

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

+ **RFA No.285/2004**

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16th March, 2012

SATNAM SINGH & ORS. Appellants

Through: Mr. V.P.Rana with Mr. Amit Rana &
Mr. Pradip Malik, Advs.

versus

SANT SINGH Respondent

Through: Mr. Rajesh Kumar Luthra, Adv.

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 12.3.2004 decreeing the suit of the respondent/plaintiff for recovery of damages on account of illegal occupation by the appellants/defendants of the suit property being C-150, Maya Puri, Phase-II, New Delhi.

2. Before I refer to the facts of the present case it is necessary to be noted that admittedly the appellants/defendants led no evidence in the Trial Court because a statement was made that no evidence is required to be led by the appellants/defendants. Not only no evidence was led on behalf of the appellants/defendants, the appellants/defendants did not even

cross examine the witnesses of the respondent/plaintiff.

3. The facts of the case are that the subject suit for recovery of damages of ₹4,39,600/- was filed by the respondent/plaintiff stating that he was the owner of the suit property no. C-150, Maya Puri, Phase-II, New Delhi. It was pleaded that there was a partnership between the parties, and as per the partnership deed and the dissolution deed the respondent/plaintiff had become the owner of the suit property. The partnership firm was dissolved on 1.4.1972 and as per Clause 6 of the dissolution deed the suit property had fallen to the shares of the respondent/plaintiff and one Sh.Dharamvir Singh. The appellants/defendants are alleged to have broken open the locks of the suit property, i.e. Hall No.2 measuring 2750 square feet on 19.5.2000 and had taken unauthorized possession of the same. The respondent/plaintiff sent a legal notice dated 11.7.2000 and a reminder dated 19.3.2001 calling upon the appellants/defendants to pay damages at ₹33,000/- per month with interest, and on failure of the appellants/defendants to pay the amount, the subject suit was filed.

4. The appellants/defendants contested the suit by filing the written statement. It was pleaded that the defendant no.1 is the co-owner of the suit property and the lease deed of the suit property was in the favour of four partners , i.e. Sardar Sant Singh (plaintiff), Dharamvir Singh, Madan

Pal Singh and Satnam Singh (defendant no.1). The claim for damages was hence denied.

5. After the pleadings were completed, the Trial Court framed the following issues:-

- “(1) Whether the plaintiff is the sole owner of the suit property as alleged by him? OPP
- (2) Whether the plaintiff is entitled to damages as claimed by him, if so, at what rate and to what amount ? OPP
- (3) Relief.”

6. The only relevant issue before the Trial Court, and before this Court, is as to whether the respondent/plaintiff is the owner of the suit property.

7. The respondent/plaintiff filed and proved on record the partnership deed as Ex.PW1/1. The partnership was dissolved on 1.4.1972. The dissolution deed was filed and proved on record as Ex.PW1/2. It was deposed that the appellants/defendants had stolen this original document from the respondent's/plaintiff's premises and with respect to which a report had been lodged with the police on 18.11.1988, which has been proved as Ex.PW1/8. Clause 6 of the dissolution deed showed ownership of respondent/plaintiff, and that appellants/defendants had no claim in this property. After dissolution of first partnership concern, another partnership was entered into between the plaintiff and his sons-Kulwant

Singh, Manmohan, Dharamvir Singh. Copy of this partnership concern was proved on record as Ex.PW1/6. This partnership was dissolved on 30.3.1974 and copy of which dissolution deed has been proved on record as Ex.PW1/7 and the relevant assessment order of the Income Tax Authority was proved as Ex.PW1/9. The Trial Court has held in favour of the respondent/plaintiff by giving the necessary findings and conclusions in paras 12 to 14 of the impugned judgment and decree which read as under:-

“12. In order to prove that firm stood dissolved, plaintiff has placed on record, Photostat copy of the dissolution deed Ex. PW1/2. It is Photostat copy which purports to have been signed by the plaintiff and defendant No.1 apart from other partners namely Dharamvir Singh and Madan Pal Singh. The question is whether this document can be read in evidence? In the written submissions filed on behalf of defendant No.1, it has been argued that defendant no. 1 had objected to proof of documents and since same has to been proved in accordance with law, it cannot be read in evidence.

13. U/s 61 of Indian Evidence Act (hereinafter referred to as Act), contents of document can be proved by primary or secondary evidence. The original document or where document is executed in several parts, each part of the document, is called primary evidence. But U/s 63 of Act, copies made from original by mechanical process which ensures the accuracy is called secondary evidence. U/s 65 of the Act, secondary evidence of the document can be led by a person if he proves that document is out of his reach, or original has been lost or destroyed or original is shown or appears to be in possession and power of the person against whom it is sought to be proved. In view of aforesaid provisions before plaintiff could be allowed to prove the document by way of secondary evidence, he will have to prove the factual premises that either the original documents is in possession or power of the other part or same has been lost or destroyed. In the present case, case of the plaintiff is that defendant No.1 had stolen his original documents. This fact has been stated by him in his affidavit filed in evidence. This witness has not been cross examine by defendant no.1. It is important to note that even when adjournment was declined to the defendant and subsequently his counsel appeared in the court, he did not move any application that he intended to cross

examine the plaintiff. Rather he made a statement that he did not want to lead evidence in defence. It is well settled law and principle of evidence that if adversary deposed certain facts against a party, it is under legal obligation to controvert or challenge the facts so deposed against him by way of suggestion or otherwise. In case he fails to cross examine the witness or to put counter version to the witness, presumption would be that facts deposed by the adversary are admitted by the party. If any authority on this proposition of law is required, then *State v Ram Avtar* (17) 1980 DLT 231 can be relied upon. Thus it clearly stand proved on record that original of dissolution deed Ex.PW1/2 had been stolen by defendant no.1 from the possession of plaintiff along with other documents mentioned by the plaintiff in his police complaint Ex.PW1/8. In view of reasons given above, I am of the view that plaintiff has been able to la the factual premises to prove the dissolution deed by secondary evidence.

14. I, therefore, come to the conclusion that plaintiff has also proved the dissolution deed. Defendnat has not disputed that he was partner along with plaintiff and Dharamvir Singh and Madan Pal Singh his brothers in the said firm. It also stands proved on record that said partnership firm stood dissolved vide dissolution deed Ex.PW1/2. What Ex.PW1/2 incorporates in para 6 is that it was settled between the parties that property No.C-160 is that it was settled between the parties that property No. C-160, Mayapuri, Phase II, New Delhi (suit property) which was purchased in the name of partnership firm and construction raised thereon by the funds of the firm, shall be owned by party no.1 and party no.2 (plaintiff herein and Dharamvir Singh) and party no.3 (defendant No.1 Satnam Singh) and party no. 4 (Madan Pal Singh) will have no claim in respect to this property. Plaintiff has also proved on record another dissolution deed of the partnership firm which he had entered into with Dharamvir Sigh and Kulwant Singh, Manmohan Singh. According to this dissolution deed also, it is mentioned that firm in the name of Sardar Plastic Industries in C-150, Mayapuri Phase II, New Delhi stood dissolved by virtue of Ex.PW1/7. All the assets and liabilities of the firm were taken by party no. 1 and 2. For the same reasons, I am of the view that this document is also admissible in evidence and has been properly proved. The third document is copy of the partnership deed Ex.PW1/1. This partnership was entered into between the plaintiff and defendant no.1 and Dharamvir Singh and Madan Pal Singh. According to this document, it was agreed between the parties that property acquired by the partnership shall be in the name of partnership firm but plaintiff Sant Singh and Dharamvir Singh shall be the exclusive owner of the same and Satnam Singh (defendant no.1) and Madan Pal Singh shall have no concern or connection

with the same. For the same reasons as given above, this document also stands proved on record in accordance with law. It is, therefore, clear that on the basis of evidence or record it stands proved that property was acquired in the name of the partnership concern but it was agreed between the parties that plaintiff along with DharamvirSingh shall be exclusive owner thereof. On the basis of dissolution deed, it also stands on record that plaintiff along with Dharamvir Singh acquired exclusive right in the property in dispute and that defendants have forcibly occupied the portion of the suit property as shown in the site plan. It, therefore, clearly stand proved on record that though plaintiff is not the sole owner of the suit property but he is joint owner thereof along with one Dharamvir Singh. In other words, it stands proved on record that he is joint owner in the suit property but to my mind a joint owner is competent to file suit for recovery of damages against the persons who have illegally occupied the same. This issue is accordingly decided in favour of the plaintiff and against the defendants.” (underlining added).

8. I completely agree with the findings and conclusions of the

Trial Court inasmuch as the appellants/defendants were playing clever by half by not filing the original dissolution deed, Ex.PW1/2, which was stated on oath to be with the defendant no.1. Neither the respondent/plaintiff was cross-examined on this aspect of the matter, and nor did the appellants/defendants lead any evidence to the contrary. Once there is a statement made on oath and a ground is laid out for leading secondary evidence, the Trial Court was justified in considering the secondary evidence being the photocopy of the dissolution deed. In any case, surely, if the dissolution deed filed and relied upon by the respondent/plaintiff was not the dissolution deed, the appellants/defendants would have, in fact, filed what was the original dissolution deed, but admittedly, no dissolution deed was filed on behalf of the appellants/defendants. It is undisputed that

as per Clause 6 of the dissolution deed, the suit property bearing No. C-150, Maya Puri, Phase-II, New Delhi, though which was purchased in the name of the partnership firm, was to be owned by the plaintiff-Sh.Sant Singh alongwith Sh. Dharamvir Singh and the other two partners namely, Satnam Singh (defendant no.1) and Madan Pal Singh had no claim in the suit property. Since admittedly, the appellants/defendants were in illegal possession, the Trial Court has granted mesne profits/damages as per the evidence led at ₹12/- per square feet per month. The relevant observations of the Trial Court in this regard are contained in para 17 and 18 of the impugned judgment which read as under:-

“17. In the affidavit filed by the plaintiff in para 10, it is stated that defendant no.1 along with other defendants illegally and unauthorisedly trespassed in the portion shown in site plan Ex.PW1/12 attached with plaint. He has also proved photograph ex.PW1/13. There is no cross-examination on these points by defendant no.1 who failed to cross examine the plaintiff. Therefore the testimony of the plaintiff has remained unimpeached. Other defendants were not represented by counsel who did not appear and proceedings were conducted in their absence which are in the nature of ex-arte proceedings. No application has been moved on behalf of defendant no.1 or on behalf of other defendants to recall PW-1 for cross-examination and the testimony of the plaintiff has remained unchallenged, I am of the view that plaintiff has been able to prove that defendants unauthorisedly occupied the portion of the premises in question as shown in the site plan Ex.PW1/2 on 19.5.2000, therefore, they are unauthorized occupant liable to pay damages.

18. No arguments has been advanced either as regards the illegal occupation of the premises by the defendants or quantum of damages as claimed by the plaintiff. Premises in question is situated in Maya Puri Industrial Area, total area in possession of the defendants is stated to be 2750 sq. feet. I am therefore of the view that total damages as claimed by the plaintiff @ ₹12 per sq. feet per

month is neither excessive, nor arbitrary but reasonable. Accordingly, I am of the view that plaintiff is entitled to recover damages @ ₹12 per sq. feet which comes to ₹33,000/- per month in respect of the portion of the premises in possession of the defendants from 19.5.2000 till filing of the suit which comes to ₹3,46,500/-. This issue is accordingly decided in favour of plaintiff and against the defendant.”(underlining added).

9. Since as already stated above, the appellants/defendants did not cross examine the respondent/plaintiff and also did not lead their evidence, the Trial Court was justified in accepting the evidence led on behalf of the respondent/plaintiff on the aspect of damages also.

10. Learned counsel for the appellants/defendants argued that it was not mentioned in the plaint that the original dissolution deed was stolen, and therefore, no evidence could be led by the respondent/plaintiff to prove that the original dissolution deed was stolen by the appellant no.1/defendant no.1. In my opinion, this argument is misconceived because a pleading has to contain averment of a material fact, i.e. existence of dissolution and a dissolution deed evidencing the same, but there is no requirement of law of pleading as to the original being in possession of the defendant no.1 had to be stated, and which is not a material ingredient of a cause of action qua the suit filed. Evidence has not to be pleaded in the plaint and nor the basis for proving a fact by secondary evidence. In any case, the argument now raised is only an argument of convenience, inasmuch as, if the appellant no.1 was really not in a possession of the

dissolution deed he ought to have had the courage to step into the witness box and ought to have subjected himself to cross-examination, and which admittedly was not done.

11. A civil case is decided on balance of probabilities. Once the appellants/defendants did not lead any evidence and did not cross-examine the witness of the respondent/plaintiff, the case of the respondent/plaintiff was therefore rightly believed. As already stated above, if a person wishes to prove his case, such as the appellants/defendants, he ought to have stepped into the witness box and should have been ready to be subjected to the test of cross-examination, and which was not done.

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

13. The amount deposited in this Court by the appellants/defendants, alongwith accrued interest if any, be released to the present respondents, who are legal heirs of the original plaintiff/respondent in equal shares.

VALMIKI J. MEHTA, J

MARCH 16, 2012
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