

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

+ **RFA No.137/2011**

% **4th March, 2011**

NARESH KUMAR SAINI Appellant

Through: Mr. S.P.Jha, Adv.

VERSUS

DAYA RANI DIXIT Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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**

VALMIKI J. MEHTA, J (ORAL)

CM No.4562/2011 (delay)

Delay in re-filing is condoned.

CM stands disposed of.

CM No.4561/2011 (Exemption)

Exemption allowed subject to just exceptions.

Application stands disposed of.

RFA No.137/2011

1. The challenge by means of this regular first appeal under Section 96 of the Code of Civil Procedure, 1908 is to the impugned judgment and decree

dated 8.9.2010 whereby the suit of the appellant/plaintiff for possession and mesne profits has been dismissed.

2. The issue pertained to the right in the property bearing no. C-7/144, Ground Floor, Lawrence Road, Delhi owned by late Sh. Rajinder Prasad Saini who expired on 13.12.1987. Plaintiff/appellant claimed to be the adopted son of late Sh. Rajinder Prasad Saini. Sh. Tilak Raj, husband of the defendant Smt. Daya Rani Dixit also claimed to be the adopted son of Sh. Rajinder Prasad Saini, however, through a registered adoption deed dated 10.4.1986. The appellant/plaintiff claimed ownership to the subject property on the basis of a Conveyance Deed dated 9.1.2002 executed by the Delhi Development Authority (DDA) in his favour i.e., a Conveyance Deed executed after about 13 years of the death of Sh. Rajinder Prasad Saini. The Conveyance Deed dated 9.1.2002, Ex. P-1, is claimed to have been got executed on the basis of a power of attorney executed by Sh. Rajinder Prasad Saini in favour of the appellant/plaintiff.

3. The defendant, wife of Sh. Tilak Raj adopted son of Sh. Rajinder Prasad Saini claimed to be owner in possession of the property by virtue of documents dated 1.11.1985 executed by late Sh. Rajinder Prasad Saini in favour of the defendant/respondent/Smt. Daya Rani Dixit.

4. After the pleadings were complete, the trial court framed the following issues.

- “ i) Whether the plaintiff has locus standii to file the present suit?OPP
- ii) Whether the defendant is a licensee for the plaintiff? OPP
- iii) Whether the plaintiff is entitled to relief of possession of the suit property from the defendant ?OPP
- iv) Whether the plaintiff is entitled to recovery of a sum of Rs.80,500/- as prayed? If yes, at what rate of interest?OPP
- v) Whether the plaintiff is entitled to recovery of damages/mesne profits as prayed?OPP
- vi) Relief.”

5. A plaintiff in a suit for possession of an immovable property claiming that the defendant is a licensee, obviously, has to prove his title to the property entitling him to possession. The claim of the appellant/plaintiff to ownership and possession of the property was not on the basis of his adoption by late Sh. Rajinder Prasad Saini or his wife Smt. Anaro Devi, and devolution by inheritance but the claim was on the basis of the Conveyance Deed executed on the basis of a power of attorney executed by late Sh. Rajinder Prasad Saini during his life time in favour of the appellant-plaintiff. It is not the case of the appellant/plaintiff that the said power of attorney is a power of attorney executed for consideration. Before the trial court, the appellant/plaintiff admittedly did not prove the adoption either by filing an adoption deed or by proving the ceremony of giving and taking and his only ground of claim to ownership of the property was the Conveyance Deed dated 9.1.2002. The trial court has held appellant/plaintiff not entitled to possession and mesne profits on the ground of invalidity of the Conveyance

Deed dated 9.1.2002 because Sh. Rajinder Prasad Saini had expired way back on 13.12.1987 and therefore, on the basis of power of attorney of a deceased person DDA could not have executed a Conveyance Deed 13 years after the death of Sh. Rajinder Prasad Saini on 9.1.2002, and once there is no ownership of the appellant/plaintiff in the subject property, by means of the Conveyance Deed, the suit for possession and mesne profits is bound to fail.

6. Learned counsel for the appellant has raised two main submissions against the impugned judgment and decree:-

(i) The first submission was that there was already a suit which was pending challenging the Conveyance Deed dated 9.1.2002 and therefore, the trial court could not have decided this issue in this particular suit.

(ii) The second submission was that the trial court ought to have decided all issues but it decided only issues no.1 and 2 and did not decide the other two issues, i.e. issue nos. 4 and 5, as already reproduced above.

7. From the trial court record, the impugned judgment and decree, and the arguments of the learned counsel for the appellant, the following admitted position emerges:-

(i) Mr. Rajinder Prasad Saini was the admitted owner of the suit property. Either the property of Sh. Rajinder Prasad will devolve by Will or by

devolution on his death to his legal heirs or if the property is sold to the plaintiff/appellant in the life time of Sh. Rajinder Prasad Saini.

(ii) The appellant/plaintiff did not file any adoption deed in the trial court nor led any evidence to prove the factum of adoption by any giving and taking ceremony. Plaintiff did not claim devolution on the basis of a Will.

(iii) The Conveyance Deed executed by DDA in favour of the appellant /plaintiff is only on the basis of a power of attorney executed by the deceased Rajinder Prasad Saini in favour of the appellant/plaintiff, and which power of attorney would come to an end on the death of Sh. Rajinder Prasad Saini. The power of attorney is not a power of attorney executed for consideration which could continue even after the death of Sh. Rajinder Prasad Saini in view of Section 202 of the Contract Act, 1872.

8. Issues no.1 and 2 as framed in the suit as to whether the appellant/plaintiff has locus standi to file the suit and whether the defendant was a licensee of the plaintiff/appellant, very much include in such issues is the requirement for the plaintiff/appellant to prove his ownership of the property and only on proving the ownership of the property, would the plaintiff succeed in the suit for possession and mesne profits by holding the defendant to be only a licensee. The contention of the learned counsel for the appellant/plaintiff that the trial court could not have decided the validity of the Conveyance Deed as another suit was pending, flies in the face of Explanation-1 to Section 11 of the CPC which says that there can surely be

two suits involving the same issue and the decision in the first suit will operate as res-judicata for the other suit, although the other suit may have been instituted prior to the decision in the suit in which the issue is decided. Therefore, merely because another earlier suit was pending would not mean that the trial court is prevented from looking into the validity of the claim of the plaintiff to possession, because after all, it is the plaintiff who has to prove his case so as to be entitled to possession and mesne profits, and which entitlement can surely and only be proved by showing that the appellant/plaintiff was the owner. It is the plaintiff who claimed ownership on the basis of the Conveyance Deed and therefore the trial had to pronounce on the issue of the validity of the Conveyance Deed which was disputed by the respondent/defendant. It does not lie in the mouth of the appellant-plaintiff to say that the validity of the Conveyance Deed should not have been pronounced upon by the trial court. Therefore, the trial court has rightly gone into the aspect of the ownership of the appellant claimed on the basis of the Conveyance Deed dated 9.1.2002, Ex.P-1, and which has been held not to confer a valid title on the appellant/plaintiff as the same was executed more than 13 years after the death of Sh. Rajinder Prasad Saini and on the basis of a power of attorney which came to an end on the death of Sh. Rajinder Prasad Saini.

9. The second argument of learned counsel for the appellant is also equally misconceived that the trial court in terms of Order 14 Rules 1 and 2 CPC, ought to have decided all the issues and since there is no decision on

issues 4 and 5, the impugned judgment and decree must fall. The issues no.4 and 5 are issues with regard to the entitlement of the plaintiff to recover of mesne profits. Once issues no.1 and 2 have been held against the plaintiff obviously, the issues no.4 and 5 also stand decided, because if the plaintiff is not the owner of the subject property, and therefore was not entitled to possession obviously, therefore, he would not be entitled to mesne profits also. Though, the trial court seems to say that these issues do not require decision, in my opinion, these issues automatically stand decided by virtue of decision on issues no.1 and 2. In fact, the trial court which dealt with the issues no.3 to 5 has clearly held that since the plaintiff failed to establish the right, title and interest in the suit property, therefore, he is not entitled to damages and mesne profits. Therefore, the contention of the learned counsel for the appellant is misconceived and is bound to fail.

10. In view of the above, I do not find any necessity to summon the trial court record in view of the admitted factual position in both facts and law as has emerged from the impugned judgment and the arguments of the learned counsel for the appellant.

11. The appeal being devoid of merit is therefore misconceived and is dismissed, leaving the parties to bear their own costs.

MARCH 04, 2011
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VALMIKI J. MEHTA, J.