

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

% Judgment reserved on: 24.01.2011
Judgment delivered on : 28.01.2011

+ **R.S.A.No.141/2008 & C.M.Nos.8810/2008, 8811/2008 & 9305/2008**

KRISHNA KUMARI Appellant
Through: Mr. Sanjiv Sharma, Advocate.

Versus

HARDWARI LAL Respondent
Through: Ms. Uma Aggarwal, Advocate.

AND

R.S.A.No.142/2008 & C.M.Nos.8813/2008, 8814/2008 & 9306/2008

KRISHNA KUMARI Appellant
Through: Mr. Sanjiv Sharma, Advocate.

Versus

HARDWARI LAL Respondent
Through: Ms. Uma Aggarwal, 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 These appeals have impugned the judgment and decree dated 12.03.2008 which has endorsed the findings of the trial Judge dated 04.04.2005 whereby the two suits filed by the plaintiff seeking possession of the suit properties herein described below were decreed:-

(i) The first suit was Suit No. 36/2002. It was a suit for possession of Plot No. H-27 (200 square yards), Laxmi Nagar, Delhi. It had been decreed in favour of the plaintiff.

(ii) The second suit was Suit No.37/2002; it was a suit for possession qua part of Plot No. H-26 (100 square yards), Laxmi Nagar, Delhi. It had been decreed in favour of the plaintiff.

Both the said suits had been consolidated in the trial court. Impugned judgment had also disposed of both the appeals of the appellant/defendant by a common judgment.

2 The plaintiff was stated to be the owner of the Plots No. 24 to 27, H-Block, Laxmi Nagar, Delhi. He had purchased them vide a registered sale deed dated 06.02.1959. In 1975, he had constructed a boundary wall around all the four plots. In 1985, the plaintiff came to know that the defendant had encroached upon his land and taken illegal possession of 200 square yards of land in Plot No. 27. In spite of request, the defendant did not vacate the suit property.

3 On 24.04.1985, the plaintiff filed suit No. 405/1985 against the defendant. Objection about the valuation of the suit property was raised by the defendant. The plaintiff withdrew the said suit on 23.04.1991 with liberty to file a fresh suit.

4 On 27.03.1991, the plaintiff had also filed a suit for injunction qua all the four plots i.e. Plots No. H-24 to H-27 against the defendant as the defendant was threatening to encroach upon his entire land; this was Suit No. 124/1991. It was dismissed in default on 25.04.1991.

5 Suit No. 36/2002 was filed for possession and injunction of Plot No. H-27. This was filed on 01.05.1991.

6 Since the defendant had also encroached upon 100 square yards of land of Plot No. H-26, a second suit i.e. Suit No. 37/2002 was filed on 10.04.1996 for possession of 100 square yards of Plot No. H-26 as also for permanent injunction.

7 Both the suits as aforementioned i.e. Suit No. 36/2002 & Suit No. 37/2002 had been consolidated and disposed of by a common judgment by the trial Judge which has been affirmed in the impugned judgment. The defence of the defendant was his claim as owner of the suit property in terms of a sale deed dated 03.02.1966; he claimed to be in lawful possession of the suit properties; ownership by adverse possession was also claimed.

8 This is a second appeal. On behalf of the appellant, it has been urged that the properties i.e. Plot No. H-27 and part of H-26 have not been correctly depicted in the site plan which has been filed by the plaintiff in the courts below. Attention has been drawn to the testimony of PW-1 who had in her version proved the site plan Ex. PW-1/2. It is pointed out that this site plan is not in conformity with the suit properties and this is clear from the fact that in the earlier two suits i.e. Suit No. 405/1985 and Suit No. 124/1991 which have been filed by the plaintiff, the suit properties had been depicted in different directions. It is pointed out that there is no dispute about the depiction of the properties on the eastern and western side but there is a dispute qua the description of the properties on the northern and southern side. In the earlier two suits Plots No. 26 & 27 were shown on the southern side whereas in the present suit they have been

shown on the northern side. Reliance has been placed upon 150 (2008) DLT 580 Mahinder Kumr Jain Vs. Mehar Singh to support his stand that the plaintiff has to stand on its own legs; the land at site has to conform to this sale deed.

Along with the appeal, an application under Order 41 Rule 27 read with Order 26 Rule 9 of the Code has also been filed in which applications the pleadings are complete. It is prayed that a local commissioner be appointed to ascertain the measurement of Plot No. H-27 as also permission to place on record Annexures A-E-1 to A-E-3 which are the khatonis of the suit property. These khatonis are for the year 1964-1965 wherein the name of the khatidar in the relevant column is of Rewti. This document admittedly does not advance the claim of the defendant of title to the suit properties.

Attention has also been drawn to the reply filed by the respondent to the application under Order 41 Rule 27 of the Code wherein (in reply to Para-2 on merits), it is stated that there has been a mistake in depicting the northern and southern directions in the site plan and this is because of a mistake in the sale deed. It is urged that this admission of the respondent has advanced the submission that the directions of the suit properties not having being depicted correctly, the application of the appellant is liable to be allowed. Reliance has been placed upon JT 2002 (6) SC 16 Wadi Vs. Amilal & Ors as also upon AIR 1999 Delhi 362 Akash Ganga Builders & Engineers Pvt. Ltd. Vs. G.P. Seth, HUF to support the proposition that while deciding the requirement or need for additional evidence,

paramount consideration weighing with the appellate Court must be the interest of justice.

Arguments have also been urged on the question of limitation; it is pointed out that the Suit No. 405/1985 had been filed by the plaintiff in the year 1985 and the subsequent suit i.e. Suit No. 36/2002 having been filed on 01.05.1991 was barred by limitation; the impugned judgment had wrongly granted him the benefit of Section 14 of the Limitation Act; further Article 64 of the first Schedule of the Limitation Act was the applicable provision to the present proceedings and not Article 65. Reliance has been placed upon (2004) 7 SCC 541 Ramiah Vs. N. Narayana Reddy to support this submission. It is pointed out that the instant is a classic case where the decree has been obtained by fraud, a fraud played upon the Courts is liable to be set aside at any stage of the proceedings. Reliance has been placed upon (2007) 4 SCC 221 A.V. Papayya Sastry & Others Vs. Government of A.P. & Others. It is pointed out that this Court while sitting as a second appellate Court has wide powers to interfere even in the finding of fact if the said finding arrived at is perverse. For the same proposition reliance has been placed upon (2008) 5 SCC 268 Maria Colaco & Another VS. Alba Flora Herminda D'souza as also another judgment in 1987 (Supp) SCC 577 Abdul Ghani Memorial Trust & Others Vs. Bihar State Sunni Wakf Board & others. It is pointed out that the finding in the impugned judgment is vulnerable, the respondent himself has admitted before this Court that the directions of the suit property as depicted in the sale deed have not been correctly proved; this is a perversity for which interference is called for even at the second appellate stage.

9 Arguments have been countered with by the counsel for the respondent. It is pointed out that no substantial question of law has arisen. It is submitted that the sale deed which had been filed in the Court below was an English translation of the document which was in Urdu; it is for this reason that the northern and southern directions as depicted in the sale deed have not been correctly shown; this does not in any manner prejudicially affect the defence of the defendant. It is pointed out that Ex.PW-1/1 and Ex. PW-1/3 which were the site plans filed along with the present suit i.e. Suit No. 36/2002 & 37/2002, the suit property has been correctly deciphered. It is pointed out that the documents which are sought to be adduced on record in terms of the application under Order 41 Rule 27 of the Code do not advance the case of the defendant. The prayer under Order 26 Rule 9 of the Code is also devoid of any merit because this Court is not a third fact finding Court. The question of limitation has been adequately dealt with by the court below.

10 Record has been perused. This Court shall first answer the argument urged on the point of limitation. Issue No. 3 had been framed by the trial Judge which reads as under;-

‘Whether the suit is within time? OPD’.

11 A positive finding has been returned in favour of the plaintiff. This suit was held to be within limitation. The appellate Court had thereafter in depth and detail examined this argument.

12 It has been noted in the impugned judgment that this was in fact the most vehement argument raised by the appellant. The question of applicability of Articles 64 & 65 of the Limitation Act had been adequately dealt with. Finding arrived at was that the Article 65

is the applicable provision. Pleadings of the parties had been adverted to answer this query and this was after a detailed study of the judgments cited before the Court on this proposition. The Court had returned a fact finding that the plaintiff in the present case has set up a plea of title as well of previous possession. In this eventuality, Article 64 was not the applicable Article; case was covered by Article 65. Article 64 in fact does not deal with the question of title. The suit was held to be within time. Section 14 (1) of the Limitation Act was also available to the plaintiff. The first suit i.e. Suit No. 405/1985 had been filed in the year 1985; it had been withdrawn on 23.04.1991. Order dated 23.04.1991 clearly states that permission is granted to the plaintiff to withdraw the suit with liberty to file a fresh suit; the suit had been withdrawn for want of jurisdiction. This suit was a suit for possession of Plot No. H-27, Laxmi Nagar, Delhi. On 01.05.1991 i.e. just eight days later, the second suit i.e. Suit No. 36/2002 was filed which was also a suit for possession with a prayer for injunction as well; the suit property was same i.e. Plot No. 27, Laxmi Nagar, Delhi. The time bonafidely spent in prosecuting the earlier litigation was rightly excluded in the impugned judgment. The decision on issue of limitation does not call for any interference. The judgment of Ramiah (Supra) is not applicable to the factual scenario.

13 The next question which is posed before this Court is as to whether a fraud had been played upon this Court by the plaintiff and if on this count, the findings are liable to be set aside. Fraud has to be pleaded and proved. There was no averment in the court below on this count; either in the pleadings or in the deposition of the defendant. Be that as it may, this Court shall examine the pleadings filed by the parties in the two courts below.

14 The plaintiff has claimed himself to be the owner of the suit property which was a 200 square yards of plot i.e. Plot No. H-27 and a 100 square yard of plot i.e. Plot No H-26, Laxmi Nagar, Delhi. He was stated to be the owner of the four plots i.e. H-25 to H-28 by virtue of a registered sale deed dated 06.02.1959. The defendant had also set up a claim of title on the suit property; he had relied upon a sale deed dated 03.02.1966; that document was disbelieved. The ownership of the plaintiff had stood proved in terms of documentary and oral evidence led by him.

15 There were two suits filed by the plaintiff; first was suit No. 36/2002 filed on 01.05.1991 for possession of Plot No. H-27; the second was Suit No. 37/2002 filed on 10.04.1996 for possession of Plot No. H-26 as also for injunction and mesne profits. In both the suits, plaint has been perused. It has categorically described the sale deed to be an English translation of the original; original being in Urdu. In the translated copy of the sale deed, the disputed property is bounded as follows:-

East : Road 100'
West ; Government Way
North : Plot No. 23
South: Plot No. 28

16 Along with the complaints, the site plans have also been filed and have been proved in Suit No. 36/2002 as Ex. PW-1/1 and in Suit No. 37/2002 as Ex. PW-1/3. Vehement contention of the learned counsel for the appellant is that in both these site plans, direction has not been shown and this is deliberate. If the document is turned up side down, the direction will change in the reverse direction. This submission of the learned counsel for the appellant is not only bereft of

merit but also appears to be a mischievous argument. Ex. PW-1/1 is the site plan of Plot No. H-27. It is so recited at the top of the document. Below it is shown the suit land marked in red; on the eastern side of the road and the western side is the Government way. On the left side of the disputed area is Plot No. H-28 and on the other side is Plot No. H-26; so also is the depiction in the same manner shown in Ex.PW-1/3 which is site plan of plot No. 26 & had been proved in the second suit i.e. Suit No.37/2002. In this plan also on one side Plot No. H-27 is depicted and on the other side is Plot No. H-28.

17 The lengthy arguments urged before this Court by the learned counsel for the appellant do not take him anywhere in any manner. The identification of the suit property was well known to the plaintiff at the time when these two suits were filed; this document has been exhibited in the version of PW-1. This was a site plan of all the four plots i.e. Plot No. 24 to Plot No. 27. Apart from a one line bald suggestion given to PW-1 that the boundaries have not been correctly shown in the site plan, never has there been any dispute that the property has not been correctly identified. Even in the grounds of appeal before the first appellate Court, no such prayer has been made. Ground (n) in the grounds of appeal has been highlighted but it is nowhere bordered on this submission. The effort of the appellant appears to confuse the Court and as a last ditch effort hang on to property of the plaintiff when two fact finding Courts have returned concurrents finding of fact against her.

18 The plaintiff is admittedly the owner of the suit property in terms of the registered sale deed. The claim of the defendant qua ownership in terms of his sale deed dated 03.02.1966 had been

rejected; his claim of adverse possession had also been disbelieved. The document of title of the plaintiff along with oral testimony had proved his ownership in the suit property.

19 The plaintiff/ respondent in his reply to the application under Order 41 Rule 27 has admitted that the discrepancy in the direction of north and south is only for the reason that the sale deed is an English translation of an Urdu document; it had been misread; on the northern side Plot No. H-23 had been shown; on the southern side plot No. H-28 had been depicted. This had however been corrected in the site plans which have been proved before the courts i.e. Ex. PW-1/1 & Ex. PW-1/3. Question of fraud does not arise; the defence of the defendant is not in any manner effected and that is even if this stand as now raised by the appellant is accepted; it takes him nowhere. Directions as depicted in the sale deed were due to a bonafide mistake of which the appellant is in no way entitled to take advantage.

20 Order 41 Rule 27 of the Code reads as follows:-

“27. Production of additional evidence in appellate Court-(1) The parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary, in the Appellate Court but if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

{aa} the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could; after the exercise of due diligence , be produced by him at the time when the decree appealed against was passed, or }

(b) The Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,
the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.”

21 This provision can undoubtedly be resorted to even at the second appellate stage, if the ends of justice so demand. It however cannot be adverted to as a matter of course or routine or for statistical purposes. The language of the Section contains the command which has to be adhered to; there is not a whisper in the application that this evidence, that the khatonis of the years 1964-1965 which the appellant seeks to adduce could not be produced for sufficient reasons or that he had made any effort to adduce this evidence either at the trial stage or before the first appellate Court. This is not his case. Even if these documents are taken on record as already noted, they do not advance the defence of the defendant. They depict the khatidar as one Rewti & Balwant. This application is devoid of any merit. The judgment of the Wadi (Supra) has no application.

22 Provisions of Order 26 Rule 9 of the Code which deal with the appointment of a Local Commissioner necessarily involves a fact finding. The prayer in this application is that the Court should appoint a Local Commissioner to verify the factum of possession in the suit land. A prayer in such like proceedings may be granted for elucidating a matter in dispute; it would however only be a piece of evidence; the relevancy of which has to be examined afresh. The appellant/defendant had ample opportunity to lead evidence on the factum of possession. Issues No. 1 & 3 were specifically recorded on this count and read as follows:-

“I. Whether the defendant has become the owner by way of adverse possession, if so its effect? OPD.

III Whether the suit is within time? OPP”

22 There was sufficient opportunity for the defendant to adduce evidence about the factum of possession. This Court is not a third fact finding Court This application is also without any merit. Dismissed.

23 No substantial question of law has been arisen. These appeals are dismissed in limine.

INDERMEET KAUR, J.

JANUARY 28, 2011

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