

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

% *Date of Judgment: 22.02.2011*

+ **RSA No. 162/2005 & CM Nos. 1887/2008 & 2730/2009**

SHRI. GANGA RAM**Appellant**

Through: Mr. N.S. Dalal, Advocate

Versus

SHRI. JAI NARAIN & OTHERS**Respondents**

Through: Mr. B.S.Kharb, Advocate for R-1.

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. (Oral)

1. This appeal has impugned the judgment and decree dated 18.05.2005 which had endorsed the finding of the trial judge dated 30.11.1990 whereby the suit filed by the plaintiff, Shri. Jai Narain, seeking a permanent injunction restraining the defendants from encroaching upon the rasta/ saream (as shown in red colour in the site plan) measuring approximately 2 gathas in Village Palam, New Delhi had been decreed in their favour.

2. Plot no. 93 and plot no. 96 at Village Palam had been allotted to the plaintiffs by the Delhi Administration of which the plaintiffs had become owner and in possession of the said suit land. Plot no. 96 was originally allotted to Dalip Singh from whom plaintiff no. 1 had purchased it. Plaintiff no. 2 was the original allottee of plot no.

93. Plaintiffs constructed their houses on the plots. It is alleged

that there is a rasta/common passage measuring about two gathas (16 ½ ft. wide) between the plots of the plaintiffs and the defendants upon which the defendants have encroached. This was with a mala fide intent to grab this common passage which is common to both the plaintiffs and the defendants and is in between their properties. Suit was accordingly filed.

3. Defendants contested the suit. It was stated that the common passage/rasta is not of two gathas but it is one gatha i.e. about 8 ¼ ft wide. It was denied that the defendants had encroached upon the said passage.

4. On the pleadings of the parties, the following three issues were framed on 14.12.1984:

1. *Whether the plaintiffs have been provided rasta measuring 2 gatha i.e. 16 ½ ft. wide in between the plots of plaintiffs and defendants by Delhi Administration?*

2. *Whether the plaintiffs have no locus standi to file the present suit against defendants?*

3. *Relief.*

5. Three witnesses were examined on behalf of the plaintiffs. The documents tendered by the defendants included exhibit Ex. D1 and Ex. D2. Ex. D1 is a document in urdu i.e. a copy of the field book wherein the common passage i.e. plot no. 99 has been mentioned as a passage measuring about 3 biswas. Ex. D2 is the Aks Sizra wherein the intervening passage (No. 99) i.e. between the properties of the plaintiffs and of the defendants shows a measurement of 1; meaning thereby that this passage no. 99 measured one gatha. These are the two documents relied upon by the defendant to substantiate his submission that the intervening passage is not of two gathas but of one gatha.

6. Although document Ex. D1 was filed in urdu and English

translation of the same had been filed only before this court yet this document is not in dispute; so also the document Ex. D1. The contention of the plaintiff is that the mention of 1 in the plot no. 99 (which is the passage) has been inadvertently and wrongly written. The passage i.e. no. 99, in fact, measures two gathas. Attention has been drawn to Ex. PW 1/C which is the Aks Sizra of the entire area. It is pointed out that there are two lines of plots on either sides i.e. 18 plots on the left side and the correspondingly 18 plots on the right side. The first batch of 12 plots have an in between passage which is admittedly of two gathas and finds 2 mentioned therein. This is plot no. 33; figure '2' refers to two gathas i.e. the intervening passage comprising of two gathas. So also the third batch of plots ranging from no. 159 to 164 on the left side and 171 to 166 on the opposite side; in between passage bears no. 165 and finds '2' mentioned therein meaning thereby that this passage no. 165 measures two gathas. The contention of the plaintiff/respondent is that the in- between passage (which is the disputed passage) i.e. passage no. 99 although has reference to '1' but this has been inadvertently written for the reason that there cannot be a two gatha passage running from the north and showing as 2 gathas at the extreme south end also; and having an intervening passage of different width; the intervening passage cannot suddenly narrow down to one gatha. It is pointed out that this inadvertent mistake in the documents Ex. D-1 and Ex. D-2 had been correctly appreciated by the two courts below and a positive finding has been returned in favour of the plaintiff that this mistake has occurred due to inadvertence in the said documents.

7. This is a second appeal. After its admission on 22.05.2007,

the following two substantial questions of law were formulated:-

1. *Whether the courts were right in ignoring the Aks Sizra Ex. D2 against the documents prepared by Delhi Administration Ex. PW 1/C?*

2. *Whether the judgments passed by the lower court are legally tenable?*

8. Admittedly the Aks Sizra Ex. D-2 is a document of the Department. Ex. PW 1/C is also the Aks Sizra prepared by the Department. The intervening passage i.e. the disputed passage makes a reference to '1' meaning thereby that it is a one gatha passage one. The spot inspection of the site had given factual findings otherwise. The first appellate court to clarify this contention had appointed the Halka Patwari as a court witness namely Parveen Kumar; he had made spot inspection and found that the intervening passage no. 99 is actually comprised of two gathas. The impugned judgment had thus recorded that the documents D1 and D2 due to inadvertence had recorded the passage as one gatha whereas on actual inspection it comprised of two gathas. The finding in the impugned judgment had endorsed the finding of the trial Judge; it had re-affirmed it on the testimony of the court witness.

9. The finding returned by the Trial Court reads as under:-

"On careful perusal of the site plan Ex. PW 1/A, in as much as akshijra Ex. PW 1/C, it is revealed that the common passage shown in between the plots is of same width. As regards the common passage in between the plot Nos. 34 to 39 and 32 to 27, the common passage is shown by a width of 2 gathas. Similarly in between the plots 166 to 171 and 164 to 159 of the south side the width of common passage is also shown 2 gathas. However, in between the plot No. 98 to 93 and 100 to 105 it is shown 1 gatha. On careful perusal of the akshijra, the dia meter of rasta shown by the authority is the same. The common passage which is 2 gatha in the north and 2 gatha in the south cannot be reduced into one gatha in between. It appears that inadvertently it is written one in between north and south. The document Ex. D-2 as relied upon by the defendants is only in respect of the passage shown in between the plots bearing No. 93 and 105 wherein the passage is shown as 1 gatha. This document does not give a clear picture as it revealed

from the record/document Ex. PW 1/C which gives the clear picture of the common passage provided by the Delhi Administration in between plots allotted to the landless persons. Document Ex. PW 1/C goes to prove that the common passage in between the plots is of 2 gatha width. Similarly on calculation of the entire land wherefrom the plots were carved out and distributed among the landless persons in as much as from the photo copy of the site plan showing the allotment, it is proved that the common passage is of 2 gatha width i.e. of 16 ½ ft. In view of the statement of PW 1, PW 2 and PW 3 and in the absence of any oral evidence led by the defendants in as much as in view of the documents proved by PW 1 which is Ex. PW 1/C which inspires more confidence whereas document Ex. D-2 does not inspire such confidence as it is not a detailed one. I am of the considered opinion that the common passage in between the plots of the plaintiffs and the defendants is of 2 gatha width which was provided by Delhi Administration at the time of allotment of the plots to the landless persons including the plaintiffs and defendants.”

10. The impugned judgment had noted as follows:-

“Since it was apparent from the findings of Ld. Trial Court that in fact rasta in question is two of gatha all throughout but to ascertain the exact position. Mr. Parveen Kumar Patwari (CW-1) was examined in the appeal and he categorically stated that though the rasta is shown of one gatha but at site the rasta is of 2 gatha and there seems to be a mistake. He further stated in his cross-examination that he had seen the width of the rasta and has taken the measurement to show that rasta is of two gatha.

In view of the categorically statement of CW-1 Mr. Parveen Kumar Patwari as well as documents on the record I am of the view that the Ld. Trial Court has rightly arrived at the conclusion that rasta is of two gatha.”

These are two concurrent findings returned by the two fact finding courts.

11. This is a second appellate court. It cannot dwell into the findings of the fact; unless and until a perversity is pointed out, interference is not called for. No such perversity has been shown.

12. Learned counsel for the appellant states that in view of the Provisions of Sections 91 and 92 of the Indian Evidence Act 1872, no oral evidence can be led which is contrary to the tenor of a document. There is no dispute of this proposition. However, issue before this court was that the documents exhibit as (Ex. D-1 and D-2) had recorded a mistake and had inadvertently recorded ‘1’ gatha

in the passage no. 99 which should have been read as 2. Evidence

has been led at this score and the findings have been returned this passage is in fact of two gathas. In this view, provisions of Section 91 and Section 92 are not attracted.

13. Learned counsel for the appellant has also urged that the provisions of Section 44 of the East Punjab Holdings (Consolidation Prevention of Fragmentation) Act, 1948 bar the jurisdiction of Civil Court; a suit for permanent injunction was not maintainable before the court below. Although this plea was not taken in the written statement, yet it was raised before the First Appellate Court and has been dealt with in para 6 of the impugned judgment.

"It is next submitted by Ld. Counsel for the appellant that proceedings are barred under Section 44 of East Punjab Holdings (Consolidation Prevention of Fragmentation) Act 1948. Again I do not find any force in the submissions of Ld. Counsel for the appellant. No such issue was framed before the Ld. Trial Court. No objection was taken before the Ld. Trial Court. It is submitted by him that even the suit is barred under Delhi Land Reforms Act. The jurisdiction of Civil Court is barred under Section 185 of Delhi and Reforms Act in respect of the items which are specified under schedule-1. Suit for injunction is not covered under Schedule -1. Suit for injunction is not covered under Schedule-1 of Delhi Land Reforms Act. Moreover, it is settled law that when plots have been curved out and land allotted to different persons then it is ceases to be land within the meaning of Delhi Land Reforms Act and the provisions of Act is not applicable. The suit is not at all bar under the Delhi Land Reforms Act or Section 44 of East Punjab Holdings (Consolidation Prevention of Fragmentation) Act, 1948."

East Punjab Holdings (Consolidation Prevention of Fragmentation) Act 1948 (hereinafter referred to as Act of 1948) is the Act to provide for compulsory consolidation of agricultural holdings and for preventing the fragmentation of agricultural holdings in the State of Punjab. There is no averment either in the plaint or in the written statement that this land has been allotted subject to Consolidation Proceedings.

Although Ex. D1 makes a reference to Consolidation of Land pertaining to the year 1953-54; however, the contention of the

plaintiff as is evident from the plaint is that this disputed passage had been allocated by the Municipal Department of the Delhi Administration; there is no whisper that this was pursuant to the consolidation proceedings. This argument is without any force.

14. There is no merit in the appeal. The findings returned in the impugned judgment call for no interference. Substantial questions of law are answered accordingly.

15. Appeal as also the pending applications are dismissed.

INDERMEET KAUR, J.

FEBRUARY 23, 2011
'SS'