

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

% *Date of Judgment: 21.02.2011*

+ **RSA No.241/2008**

SMT.KAMLA YADAV & ANR. Appellant
Through: Mr.Nageshwar Pandey and
Mr,Anoop Kumar Sinha,
Advocates.

Versus

SH.SUNIL KUMAR & ANR. Respondents.
Through: Mr.A.P.S.Ahluwalia,Sr.Adv. with
Mr.S.S.Ahluwalia and
Mr.Amarjit Singh, 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. This appeal has impugned the judgment and decree dated 30.9.2008 which had reserved the finding of the trial judge dated 30.3.2007. The judgment and decree dated 30.3.2007 the suit for possession and mesne profits filed by the plaintiffs Sunil Kumar & Ors. had been dismissed. Vide the impugned judgment dated 30.9.2008 this judgment was reserved and the suit of the plaintiffs stood decreed.

2. This is a second appeal. After its admission on 27.7.1010 the following substantial question of law was formulated; it reads as

follows:

“Whether the impugned judgment dated 30.9.2008 decreeing the suit of the plaintiff and not conforming to the observations of the Division Bench in its judgment dated 08.5.2005 passed in RFA No.68/1998 was in respect of the same suit land between the same parties and if so, its legal effect?”

3. Briefly stated the factual matrix is as follows:

- i. The plaintiffs are the owners of the plot bearing No.E-15 to ER-20 measuring 2400 sq. yards falling in Khasra Nos.1647 & 1649.
- ii. Portions of this property had been sold piecemeal.
- iii. As per the site plan (Ex.PW-1/1) plot measuring 790 sq. yards was sold to a mandir.
- iv. 400 sq. yards was sold to Inderjit Verma
- v. 360 sq. yards was sold to Anil Kumar Goel and vide a separate sale deed 400 sq. yards was sold to Satyanarain.
- vi. Defendant is stated to be in use and occupation of rectangular plot which is between the plot of Inderjit Verma and Anil Kumar Goel. It is depicted in green colour in the site plan.
- vii. Plaintiff had earlier filed suit No.122/1991 seeking possession of plot measuring 180 sq. yards (as shown in red colour in the site plan) against the defendant. The said suit had been dismissed on the ground that the property had not been identified correctly.
- viii. RFA No.68/1998 was preferred against the said decree. The RFA was disposed off, remanding the matter back to the trial court with a direction that opportunity be afforded to the defendant to amend his written statement on account of

his plea that the suit has become infructuous as the suit property had been sold in favour of Anil Kumar Goel; further directions were given to the trial court to decide the issues in accordance with law after affording opportunity to the parties to adduce their evidence. This was vide order dated 8.5.2008.

ix. Phool Singh and Om Prakash who were in occupation of the green portion of the suit property (as depicted in Ex.PW-1/1) filed two separate suits for injunction. The suit of Phool Singh was dismissed. Suit of Om Prakash was withdrawn. Vide Ex.PW-2/20 dated 3.9.1992, the DDA gave physical possession of the suit property to the plaintiff who was rightful owner of this property. In 1992-93 the defendant broke open the boundary wall between the portion in his occupation (red portion) and trespassed into the green portion. Police complaint was filed but to no avail. Present suit i.e. suit No.62/1998 was then filed. It was dismissed. It was held that the suit property was not correctly identified.

x. The appellate Court reversed this finding; suit stood decreed.

4. On behalf of the appellant, it has been urged that the suit No.122/1991 is yet pending in terms of the direction of the Division Bench (in its order dated 08.5.2005 passed in RFA No.68/1998) the subject matter of the present suit property is sub-judice in those proceedings and till that suit is decided no effective decision can be taken in the present proceedings. It is submitted that the interest of justice demands that this RSA should be remanded back to decide both the suits i.e. the present suit No.62/1998 and the

earlier suit i.e. suit No.122/1991 together as there is a discrepancy in the identity of the property in both the suits.

5. Arguments have been countered. It is pointed out that the appellant is trying to confuse the Court and the subject matter of the suit property in suit No.122/1991 is different and distinct from the suit property in the present suit. No substantial question of law has arisen.

6. Record has been perused.

7. Ex.PW-1/1 is the site plan. There is no dispute to the fact that the plaintiff is the owner of the 2400 sq. yards of suit land bearing No. E-15 to E-20, in Khasra No.1647 and 1649 Revenue Estate of Naraina, Inderpuri, New Delhi. It is also not in dispute that out of 2400 sq. yards 790 sq. yards had been sold to a mandir. Another 400 sq. yards had been sold Inderjit Verma. The property which is the subject matter of the present suit has been depicted in the green portion in Ex.PW-1/1 is measures 220 sq. yards. The suit property which was the subject matter of the earlier suit i.e. suit No.122/1991 is depicted in red colour in the site plan, it measures 180 sq. yards. Below this portion is the property which has been sold to Anil Kumar Goel and Satyanarain vide two separate sale deeds i.e. 400 sq. yards and 360 sq. yards.

8. The contention of the plaintiff is that the portion shown in the red is subject matter of the suit property in the earlier suit i.e. suit No.122/1991; it measures 180 sq. yards. This is also evident from the plaint and the proceedings of the earlier suit. The subject matter of the present suit is 220 sq. yards area which is depicted in green colour and is contiguous and adjoining this red portion. This is a distinct portion and has been separately shown in green

colour. Prayers in the first suit and the second suit clearly evidenced this fact. The prayers in the first suit i.e. Suit No.122/1991 reads as follows:

“(a) the suit of the plaintiff may kindly be decreed by passing a decree of possession in respect of the portion as shown in red colour in the site plan attached in Property No.ER-15 to ER-20 in the revenue estate of village Naraina, Inder Puri, New Delhi, in favour of the plaintiff and against the defendant, also with necessary direction to the defendant to remove all the unauthorised construction raised by her on the said plot.

(b) A decree for a sum of Rs.6500/- on account of damages/mesne profit in respect of above part of property No.ER-15 to ER-20, Inder Puri, in the revenue estate of village Naraina, New Delhi as shown in red colour in the site plan attached w.e.f. 1.2.90 till 31.3.91 at the rate of Rs.500/- p.m. and future damages from 1.4.91 till the defendant vacate the above said property and hand over the vacant possession of the same to the plaintiff at the rate of 500/- or more as this Hon’ble court deems fit and proper in the circumstances of the case may kindly be passed in favour of the plaintiff and against the defendant.

(c) Any other relief which this Hon’ble Court deems fit and proper in the circumstances of the case may also be granted in favour of the plaintiff and against the defendant.”

The prayers in the present suit i.e. Suit No.62/1998 reads as follows:

“(i) Pass a decree for possession in respect of the portion shown in Green Colour in the site plan attached measuring 220 sq. yds situated in property/plot No.ER-15 to ER-20, in Khasra No.1649 and 1647 in the Revenue State of Naraina, Inderpuri, New Delhi-110012 in favour of the plaintiffs and against the Defendants, after removal of all the unauthorized construction raised by the defendants or likely to be raised in future by the defendants, without the consent of the plaintiffs or any concerned authorities.

(ii) A decree for Permanent Injunction for Perpetual Injunction may kindly be passed in favour of the Plaintiffs and against the Defendants and their other family members, agents, from raising any sort of construction on the paid plot of the plaintiffs or from subletting, assigning or parting with the said portion of the land of

the plaintiffs in any manner whatsoever, as shown in green colour in the site plan attached measuring 220 sq. yds. situated in Plot No.ER-15 to ER-20, in Khasra No.1649 and 1647 in the Revenue State of Naraina, Inderpuri, New Delhi-110012.

(iii) A decree for a sum of Rs.36,000/- on account of damages/mense profits till date at the rate of Rs.1000/- p.m. for the last three years and future damages at the rate of Rs.1000/- or more, from the date of filing of the suit till the recovery of the possession as provided under the Code of Civil Procedure in favour of the Plaintiffs and against the defendants, in respect of the plot as mentioned above on account of use and occupation charges, as shown in Green colour in the site plan attached.

(iv) Cost of the suit may also be granted/awarded to the Plaintiffs and against the Defendants.

(v) Any other relief which this Hon'ble Court deem fit and proper under the circumstances of the case may also be granted."

In the first suit possession had been sought of the coloured portion in red as per the site plan Ex.DW-1/P6. In the present suit possession has been sought of 220 sq. yards of the green coloured portion and further clarifying that the red portion measuring 180 sq. yards is the subject matter of earlier suit. This is clearly averred in para 8 of the plaint.

9. The earlier suit i.e. the suit No.122/1991 had been dismissed. Appeal had been filed against the said order which has been disposed of in RFA No.68/1998 on 08.5.2005. Since the substantial question of law is bordered on this order which has become crux of the disputes between the parties it would be relevant to reproduce the relevant portion of the said order. It inter alia reads as under:

".....The short question that falls for our consideration is whether the Trial Court was justified in dismissing the suit without so much as framing an issued on the question of identity of the land which forms the subject matter of the suit and allowing parties to adduce evidence in support of their respective versions. It is true that the defendant/respondent had set up a specific plea that the suit property stood transferred by the plaintiff/appellant

to Shri Anil Kumar Goel in terms of the two sale deeds executed in his favour, but it is equally true that the plaintiff had while admitting the execution of the said sale deeds, clearly asserted that the suit property did not comprise the property covered by the said sale deeds. According to the plaintiff, the property sold to Shri Anil Kumar Goel measured only 360 sq. yds in ER-19. The total area of ER-19, however, was 400 sq. yds which meant that the residual area measuring 40 sq. yds. was still in the ownership of the plaintiff. The plaintiff's however, case in the statement recorded by the Trial Court under Order 10 of the CPC was that the defendant was occupying a part of ER-18 apart from a part of ER-19 which is still in his ownership. This was supported by the plaintiff by reference to a site plan which accompanied the plaint. Even assuming, therefore, that the execution of the sale deeds in favour of Shri Anil Kumar Goel were admitted, as in deed is the position even before us, the defendant was according to the plaintiff in occupation of a part of ER-19 and a part of land from out of ER-18, the boundaries whereof were identified in the site plan filed by him. The Trial Court has, however, disbelieved that version on the basis of the sale deeds placed on record and recorded a finding that the entire area which the plaintiff claimed in the suit stood transferred to Shri Goel. In the process it has also disbelieved that affidavit filed by the purchaser, Shri Goel, and hastened to dismiss the suit on that basis. We do not think that the Trial Court was correct in deciding a matter that would have required evidence and its proper appreciation before a finding could be recorded whether or not the plaintiff was the owner of any part of the property that was in occupation of the respondent. If the defendant was very anxious to set up the plea based on loss of title to the property as a defence to the suit, he would have been well advised to seek an amendment to the written statement, in which even, the Court below could have certainly framed an issue whether the execution of the sale deeds during the pendency of the suit had in any way rendered the suit untenable or infructuous. That is not what the Trial court did. It proceeded to record a finding on the basis of the averments made in the application and the affidavits of the parties thereby denying to them a fuller opportunity to establish their respective versions. This has caused miscarriage of justice which, in our opinion, needs to be corrected in appeal.

Learned counsel for the respondent drew our attention to the decision of the Supreme Court in Shipping Corporation of India Vs. Machado Brothers and Ors; (2004 11 SCC 168 to argue that a subsequent development can be taken note of by the court.

There is no quarrel with the proposition. If the plaintiff transfers

the suit property during the pendency of the suit, the Court trying the suit can certainly look in to the subsequent development and mould the relief accordingly. The question, however, is whether that can be done in the manner in which the Court below has done in the instant case. Our answer to that is in the negative. The Court ought to have insisted on an amendment of the written statement having regard to the nature of the controversy, framed an issue, allowed the parties to leave evidence and then recorded an appropriate finding. Inasmuch as it failed to do so, it committed an error which renders the impugned judgment and decree unsustainable.

In the result, we allow this appeal; set aside the impugned judgment and decree and remand the matter back to the Trial Court with the direction that it may afford an opportunity to the respondent to amend the written statement and raise the plea regarding the suit having become infructuous on account of the sale deeds executed in favour of Mr. A.K.Goel and frame a suitable issue on the same. The Court shall then decide the issue in accordance with law after affording to the parties an opportunity to adduce evidence in the matter. Needless to say that if the defendant/respondent wishes to place reliance upon any other subsequent development including the one which was pointed out to us in the course of hearing in the form of a subsequent dispute having been decided by a competent court involving similar issues, he shall be free to raise the said plea also in which event the Trial Court shall suitably examine and determine the same. The parties are directed to appear before the District Judge on 28th May, 2008 who shall assign the case to a competent court as the court earlier dealing with the matter is said to have been abolished.”

10. While remanding the matter to the trial court the Court had noted the arguments of the appellant that the suit proceedings has become infructuous in view of the fact that this suit land had been sold to Anil Kumar Garg. The Court was of the view that this should have been incorporated by the defendant by way of amendment in his written statement and the matter was remanded back in order that the parties will lead evidence on this score. This was the only dispute before the Court at the time of the remand of the RFA. There was no dispute raised about the identity of the suit

property as is now sought to be urged before this Court. The subject matter of the suit property in that case i.e. in suit No.122/1991 was 180 sq. yards as depicted in red colour in Ex.PW-1/1. The present suit land is 220 sq. yards as depicted in green colour in Ex.PW-1/1. There is no confusion in the identity of the two properties. This confusion on the identity of the suit land which has been urged before this Court was never a part of the written statement. In the written statement defendant had set up a plea of res judicata. Main defence of the defendant was that the earlier suit i.e. suit No.122/1991 was based on the same cause of action and the said suit having been dismissed it will operate as res judicata to the present proceedings. The other contention was that the number of the suit property had not been properly given.

11. Although the trial judge had dismissed the suit of the plaintiff yet on this score it had returned a finding in favour of the plaintiff that the plea of res judicata is not maintainable as the earlier suit was qua land measuring 180 sq. yards whereas the present suit was qua land measuring 200 sq. yards and adjacent to the aforesaid area of 180 sq. yards and thus different and distinct from the earlier suit. This finding was returned in para 10 of the judgment of the trial judge dated 30.3.2007. Suit was dismissed as the rectification deeds were disbelieved.

12. The impugned judgment had decreed the suit.

13. The arguments urged now have been taken care of in the impugned judgment. The relevant extract reads as follows:

“The defendants/respondents have submitted that the suit property was owned by Anil Goel and as such the appellants had no locus to file the suit. In fact Anil Goel appeared in court as the plaintiff’s witnesses PW1, and has categorically deposed that the suit property belonged to the appellants and not to him. As far as

the boundaries are concerned, ld. counsel has taken me through the evidence on record whereby the entire plot has been identified in evidence in accordance with the site plan annexed. The boundaries of the plot occupied by the respondent are defined as the plot boundaries by the plot of Inderjeet Verma one side and the plot of Anil Kumar Goel on the other side. The other two sides are also not disputed as a road in front and a part on the back side. The portion in use and occupancy of the respondent has been marked A1, A1, A3 & A4. This rectangular piece of plot has been reflected in two portions marked in red and green in the site plan, Ex.PW-1/1. While the appellants' earlier suit is pending adjudication in respect of the portion measuring 180 sq. yds shown in red, the present suit giving rise to the impugned order is shown in green and measures about 220 sq. yds. As per the averments made in the plaint it was sometime in the year 1992-93 that the respondents are alleged to have broken down the fence between the two portions and had unauthorisedly extended their encroachment over the portion shown in green measuring 220 sq. yards i.e. the suit property in the present case. Through the testimony of the respondent himself, the neighbouring boundaries have been identified.

7. I do not think that the suit should fail on this count too. Be that as it may, while the plaintiffs have been able to show the title of Shri Bidhi Singh in respect of the entire property and vide order of the SDM EX.PW2/17 and consequent mutation Ex.PW2/11-15, the defendants have not been able to substantiate on what basis they are in possession of the same. It is merely averred through oral testimony that they are in possession of the suit premises for the last 40 years. This is belied by the fact that in September, 1992, DDA had ordered eviction of one Sh. Om Prakash and Sh. Phool Singh from the suit property. In fact Om Prakash had filed a suit against the appellant herein, being Suit No.207/92, praying for declaration and permanent injunction. At the time of adjudicating the interim relief, the Ld. Court opined that Om Prakash did not have any document to substantiate his title and no plausible ownership could be inferred. Phool Chand also filed a suit for declaration & injunction against Bidhi Singh. In fact the Jhuggis of Om Prakash and Phool Chand were removed by the DDA from the suit premises and the possession was handed over to Angoori Devi, deceased mother of the appellants. There is no evidence that the respondents have been in the suit premises for the last 40 years or more. There is nothing to infer that they have been in adverse possession, or if at all, any hostile title had been set up for them to plead limitation.

8. The over all identity of the suit premises is clear in so far as

the boundaries are defined. Whether the plot fell in ER 18 or 19 is immaterial as these numbers cannot be properly defined even by the municipal authorities Bidhi Singh, father of the appellants was the owner of ER-15-20 in Khasra No.1647/1649 bearing a continuous plot of 2400 sq. yds. The Ld. Trial court has opined that there was discrepancy in the testimony of the Appellants with respect to the measurement of the plot under the defendants use and occupation as well as in the ER nos. Given the literacy level of the appellants' I do not think that the suit should fail merely if the witness has given slightly inaccurate measurement. There is admittedly no dispute to the overall size, dimension and location of the entire holding of Bidhi Singh in respect of his plot spread over ER-15 to E-20. Piecemeal sales of different portions is also not a contentious issue. Only the intervening plot between the plots of Inderjeet Verma & Anil Goel is stated to be with the respondents for which two separate suits were filed. The portion which is the subject matter of the impugned decree was under occupation of Om parkash & Phool Singh. This suit property was also a subject matter of litigation initiated by Om Prakash & Phool Singh. This suit property was also a subject matter of litigation initiated by Om Prakash & Phool Singh and the site plan was duly annexed in those cases and is identical to the portion of the suit property reflected in the site plan Ex.PW-1/1. One of the respondents was also a defendant in one those suits. Jhuggis of Om Prakash and Phool singh were demolished from the suit property of and they were forcibly evicted by the DDA. This clearly reflects that the respondents have encroached upon this area subsequently. Needless to state that the defendants have not been able to establish their right or title in the suit property.

9. On appraisal of the evidence and facts of the case I do not find any dispute with respect to the identity of the suit property or the locus of the appellants in filing the suit. With respect to the valuation of the suit property the Ld. trial court ought to have come a definite conclusion about its valuation and directed the plaintiffs to take appropriate steps. I therefore set aside the impugned order and judgment. The appellants are entitled to a decree of possession of the suit premises, more specifically shown in green in the site plan annexed as Ex.PW-1/1. The plaintiff has also claimed arrears, damages/mesne profits @ Rs.1000/- per month. Keeping in view that the respondents were in unauthorized use and occupation of about 220 sq. yds, I do not find this amount excessive. The appellants are entitled to these damages as claimed in the suit till recovery of possession of the suit property.

9. The appeal is allowed. A decree of possession in respect of

the suit property measuring about 200 sq. yads situated within plot Nos. ER-15 to ER-20, in Khasra No.1647 and 1649 in the Revenue State of Naraina, Inderpuri, New Delhi more specifically shown in green in the site plan annexed as Ex.PW-1/1 and for arrears of damages/mesne profits @ Rs.1000/- per month for three years prior to the filing of the suit till the recovery of possession in favour of the appellant/plaintiff, is passed together with costs and future interest @ 8% per annum.”

14. This is a second appeal. It is not a third fact finding Court. It is only when a substantial question of law arises is interference called for. The finding in the impugned judgment calls for no interference. The subject matter of the suit land in the present suit i.e. in Suit No.62/1998 is different and distinct from the earlier suit i.e. Suit No.122/1991. RFA No.68/1998 had remanded the proceedings of Suit No.122/1991 vide its order dated 08.5.2005. It had noted that through the testimony of the defendant himself the boundaries around the suit land had been identified. DW-1 in his cross-examination had in fact admitted that as follows:

“The portion mark A and B shown in the site plan has not been correctly measured. I am in possession of portion A-1, A-2, A-3, A-4 shown in the said site plan. The portion of one Sardarji in property no.ER 20 has not been shown in the site plan ex.PW-1/1.”

It had specifically recorded the contention raised in the first appeal which was that the suit had become infructuous in view of the fact that entire suit property had been sold to Anil Kumar Goel. The sale deed in favour of Anil Kumar Goel registered on 16.5.1997 and 20.6.1997 evidenced that 100 sq. yards and 260 sq. yards of land had been sold in portion ER-19 to him. Although initially there was a discrepancy in the sale deed; this was rectified by the rectification deed dated 28.2.2005 which was also a registered document.

15. The suit land in the present case measures 220 sq. yards (as

shown in green colour in Ex.PW-1/1) is different and distinct from the suit land in the earlier suit i.e. Suit No.122/1991 which had measured 180 sq. yards(as shown in the red colour in Ex.PW-1/1). Those proceedings do not in any manner come in the way of the decision which has been made in the present suit i.e the suit No.62/1998.

16. Vide Ex.PW-2/20 dated 3.9.1992 the DDA had in fact given vacant and physical possession of the suit land to the plaintiff on 27.4.1992. This land was measuring 74 x 90 sq. yards (admittedly wrongly mentioned as yards; should have been read as feet) which was roughly equivalent to about 740 sq. yards. Admittedly 400 sq. yards had thereafter been sold to Inderjit Verma on 21.9.1993; 100 sq. yards forms the passage between the mandir and the plot of Inderjit Verma; the suit land in this case is 220 sq. yards which was the land earlier in occupation of Phool Singh and Om Prakash. This is borne out from the record. Impugned judgment calls for no interference. Substantial question of law is answered accordingly.

INDERMEET KAUR, J.

FEBRUARY 21, 2011
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