

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

% *Judgment Delivered on: 11.03.2011*

+ **RSA No.167/2005**

BADRI PRASAD Appellant
Through: Mr. Rajat Aneja, Advocate.

Versus

SMT. CHANDRAWATI & ANR Respondents
Through: Mr. P.C. Kaushik, Advocate.

AND
RSA No.199/2005

BADRI PRASAD Appellant
Through: Mr. Rajat Aneja, Advocate.

Versus

SMT. CHANDRAWATI Respondent
Through: Mr. P.C. Kaushik, 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. (oral)

1 These are two appeals which have been filed against a common judgment. The impugned judgment is dated 21.02.2005. It has affirmed the findings of the trial Judge dated 12.05.2003 whereby the two suits filed by the plaintiff i.e.

(i) suit for possession and mandatory injunction and

(ii) second suit for injunction had been dismissed. The impugned judgment had modified the findings of the trial Judge partially on issues No. 3 & 4 only. The result of the impugned judgment was that both the suits of the plaintiff stood dismissed.

2 The plaintiff Badri Prasad had filed two suits. The First suit i.e. Suit No. 1044/88/87 was a suit for possession and mandatory injunction. The contention of the plaintiff was that he was the owner of 150 square yards of land which he had purchased from defendant No. 4 on 14.02.1979. Out of this 150 square yards, the defendants had unauthorisedly occupied 35 square yards. This was in Plot No. 12-C, Sham Nagar, New Delhi. Further contention was that on 21.02.1982, the defendants had illegally and wrongly trespassed into the suit land. Relief of mandatory injunction and possession had accordingly been sought. This suit of the plaintiff had been dismissed on 12.05.2003.

3 The second suit filed by the plaintiff was simplicitor a suit for permanent injunction. This was suit No. 1037/88. Relief sought was that the defendants be restrained from raising any unauthorized or illegal construction in the suit property i.e. property measuring 35 square yards bearing No. 12-C, Sham Nagar, Delhi, Okhla Industrial Estate. This suit had also been dismissed on 12.05.2003.

4 Two first appeals had been filed against the judgment in both the suits impugning the findings therein. The first appellate court had endorsed the findings of the trial Judge. This was vide the common impugned judgment dated 21.02.2005.

5 This is a second appeal. It is yet at the stage of its admission.

On behalf of the appellant, it has been urged that there is a
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perversity in the findings of the two courts below as the plaintiff had by cogent and coherent evidence both oral and documentary proved that he was the owner of the suit property. He had produced Ex. PW-1/1 to Ex. PW-1/4 all dated 14.02.1979 which was a General Power of Attorney, agreement to sell, affidavit and a Will showing the purchase of this suit property by the plaintiff from defendant No. 4; the plaintiff had also deposed on oath that coupled with these documents, the physical possession of the suit land had been handed over to him. This was in 1979. His further averment was that on 21.02.1982 in his absence, the defendants had trespassed into the suit land. The status of the defendants had not in any manner been proved. They are rank tress-passers; they have not been able to show any document to substantiate that they had purchased the suit property; findings of the two courts below are clearly perverse and call for an interference.

6 Record has been perused. Certain facts are admitted. It is not in dispute that the present plaintiff Badri Prasad had purchased 150 square yards of suit land from its erstwhile owner Desh Raj. Desh Raj in June, 1982 had filed a suit for possession against the present defendants. The power of attorney holder of Desh Raj was Badri Prasad. This suit had averred been rejected on an application filed by the defendants under Order 7 Rule 11 of Code of Civil Procedure (hereinafter referred to as the 'Code'). The application had been allowed whereby the plaint of Desh Raj had been rejected; the Court had returned a finding that Desh Raj has sold his rights in the suit land to Badri Prasad and keeping in view the fact that he had delivered possession for a consideration of Rs.2,000/-, Desh Raj had ceased to be owner of the suit property

was thus not entitled to relief claimed for by him. Plaint was accordingly rejected on 16.09.1997.

7 It is also not in dispute that Badri Prasad had also filed a suit in February 1982 against the same defendants which suit was withdrawn on 09.11.1982. This was a suit seeking injunction against the defendants from raising any construction or encroachment upon the suit land. It had been withdrawn on 09.11.1982 on the statement of the plaintiff. The plaint in this suit is relevant. Para 1 of this plaint states that the plaintiff and the Vinod Kumar had purchased the suit property from Desh Raj in January, 1978; it was assessed to house tax since 1978. Further contention was that the defendant had wrongfully encroached upon the suit land forming part of Plot No. 12-C and made a jhopri. This was in 1979. It was further contented that in the beginning of February, 1982 with the help of hired gundas, the defendant had been threatening to enlarge their encroachment by raising a wall on the site. This threat was again reiterated on 22.02.1982. Suit was accordingly file.

8 The present plaint i.e. plaint seeking possession and mandatory injunction as also the second plaint for permanent injunction is in contrast to the earlier pleadings of Badri Prasad in this earlier suit. In the present plaints it was stated that the present suit property comprising of 150 square yards had been purchased from defendant No. 4 of 14.02.1979. On 21.02.1982, defendants no. 1 to 3 had illegally trespassed into this suit land. Suit for possession and mandatory injunction was accordingly filed.

9 A bare reading of the pleading in the earlier suit and the later two suits shows that there are material contradictions; the plaintiff has not come to the Court with clean hands. He has made false averments and appears to be a compulsive liar. Whereas in the first plaint which has been withdrawn by him his contention was that he had become the owner of the suit property by purchase documents dated January, 1978; further defendants had encroached upon the suit land in 1979; further in February i.e. on 21-22/02/1982, the defendants were threatening to encroach upon the suit land. In the present two suits i.e. Suit No.1044/88/87 (suit for possession and mandatory injunction) and the second suit being Suit No. 1037/88 (suit for permanent injunction), the pleadings are entirely in contrast. In this case the plaintiff has averred that he had purchased this property vide documents of title dated 14.02.1979 which have also been exhibited in the course of trial as Ex. PW-1/1 to Ex. PW-1/4. Further averment is that the defendants had encroached upon the suit land on 21.02.1982 which is not the case in the earlier suit.

10 Both the courts below had rightly returned a finding that the plaintiff has failed to establish his ownership in the suit land. In suit No. 1044/88/87, the trial Judge had framed nine issues. On the basis of oral and documentary evidence, a finding had been returned that the plaintiff has failed to show his ownership in the suit land. On the scrutiny of agreement to sell Ex. PW-1/1, the Court had held that this document merely shows that Desh Raj is the owner of a plot measuring 150 square yards of suit at Sham Nagar; no number of the plot as to whether it was Plot No. 12-B or 12-C has been detailed. Further the site plan Ex. PW-1/7 proved in

the testimony of PW-1 had not mentioned the dimensions of the property; length and breath of the property produced by the plaintiff had not been given; a categorical fact finding had been returned that the plaintiff is not the owner of the disputed property depicted in red colour in the site plan. The version of the defendants had been given credence. Statement of DW-1 stating that he had received two letters from the DDA Ex. DW-1/8 & Ex. DW-1/9 pertaining to property No. 12-B, Sham Nagar, regarding the development charges had been proved on record; the defendants were held to be in occupation of the suit land as depicted in red colour in the site plan since 1976. Suit of the plaintiff was dismissed.

11 In the second suit i.e. Suit No.1037/88 which was a suit for permanent injunction, six issues had been framed. They read as under:-

- "1. Whether the plaintiff has locus standi to file the instant suit as he is the owner of the disputed property? OPP*
- 2. Whether the actual number of the property is 12.B Sham Nagar or 12.C Sham Nagar? Onus of parties.*
- 3. Whether the suit is barred by Section 10 CPC?*
- 4. Whether the suit is bad for misjoinder and non-joinder of parties.*
- 5. Whether the plaintiff is entitled to decree of permanent injunction as prayed for? OPP.*
- 6. Relief."*

12 This suit had also been dismissed.

13 The finding of the trial Judge in both the suits was endorsed by the first appellate court vide common judgment dated 21.02.2005.

14 The first appellate Court had also returned a finding to the effect that the earlier suit filed by Badri Prasad had been dismissed

as withdrawn; that was a suit simplicitor for injunction. In that plaint (Ex. PW-1/B1) it had been specifically averred that the defendants wrongfully encroached upon the suit land and made a Jhopri; relief of possession had however omitted and had not been sought for. The impugned judgment had pointed out that the bar of Order 2 Rule 2 of the Code is applicable and since the plaintiff had deliberately and intentionally relinquished his claim for a relief which was entitled to at the time filing of the first suit, such a relief could not now be claimed in the second suit. Moreover, even at the time of withdrawal of the first suit on 09.11.1982 admittedly no liberty had been granted to the plaintiff to file a second suit.

15 The first appellate Court had reappreciated the evidence both oral and documentary. It had reexamined the site plan Ex. PW-1/7 relied upon by the plaintiff where length and breath of the suit property had been omitted. This assumed significance in view of corresponding site plan of the defendants Ex.DW-1/7 where the measurement of the suit land had been depicted; it was held to be suppression of a material fact which was yet another reason for disentitling the plaintiff to the equitable relief of injunction. Moreover in the first suit which had been filed by Desh Raj, statement of Desh Raj had been recorded on 10.02.1987 wherein he has stated that the appellant was in possession of 150 square yards of land on the said date. This also negated the case of the plaintiff as in his plaint he had specifically averred that 35 square yards out of 150 square yards had been encroached upon by the defendants on 21.02.1982. If this was the factual position as has been averred by the plaintiff, statement of Desh Raj stating that 150 square yards of land was in possession of the appellant on

10.02.1987 was again a false statement. This Court has also noted that the pleadings of Badri Prasad in the first suit and in the later two suits are in contrast. Not only are the documents of purchase as pleaded in the first suit and the later two suits different but also the plea of encroachment by the defendants. In the first suit it had been averred that the plaintiff that the defendants had encroached upon and made a Jhopri in the suit land in 1979 and they were threatening to dispossess him on 21 & 22.02.1982. In the later two suits (present suits), it has been averred that the suit property had been purchased vide documents dated 14.02.1979; the defendant had encroached into the suit land on 21.02.1982. Oral and documentary evidence of the plaintiff had been disbelieved. He was rightly not entitled to the relief claimed for by him. Both the concurrent fact finding courts had held so.

16 This is a second appeal. Interference is called for at the second appellate stage in findings of fact only if the same are perverse. No such perversity has been pointed out.

17 The substantial questions of law have been embodied on page 3 of the body of both the appeals. They read as under:-

1. *Whether the prior possession of the respondents has been legally proved?*
2. *Whether the respondents having no title and otherwise also having not proved any title could still retain possession of the suit land in face of title documents filed and proved by the appellant?*
3. *Whether the title documents of the appellant could be taken as doubtful merely on account of slightly different statement made by the appellant and Shri Des Raj Sharma in the two different suits filed by each of them, when the said statements were in unison, in pith and substance?*

4. *Whether the suit could be said to be barred under order 2 Rule 2 CPC and whether seeking of possession was compulsory in the earlier suit No. 96 of 1982 or merely optional?*
5. *Whether the withdrawal of the said earlier suit No.96 of 1982 which was filed on a different cause of action, was fatal to the present suit?*
6. *Whether the dismissal of the suit No. 121/1984 which was merely on account of technical defect, could come in the way of filing of the present suit?*
7. *Whether the action of Shri Des Raj Sharma in filing of the earlier suit No. 121 of 1984 or in any case the action of the appellant in getting the said suit filed from Shri Des Raj Sharma was malafide, so as to debar the appellant from filing the present suit?*
8. *Whether the owner of the property as per the sale deed had an independent right to file the suit for eviction against a trespasser, despite execution of sale agreement, power of attorney etc in token of sale of the property in favour of the purchaser, until the execution of the sale deed in favour of the said purchaser?*
9. *Whether the purchaser also being in prior possession and having been disturbed in his possession by a trespasser could also have an independent remedy of filing the suit by evicting the trespasser notwithstanding that the sale deed had not yet been executed in his favour?*
10. *Whether a single co-owner can file suit against a trespasser?"*

18 No such substantial question of law has arisen. Appeals are dismissed in limine.

INDERMEET KAUR, J.

MARCH 11, 2011

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