

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

% Judgment reserved on: 28.03.2011
Judgment delivered on: 31.03.2011

+ **RSA No.62/2006 & CM Nos 7239/2010 & 10110/2010**

SHRI ISHWAR SINGH & ANR. Appellants
Through: Mr.P. Norula & Ms.Pruna Mehta,
Advocates.
Versus

SHRI ROHTASH SINGH & ANR Respondents
Through: Mr. A.K. Singla, Sr. Advocate with
Mr. J.K. 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? 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 03.01.2006 which had reversed the findings of the trial Judge dated 20.09.2005. Vide judgment and decree dated 20.09.2005, the suit filed by the plaintiff Rohtash Singh seeking recovery of possession in respect of two plots i.e. plots No 132 & 133 measuring 250 square yards situated at Karawal Nagar, Abadi of New Sabha Pur, Illaka Shahdara, Delhi as also recovery of Rs.1,70,000/- had been dismissed. Vide the impugned judgment, the suit of the plaintiffs stood decreed.

2 The case of the plaintiffs as is evident from the averments made in the plaint is that the father of plaintiff No. 1 had on 06.02.1989 purchased plot No. 132 of the aforementioned suit property.

Plaintiff No. 2 had purchased plot No. 133 on the same day. These plots were purchased through the defendants; defendant No. 1 was a witness to the aforementioned documents of purchase. In November, 2001, the defendant had threatened to encroach upon the property of the plaintiffs. In January-February, 2002, they had encroached upon the land and committed criminal trespass. Suit No. 973/2002 was filed by the defendants seeking an injunction against the plaintiffs; the plaintiffs had made a statement that the defendants would not be dispossessed without due process of law; suit of the defendants stood withdrawn. A second suit was thereafter filed by the defendants seeking permanent injunction and declaration; the plea set up by the defendants was that they had become owners by adverse possession. The defendants have illegally trespassed into the property of the plaintiffs; they are also liable to pay damages @ Rs.10,000/- per month. Present suit was accordingly filed.

3 In the written statement, the defence set up was that the suit is not maintainable. The contention of the defendants was that the said two plots had been purchased for a consideration of Rs.1,40,000/-; the plaintiffs did not have the money to pay the said consideration; defendant No. 1 had advanced a sum of Rs.70,000/- to the plaintiffs; on account of family relations, no receipt was exchanged between the parties; parties had agreed that the physical possession of the suit property would be handed over to the defendants on a rental basis; the defendants are tenants in their own right; they cannot be evicted.

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

1. *Whether the plaintiff is entitled for a decree of possession as prayed for? OPP*
2. *Whether the plaintiff is entitled for a decree of Rs.1,70,000/- along with interest, if so at what rate? OPP*
3. *Whether the suit is time barred and liable to be dismissed? OPD.*
4. *Whether the suit is not maintainable as it is barred by resjudicata? OPD*
- 5 *Whether the suit is hit by under Order 2 92) CPC? OPD.*

5 One PW was examined on behalf of the plaintiffs. The site plan of the suit property had been proved as Ex. PW-1/A. In defence, the defendants had adduced their evidence. On the basis of oral and documentary evidence produced in the courts below, the trial Judge was of the view that the plaintiffs have failed to discharge the onus to prove that they had become owners of the suit property in terms of the documentary evidence relied upon by them; i.e. a power of attorney, Will, agreement to sell etc. do not transfer title; suit of the plaintiffs stood dismissed.

6 In appeal, the impugned judgment had reversed this finding. The impugned judgment had noted that the plaintiffs have become owners of this property vide the aforementioned documents relied upon by them dated 06.02.1989; PW-1 had averred that the physical possession of the suit land had also been handed over to them contemporaneously with the execution of the said documents; the defendants had failed to show their status in the suit property; testimony of DW-1 was held to be unreliable and no credence was given to his version. Suit of the plaintiff stood decreed.

7 This is a second appeal. It had been admitted and on 14.02.2011, the following substantial question of law was formulated. It reads as under:-

“Whether the findings in the impugned judgment dated 03.01.2006 are perverse? If so its effect?”

9 On behalf of the appellant it has been urged that the judgment of the trial court is illegal and arbitrary. The impugned judgment in para 14 had noted that the plaintiffs have failed to bring on record any evidence to establish the fact that the defendants had encroached upon the suit land in January-February, 2002. Attention has also been drawn to para 16 of the impugned judgment wherein it had been noted that no evidence had been brought on record by the plaintiffs to prove his claim of damages @ Rs.10,000/- per month; it is submitted that thereafter the Court having awarded damages @ Rs.5,000/- per month is a gross illegality. For this proposition, reliance has been placed upon a judgment of this Court reported in 122 (2005) DLT 629 National Radio And Electronic Co. Vs. Motion Pictures Association. It is further pointed out that PW-2 had given his affidavit by way of a rebuttal evidence; this evidence was rightly rejected by the trial Judge; the impugned judgment could not have relied upon it as PW-2 had not come into the witness box in chief; evidence in rebuttal of such a witness could not have been read. For all the aforementioned reasons, the judgment being perverse it is liable to be set aside. It is further submitted that the first appellate court while reversing the findings of the trial Judge was required to record reasons in arriving at the reversed finding which it has not done. For this proposition, reliance has also been placed upon JT 1999 (3) SC 163

Kondiba Bagabu Kadam Vs. Savitri Bail Sopan Gujar & Ors. as also another judgment reported in JT 1999 (3) SC 168 Allahabad Paper Mills Corporation Ltd. & Others Vs. Bengal Paper Mills Corporation & Others.

10 Arguments have been countered. It is pointed out that the judgment suffers from no perversity. Findings of fact can be interfered only if there is substantial question of law; in this case no substantial question of law has arisen.

11 Record has been perused. The case of the plaintiff is that the father of plaintiff No. 1 had purchased the suit property vide agreement to sell, Power of attorney, receipt and Will dated 06.02.1989. This was qua plot No. 132. Plaintiff No. 2 had purchased the plot No. 133. The defendants have not denied this factum. It has in fact been admitted that the plaintiffs had purchased the aforementioned plots; defence of the defendants is that they had lent a sum of Rs.70,000/- to the plaintiffs for purchase of the said plots; parties had agreed that in terms of the aforementioned money advanced by defendant No. 1 to the plaintiffs, defendant No. 1 would retain the physical possession of the premises as a tenant. Defendant has also admitted that no rent thereafter was demanded by the plaintiffs; no document to this effect was also executed between the parties.

12 This version of the defendants is palpably false and rightly held so in the impugned judgment. DW-1 in his cross-examination has admitted that he has no documentary proof to show that he had paid Rs.70,000/- to Rohtash Singh; no such entry had also been maintained in his books of record; he has admitted that documents

of purchase of the plaintiffs dated 06.02.1989 had been witnessed by defendant No. 1 namely Jai Bhagwan. DW-1 had on oath deposed that on the date of execution of the aforementioned documents i.e. for plot No. 132 in favour of father of plaintiff No. 1 and plot No. 133 in favour of plaintiff No. 2, the physical possession of the suit property had also been handed over to the plaintiffs. It is also not in dispute that the aforementioned documents had been attested by defendant No. 1 as a witness. It is also admitted that two suits had been filed by the defendants. The first suit was suit No. 973/2002 which was a suit for injunction had been withdrawn on the statement of the plaintiffs that they would not dispossess the defendants without due process of law. The second suit filed by the defendants had sought relief of permanent injunction and declaration; in this case the defendants had claimed title by way of adverse possession. Stand of the defendants is unsure and confused. He is claiming tenancy and adverse possession in the same breath; in any eventuality, he has not been able to prove either tenancy or his claim of adverse possession.

13 The plaintiffs have by cogent and clear evidence established their claim in the suit property. Along with the documents i.e. power of attorney, registered Will, GPA and receipt PW-1 had specifically averred that the physical possession of the suit property had been handed over to the plaintiffs. A Bench of this Court in 94 (2001) DLT 841 Asha M. Jain Vs. Canara Bank & Others has recognized sales by means of power of attorney; if these documents are coupled with transfer of possession, such a mode of transfer of immoveable property has been given recognition in Delhi. This has been reiterated by a Bench of this Court in Indian

Institute of Finance Vs. Shakti Tower (P) Ltd. & Anr in RFA No.99/2005 decided on 10.10.2006.

14 The contention of the plaintiffs that the defendants had encroached upon the suit land was also clear and categorical; the plaintiffs were however not able to prove the exact date of encroachment. The status of the defendants in the suit property of the plaintiff was nothing but that of trespassers; in these circumstances, the plaintiffs were rightly granted a decree of possession. This finding calls for no interference.

15 The claim of Rs.1,70,000/- (as pre-suit amount qua damages) claimed by the plaintiffs had been dismissed. The impugned judgment has noted that apart from the statement of PW-1, there was no other evidence forthcoming to establish the claim of quantum of damages claimed @ Rs.10,000/- per month. The impugned judgment had granted damages @ Rs.5,000/- per month; it had relied upon the "size of the property involved". The suit property which is admittedly in the unauthorized occupation of the defendants are two plots i.e. plots No. 132 & 133 which comprise of one room with boundary wall; area is 260 square yards. Para 8 of the affidavit by way of evidence of PW-1 states that the defendants are liable to pay damages @ Rs.10,000/- per month; the plots in the same area can easily fetch a monthly rent of Rs.15,000/- per month. In the entire cross-examination of PW-1, not even a suggestion has been given to this witness that this amount has not been correctly evaluated. This finding having remained unassailed, it cannot be discredited. This is clearly not a case of no evidence. It is also not in dispute that judicial notice can be taken

by the Court of escalating rates of the property prices including rentals. In Manu/DE/3746/2010 Ms. Vanita Vohra Vs. Voith Paper Fabrics India Ltd., a Bench of this Court had recognized this fact; it was reiterated that the courts bear in mind that for grant of mesne profits, judicial presumption and judicial notice can be taken with respect to the constantly increasing rents in urban areas or cosmopolitan cities. Damages awarded @ Rs.5,000/- per month in favour of the appellants are fair; this fact finding calls for no interference.

16 Last argument urged by learned counsel for the appellants was that the version of PW-2 cannot be relied upon as he had only adduced evidence in rebuttal is belied by the record. On 06.07.2005, PW-2 had tendered his affidavit by way of evidence; no cross-examination had been affected of this witness; thereafter PW-2 had tendered rebuttal evidence.

17 There is no perversity in the finding in the impugned judgment. Substantial question of law is answered in favour of the respondents and against the appellants. There is no merit in this appeal. Appeal as also pending applications are dismissed.

(INDERMEET KAUR)
JUDGE

MARCH 31, 2011
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