

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

+ **RFA No. 451/2001**

% **2nd January, 2012**

SH. RAMESHWAR DASS **..... APPELLANT**

Through: Mr. J.P. Verma, Advocate.

versus

SH. HAKIM JAVED & ORS. **..... RESPONDENTS**

Through: None.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J. (ORAL)

1. The challenge by means of this Regular First Appeal (RFA) filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 16.8.2001. By the impugned judgment, the suit of the appellant/plaintiff for possession and declaration qua the property, B-1/27, New Ashok Nagar, Shahdara, Delhi was dismissed.

2. The brief facts of the case are that the appellant/plaintiff claimed to have purchased the suit property vide customary documentation being an

Agreement to Sell, General Power of Attorney and receipt executed in his favour by one Sh. Shaukeen on 3.3.1992. Sh. Shaukeen is stated to have purchased the suit property from Smt. Jereefan by similar documents dated 3.2.1992. Smt. Jereefan was stated to have purchased the property from one Sh. Nabbu Singh by the same type of documents dated 16.5.1986 and Sh. Nabbu Singh had purchased the property from the original owner/Sh. Lachcho Ram by means of the documents on 19.5.1981. The appellant/plaintiff claimed to have received the possession of the suit property on 3.3.1992 when the documents were stated to have been executed in his favour. There were proceedings under Section 145 Code of Criminal Procedure, 1973 (Cr.P.C.) whereupon the property was sealed on 6.4.1992, however, subsequently the property was de-sealed and possession was handed over to the respondents/defendants. The subject suit for possession and declaration thereafter came to be filed by the appellant/plaintiff.

3. The respondent No.1/defendant No.1 contested the suit on the ground that he was the owner of the suit property having purchased the same by means of documents dated 12.2.1986 from one Sh. Radhe Shyam Gupta and who had purchased the same from the earlier owner Sh. Raj Kumar. It was contended that the appellant/plaintiff was claiming the suit property to be 200 sq. yds whereas the suit property was 235 sq. yds. The respondent

No.1/defendant No.1 also alleged that the appellant claimed the suit property to be situated in khasra No. 393/264, however, the suit property was situated at khasra No. 396/264. The respondent No.1/defendant No. 1, therefore, disputed the ownership of the appellant/plaintiff qua the suit property and prayed that the suit be dismissed.

4. After completion of pleadings, the trial Court framed the following issues:-

- “1. Whether the plaintiff was in possession of the suit being owner? OPP
2. Whether the property is situated in Khasra No. 393/264, Main village Chilla Sharonda Banga Shahdara, Delhi? OPP
3. Whether the plaintiff is entitled to possession as claimed? OPP
4. Whether the suit is not maintainable in view of pendency of the proceedings u/s 145 Cr.P.C.? OPD
5. Relief.”

5. The trial Court while dealing with issue Nos. 1 and 2 has observed that though the appellant/plaintiff proved on records the documents dated 3.3.1992 being Agreement to Sell, General Power of Attorney and receipt executed in his favour as Ex. PW1/B to Ex.PW1/E, however, the trial Court held that such documents cannot be looked into as these were not registered documents, because these documents transferred rights in immovable properties and consequently required compulsory registration by virtue of Section 17 of the Registration Act, 1908. In the absence of registration as per Section 49 of the

Registration Act there was a bar to look into the documents. The trial Court had also noted that the appellant/plaintiff has not based his claim under Section 53A of the Transfer of Property Act, 1882 i.e. on the basis of doctrine of part performance. The trial Court has also held that the appellant/plaintiff claimed to have received possession on 3.3.1992, however, it could not be believed that he was dispossessed just after nine days on 12.3.1992 by the respondents/defendants. The defendants, other than defendant No.1/respondent No.1, were the tenants in the property. The most important issue was if and whether the appellant/plaintiff had actually taken possession of the premises on 3.3.1992 when the documents were executed in his favour. In this regard, the trial Court has relied upon the unimpeachable evidence of a public authority, being the Food and Civil Supply Department, who had issued a ration card with respect to property No.B-1/27, New Ashok Nagar, Delhi in favour of respondent No.1 on 23.12.1991 i.e. before 3.3.1992, the date on which the appellant/plaintiff claimed to have purchased the suit property. The trial Court has also referred to the statements of the tenants who deposed in favour of the respondent No. 1/defendant No. 1 as DW1-Dr. D.K. Kar and DW2-Sh. Rahis. Both of the tenants deposed that they were tenants of respondent No.1 and were paying rent to him well before the appellant/defendant claimed to have purchased the suit property. DW1-

Dr.D.K. Kar stated that he had taken one shop in the suit property on rent from respondent No.1/defendant No.1 in the year 1989 and to the same effect was the statement of DW2-Sh. Rahis. The trial Court has also referred to the findings that it was necessary for the revenue records to be filed and proved (and which was not done) in order to determine whether the suit property is situated in Khasra No. 393/264 as claimed by the appellant inasmuch as respondent No.1/defendant No.1 claimed that the suit property was in fact situated in Khasra No. 396/264 and in fact the suit property was of 235 sq. yds and not of 200 sq. yds at Khasra No. 393/264. Some of the relevant observations of the trial Court, as contained in the following paragraphs of the impugned judgment, read as under:-

9. The documents proved in evidence by the plaintiff as his title documents as pointed out above, are agreement to sell, general power of attorney and receipt Ex.PW1/B to Ex.PW1/D. These documents are not registered. They are all allegedly attested by the Notary Public. They do not bear any notarial stamp of Rs.3 as is required under the Notary Public Act. The agreement to sell is allegedly not executed on requisite stamp paper. Now it is to be seen if these documents transfer any ownership rights in favour of the plaintiffs. Section 17 of the Registration Act makes it mandatory that an instrument which purports to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property or on account of creation, limitation or extinguishing of any such right, title or interest to be compulsorily registerable. Section 49 of the said Act, speaks of effect of non registration of the

documents required to be registered. According to this provision any documents requires registration u/s 17 or by any provisions of the Transfer of Property Act, to be registered shall not be received as evidence of any transaction effecting such property or conferring such power. There is a proviso to this Section according to which an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act or as evidence of part performance of a contract for the purpose of section 53A of the TP Act or as evidence of any collateral transaction not required to be affected by registered instrument. Coming to the facts and circumstances of this case, admittedly the documents in question related to the transaction affecting the immovable property. By way of these documents, plaintiff claims that a right has been created in his favour whereby the right of previous purchaser Shri Shokeen in present, as well as in future, in respect of the property which is the subject matter of these documents have been extinguished. The receipt Ex.PW1/D, which is for consideration on account of creation, declaration, assignment in respect of the immovable property is also not registered. None of these documents can be considered in evidence as they do not fall within the purview of Section 49 of the Registration Act. The present suit is for declaration of title as owner in possession of the suit premises and plaintiff has sought possession of the suit premises against the defendants on the basis of title documents as owner. Therefore, these documents cannot be taken into evidence of a contract in suit for specific performance under Chapter II of Specific Relief Act. Plaintiff has not filed the present suit for enforcement of his rights in respect of the suit premises against Mr. Shokeen from whom he allegedly purchased the property in suit for specific performance of the agreement to sell. Plaintiff has also not based his claim under section 53A of the Transfer of Property Act as evidence of part performance of the contract. Therefore,

the documents under consideration were compulsorily registerable. Since these documents are not registered, they cannot be taken in evidence for deciding the title of the plaintiff in respect of the property in suit.

10. There is an explanation to section 17 of the Registration Act. This explanation reads as follows:-

“A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.”

This explanation therefore, takes out, the purview of section 17 of the act these documents though pertaining to the sale of immovable property and can be taken in evidence even if not registered, provided, these documents only contain against other claim recital of any payment of earnest money or whole or part of the payment. In other words, documents which do not create any interest in the immovable property do not need compulsory registration and these documents can be taken in evidence for deciding the dispute inter se the parties. In the present case, vide documents i.e. agreement to sell Ex. PW1/C a right was created in favour of the plaintiff by Mr. Shokeen by delivering the possession of the said plot/property to the present plaintiff. Since this document created a right in favor of the plaintiff and against Mr. Shokeen it required compulsory registration. This aspect of the matter is not disputed at the bar by the Ld. counsel for the plaintiff. Since the documents under consideration are unregistered documents they are in admissible in evidence.

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12. Plaintiff has claimed himself to be in possession of the property soon after its purchase on 3.3.1992. Defendant No.1 has disputed the right of the plaintiff. As per para 7 of the plaint, soon after the property was

allegedly purchased by the plaintiff, he on 12.3.1992 i.e. after about nine days of the alleged purchase of the property, plaintiff lodged a report with the police. This report has not been proved in evidence. However, it is admitted that plaintiff filed a complaint under section 145 and 146 Cr.P.C. before the SDM on 16.3.1992. It is also a common case of the parties that vide order dated 18.7.1992, of Shri J.P. Singh, the then ADJ, Delhi, the defendants were given the possession of the suit premises. Now it is to be seen, if plaintiff had actually taken the physical possession of the premises on the date of its purchase i.e. on 3.3.1992. Plaintiff in his statement on oath deposed that after taking the possession of the premises on 3.3.1992, he locked the premises that means he did not physically remained in possession of the suit premises till he failed the complaint under section 145 and 146 Cr.P.C. Plaintiff has not produced any record to show that this property was mutated in his name and that he was in actual physical possession of the same may be for a short period of 10 days. On the other hand, defts. Hakim Javed has proved in evidence is ration card in respect of suit premises. From the statement of Shri Shankar Mahla, LDC- in Food and Supply Department, Govt. of NCT of Delhi, it is clear that the registered ration card holder of property No.B1/27 New Ashok Nagar is Hakim Javed. The relevant entry in the register is 652 and the defendant's ration card number is 174408. Mr. Shankar Mehla, DW3 has proved the photocopy of the entry No. 652 as Ex.DW3/A. According to this entry, a ration card was issued to defendant on 23.12.1991 and the address as mentioned in the ration card is B1/27, New Ashok Nagar, Delhi. The department of food and supply issued ration card only after due verification of the address of the applicant, who applies for issuance of ration card. Besides the number of family members of the consumer are also verified by the department of food and supply.

13. Therefore, it is clear that defendant No.1 is in possession of the suit premises since before 23.12.1991 i.e. prior to alleged purchase of the property by the plaintiff,

form one Mr.Shokeen on 3.3.1992. Defendant has also placed on the record his documents of title which are also in the form of GPA, agreement to sell, and receipt. These documents were executed on 12.2.1986 in between Shri Radhey Shyam Gupta and Hakim Javed, defendant No.1 in the present suit. The description of the property as given in these documents is land measuring 235 sq. yards forming part of Khasra No. 396/264, situated at Abaid of Block B1, New Ashok Nagar, Shahdara Delhi. Ld. counsel for the plaintiff has tried to state that these documents are fabricated. For that purpose, he has tried to compare another set of documents consisting of GPA, agreement to sell and receipt allegedly executed between one Raj Kumar and Radhey Shyam Gupta. Radhey Shyam Gupta is the person from whom defendant No.1 is alleged to have purchased the property. However, since these document have not been proved in evidence, they cannot be looked into for any purposes. Even otherwise, Ld. counsel for the plaintiff has not been able to satisfy the court as to how these documents can be treated to be forged documents. None of the attesting witnesses have been summoned by the plaintiff who could deny their signatures on the documents. The attack of Ld. counsel for the plaintiff on the genuineness of these documents is the purchase of the stamp papers by the defendant from the same stamp vendor, from whom the earlier stamp papers were purchased by Raj Kumar, and also on the ground that the lawyer attesting these documents is the same. This itself cannot be considered as a valid ground to doubt the genuineness of these documents.

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15. The site plan produced and proved in evidence by the plaintiff indicate that there are six shops besides two rooms, bath and latrine in the property in dispute. The site plan is Ex.PW1/A on the record. This site plan is contrary to the statement of the plaintiff made by him as PW1 in respect of his case as well as his averments contained in

para 2 of the plaint. The premises purchased by the plaintiff have been described as one room, five shops with boundary wall. The site plan depicts rooms instead of one room, six shops instead of five shops. It also depicts bath and toilet, which is described in the plaint. Therefore, this site plan also does not corroborate the statement of the plaintiff and his averments in the plaint. PW2 Fakruddin in cross examination has admitted that at the time of selling the property, Mr. Javed was living in the rear room of the disputed property. Admittedly, the rear room which was not in occupation of the defendant was not sealed by the police. Only the five shops were sealed which were in occupation of different tenants. Shri D.K. Kak, DW1 who is defendant No. 3 has categorically deposed that he is the tenant in respect of premises in suit qua defendant No.1 since the year 1898 and he had been paying the rent to him. Mr. Rahish DW2 is defendant No. 6. He has deposed on oath that he had taken a shop on rent in premises No. B1/27, New Ashok Nagar, Delhi from defendant No.1 on monthly rent of Rs.500/-. He is still running his Barber shop in the said premises. He deposed that in the year 1992 his shop was sealed by the police and after 2/3 months of the said sealing, he again came in possession of the same. He has further deposed that defendant No.1 in vesting in the premises and was already residing in the premises when he took the premises from defendant No. 1. Had the plaintiff purchased the property in suit, these tenants would have been given letter of allotment by the previous owner/land lord. Defendant No.1 could not have inducted tenants in the suit premises just within 10 days of its alleged purchase by the plaintiff. The tenants could have taken a defence of their being in possession of their shops in their own rights. There was no necessity to admit the defendant No.1 as landlord. Plaintiff himself has admitted in the plaint in his statement on oath that defendant No.3 to 7 were inducted as tenants by defendant No.1 and 2. Plaintiff has not disclosed as to since when the tenants occupied their respective shops under defendants No.1. Even in his statement on oath, the plaintiff is absolutely silent as to when defendant No.2 to 7

came in possession of the respective portions i.e. shops etc. under defendant No.1 or at his behest. It is not the case of the plaintiff that these persons occupied the shops which were sealed by the police only after purchase of the property in suit from Mr. Shokeen. Therefore, from the oral evidence as adduced on the record, it can be safely inferred that defendant No. 1 has been in continuous possession of the property in dispute personally as well as through his tenants much before it was allegedly purchased by the plaintiff and plaintiff never came in possession of the suit premises.

16. Much has been argued regarding the khasra Number of the property in suit. As per the documents of the plaintiff placed on record, which are Ex.PW1/B, PW1/C and PW1/E the property in suit is described as forming part of Khasra No. 393/264 min, situated in the area of village Chilla Saronda Bangar, in the abadi of New Ashok Nagar, Illaqua Shahdara, Delhi measuring 200 sq. yds whereas the documents of the defendant No.1 Ex.D-1 to D-3 describe the property measuring 235 sq. yds forming part of Khasra No. 396/246, situated at abadi of Block B1/27, New Ashok Nagar, Shahdara, Delhi. None of the parties have proved in evidence the revenue records or any other relevant documents for the identification of the khasra number in which the property in suit falls. The only witness for the purpose of identification of the khasra number of the suit property i.e. B1/27 New Ashok Nagar is DW4 Shri Yogesh Kumar, draftsman, Town Planning Deptt. He had brought two lay out plans submitted by the Welfare association of the colony pertaining to block No.B and B-1 of New Ashok Nagar, East Delhi near village Chilla, Saronda Bangar. The said two lay out plans were filed for the purpose of electrification and as per the policy of unauthorized colonies dated 1.1.81. However, he had no personal knowledge about the same i.e. lay out plans of block B and B1. DW5 Shri Surender Singh is the general secretary Seva Samity, New Ashok Nagar, Delhi. He has deposed that he is residing in house No. 168, New Ashok Nagar Block D-1 since 1989. He deposed that he had

personal knowledge of block B and B-1. He has deposed that B Block of Ashok Nagar was never divided and prior to his coming to Ashok Nagar, B Block was in existence. House numbers have not been changed in B block. He deposed that defendant is resident of B1/27, New Ashok Nagar, Delhi. The fact remains that in the absence of any revenue record, it is not possible for the court to decide as to in which khasra number, the property in suit falls. I need not even go into the questions of deciding as to in which khasra number, the suit property falls because, admittedly, the property in the suit bears house No. B1/27, New Ashok Nagar, Shahdra, Delhi and it is the same property which is under dispute and is the subject matter of the present suit. Since the identification of the property is not in dispute, it is a futile exercise to decide about the khasra number in which it is situated or of which, it forms a part.”

(underlining added)

6. I completely agree with the conclusions of the trial Court and would not seek to repeat the same, inasmuch as I have already reproduced the substance of findings above. Suffice it to state that appellant, being the plaintiff in the suit, the onus of proof was upon him to show that he was the owner of the suit property and which he miserably failed to prove inasmuch as the entire chain of title documents i.e. from the original owner-Sh.Lachcho Ram to Sh. Nabbu Singh to Smt. Jarreefan and then to Sh. Shaukeen from whom the appellant/plaintiff purchased the suit property, were not filed before the trial Court. The fact that there was proved the unimpeachable record of the public authority i.e. of the Food and Civil Supply Department, which

issued Ration Card after detailed verification, was a very strong conclusion against the appellant/plaintiff, and which public record showed the possession on the part of the property by respondent No.1/defendant No.1 on 23.12.1991 i.e. prior to 3.3.1992, when the appellant/plaintiff claimed to have purchased the suit property.

Further, those tenants who were still available deposed in favour of respondent No.1/defendant No.1 inasmuch as the other tenants had left the property. The trial Court has also rightly held that in the absence of revenue record it cannot be known if the property is situated in Khasra No. 393/264 as claimed by the appellant/plaintiff or Khasra No. 396/264 as claimed by respondent No.1/defendant No.1.

7. A civil case is decided on balance of probabilities. The balance of probabilities is arrived at after weighing the respective evidence which is led by both the parties. In the present case, considering the preponderance of probabilities, the trial Court has rightly held that appellant/plaintiff failed to prove his ownership of the suit property and of taking possession of the suit property on 3.3.1992.

8. Learned counsel for the appellant sought to take me through certain un-exhibited documents of the trial Court, however, admittedly, those documents have not been proved in accordance with law, hence such documents are not

evidence in this case and I, therefore, cannot look into the same. In any case, the clinching evidence of the public authority, being the Department which issued ration card, in my opinion weighs strongly against the appellant/plaintiff, and who did not even bother to summon the revenue records.

9. In view of the above, I do not find any merit in the appeal, and the same is accordingly dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

VALMIKI J. MEHTA, J.

JANUARY 02, 2012

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