“Whether the suit has been properly valued for the purpose of court fee and jurisdiction? OPP”

5. Oral and documentary evidence was led which included the statement of the plaintiff as also the statement of the defendants. On the preponderance of the probabilities, the Court relied upon this partition agreement dated 12.12.1984 executed between the parties and in terms of the site plan (Ex. PW-1/2) it was concluded that the suit shops (as shown in red colour and yellow colour) in site plan Ex. PW-1/2 had fallen to the share of the plaintiff and the defendants were liable to be ejected from the aforementioned suit property. The suit was decreed in favour of the plaintiff.

6. In appeal, the impugned judgment had upheld this finding.

7. This is a second appeal, It was admitted and after its admission on 08.11.2010, the following substantial question of law was formulated. It reads as under:-

“Whether the findings in the impugned judgment dated 4.12.2004 are perverse? If so , its effect?”

8. On behalf of the appellant, it has been urged that a valuable right of the defendants had been lost as their application under Order XLI Rule 27 of the Code of Civil Procedure (hereinafter referred to as the ‘Code’) had been dismissed without due application of mind by the first appellate court. The appellant wanted to place on record the documents dated 05.01.1989 which were an agreement to sell, receipt and Will executed by the plaintiff in favour of the defendants whereby the plaintiff agreed to sell the disputed shops to the defendants. Dismissal of this

application has led to a travesty of justice. Learned counsel for the appellant has relied upon 2008 (3) CCC 226 North Eastern Railway Administration Vs. Bhagwan Das to support her submission that additional evidence can be permitted even at the second appellate stage not only to enable the Court to pronounce judgment but also for any other 'substantial cause'. It is submitted that justice cannot be subverted and a technical plea should not be allowed to erode the elicitation of true facts.

9. Submissions have been countered. It is pointed out that the defence now sought to be set up by adducing additional evidence would be contrary to the written statement and would be set up a new case as nowhere in the written statement has there been any plea that in terms of the agreement dated 05.01.1989, the plaintiff had agreed to sell the aforementioned shops to the defendants.

10. Record has been perused. The first appellate Court has dealt with these submissions urged by the appellant. In the written statement, there is a denial about the partition of the suit properties on 12.12.1984, submission being that the parties had agreed that the possession of one another shall not be disturbed and the shops which were in possession of defendants No.1 & 2 would be continued to be retained by them. There is, however, not a whisper in the entire written statement that any document i.e. agreement to sell, receipt or Will had been executed between the parties on 05.01.1989 whereby the plaintiff had agreed to sell these shops to the defendants. Even otherwise, the impugned judgment had correctly noted that a perusal of the certified copy of these documents (receipts, GPA and agreement to sell) which the appellant was seeking to place on record were in his possession on

06.08.2004; first appeal had been filed on 20.08.2004; the application under Section under Order 41 Rule 27 of the Code had been filed on 06.11.2004 at the time when the matter was fixed for final arguments. This was after a trial which had remained pending for nine years. The plaintiff in para 4 of his plaint had stated that the cause of action has arisen on 05.01.1989 when defendants No. 1 & 2 had received ₹ 20,000/- from the plaintiff as a pre-condition for vacating the aforementioned suit shops. In the corresponding para of the reply, there was a mere denial of this date of 05.01.1989. It is evident that this date of 05.01.1989 was well within the knowledge of the defendants at that time as it was the specific contention of the defendants that on the said date, ₹20,000/- had been paid by them to the plaintiff; even at this stage, there was no averment in the written statement that the aforementioned documents i.e. GPA, Will and receipts had been executed between the parties wherein the plaintiff had agreed to sell the disputed shops to the defendants. It is obvious that this defence has been set up later on only to fill in a lacuna for which the provisions of Order 41 Rule 27 of the Code cannot be resorted to. A party seeking to adduce additional evidence must establish that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when decree appealed against was passed. The present is by no means one such case where in the absence of these documents, the appellate Court could not pronounce judgment; it also does not fall in the category of 'substantial cause'. In fact, interest of justice demands that the aforementioned documents should not be permitted to be placed on

record as on 6.8.2004 these documents were in fact in possession of the defendants i.e. before filing the appeal. Further he had never set up this plea in his written statement that no such documents were executed on that date although he had mentioned the date of 5.1.1989. By permitting these documents to be placed on record, the defence of the defendants would be changed in its entirety; the appellant is only trying to fill in lacuna and gaps in his defence which is not permitted. The said application was rightly rejected.

11. The second submission made by learned counsel for the appellant is that the trial court while decreeing the suit of the plaintiff had permitted extension of time for payment of court fee by the plaintiff which was not permissible; it was incumbent upon the Court to have framed a preliminary issue on the question of valuation and it could not have been decided along with the other issues. The law is settled; the averments made in the plaint have to be looked into to determine the valuation of the suit. In the written statement a feeble defence had been taken that the suit has not been correctly valued for the purpose of court fee and jurisdiction. Thereafter an additional issue had been framed on this ground. This was after the framing of issues in the main suit. Issues had been first framed on 11.08.1999. Additional issue had been framed on 27.03.2003 by which time the evidence already stood recorded. On 30.10.2002, the matter had been fixed for final arguments for 12.12.2002 when the aforementioned application under Order XLI Rule 5 of the Code had been filed by the defendants pursuant to which the additional issue was framed. It was in these circumstances that this additional issue was decided along with main suit. Provisions

of Order VII Rule 11(c) of the Code permit the Court to grant time to the plaintiff to correct the valuation of the suit and to furnish the requisite stamp papers. This power had been exercised in terms of the aforementioned statutory provision. Decree had been directed to be prepared only after payment of the court fee for which four weeks time was granted. The order does not suffer from any infirmity.

12. Bar of Section 41 (h) of the Specific Relief Act is also not attracted. The question whether an equally efficacious relief can certainly be obtained by any other usual mode of proceedings within the meaning of this section is a question of fact to be determined in each case on its own circumstances and no hard and fast rule can be laid down in the matter. In the instant case as per the averments made in the plaint, the plaintiff already had a vested right in the property in terms of the memorandum of partition; in these circumstances the relief sought by way of mandatory injunction was well maintainable.

13. The last contention raised by learned counsel for the appellant is that the provisions of Sections 17 & 49 of the Indian Registration Act, 1949 are attracted and no partition could have been affected of immoveable properties without adhering to the aforementioned provisions i.e. a compulsory registration. The partition deed dated 12.12.1984 had necessarily to be registered. This argument has been noted only to be rejected. The suit of the plaintiff was based on a memorandum of partition dated 12.12.1984 entered into between three brothers. The pre-existing right of each brother in the aforementioned immoveable properties is not in dispute. They had pre-existing shares in the said properties and by way of partition they had merely agreed to re-allocate those

shares. Such a partition memo does not require any compulsory registration. In AIR 1975 SC 1119 Munna Lal (Dead) by LRs Vs. Suraj Bhan the Apex Court had held that a document which simply acknowledges or makes an admission as to a prior partition is not compulsorily registrable.

14. Substantial question of law is answered accordingly. There is no merit in this appeal. Appeal as also pending application is dismissed.

INDERMEET KAUR, J.

FEBRUARY 22, 2011

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