

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

+ **RFA No.101/2008**

% **16th January, 2012**

SMT. VIMLA GAUTAM & ORS. Appellants
Through: Mr. Sanjay Rathi, Advocate.

versus

SMT. MOHINI JAIN & ANR. Respondents
Through: Mr. N.S. Dalal, Advocate with Mr.
Devesh Pratap Singh, Advocate.

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

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal (RFA) under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 27.10.2007 decreeing the suit of the respondents/plaintiffs for possession and mesne profits with respect to the suit property bearing No.F-274, Abadi of Janta Garden, Pandav Nagar, Patparganj, Delhi admeasuring 200 sq. yds.

2. The facts of the case are that the respondents/plaintiffs claimed to be owners of the suit property inasmuch as the suit property was said to belong to their mother-Smt. Indira Kumari Jain who died on 2.11.1996. Smt.

Indira Kumari Jain is said to have executed a Will dated 9.4.1991 with respect to the suit property in favour of the respondents/plaintiffs-daughters. Smt. Indira Kumari Jain is said to have purchased rights in the suit property by means of usual documents being registered power of attorney dated 17.4.1986; Ex.PW1/3, a receipt for a sum of ₹ 15,000/-; Ex.PW1/4, an agreement to sell dated 17.4.1986; Ex.PW1/5 and an affidavit dated 17.4.1986; Ex.PW1/6. Sh. Birender Kumar Jain from whom Smt. Indira Kumari Jain, mother of the respondents/plaintiffs purchased the suit property is said to have purchased the property by means of a registered sale deed dated 11.7.1966; Ex.PW1/2 from one Smt. Raj Kumari Bhatnagar. Smt. Raj Kumari Bhatnagar had purchased the suit property from Delhi Housing Company vide registered sale deed dated 20.8.1959, Ex.PW1/1. The respondents/plaintiffs employed a Chowkidar, namely, Dildar Hussain alias Chunnu to look after the suit plot who was also residing in the suit plot alongwith his family members. This Chowkidar in breach of trust made some forged documents such as the power of attorney in collusion with the defendants and thereafter on 9.3.1994 under the power of attorney first executed certain documents and thereafter gave possession of the land to the defendants. An injunction suit therefore came to be filed by Smt. Indira Kumari Jain seeking permanent injunction against the defendants and which suit was filed on or around 4.8.1994. In this suit, Smt. Indira Kumari Jain

made a statement through her Advocate that defendants will not be dispossessed without due process of law and therefore the suit for injunction was withdrawn on 8.4.1999 with liberty sought from the Court to claim the relief sought in the said suit, in the present suit for possession and mesne profits which was already filed on behalf of respondents/plaintiffs. The respondents/plaintiffs also prayed for mesne profits in the suit, and which relief of mesne profits has been granted alongwith the relief of possession by the impugned judgment and decree.

3. The appellants were the defendants in the suit and who contested the suit firstly on the ground that they were owners of the suit property by means of the documents executed in their favour by one Sh. Shafiq Raja. The documents which were sought to have been executed in favour of the defendants were agreement to sell dated 9.3.1994; Ex.DW2/1, general power of attorney dated 9.3.1994; Ex.DW2/2, receipt dated 9.3.1994 for a sum of ₹ 3,80,000/-; Ex.DW2/3 and an affidavit, Ex.DW2/4. The appellants/defendants also claimed that the subject suit was barred by provision of Order 2 Rule 2 CPC. As already stated that disbelieving the defence, suit was decreed.

4. Before this Court, learned counsel for the appellants/defendants has argued two basic points:-

(i) The suit was barred by provision of Order 2 Rule 2 CPC; and

(ii) The appellants/defendants were owners of the property by means of documentation dated 9.3.1994, Ex.DW2/1 to Ex.DW2/4, and therefore the suit was liable to fail.

5. So far as the issue with respect to the subject suit being barred by provision of Order 2 Rule 2 CPC, the same was an additional issue which was disposed of by the trial Court in paras 25 and 26 of the impugned judgment by holding that the suit was not barred under Order 2 Rule 2 CPC. The relevant observations, of the trial Court in this regard, read as under:-

“After giving due thoughts to the rival submissions of the counsels for the parties and perusing the entire relevant material placed in the file including the authorities cited by them, I have come to the conclusion that the present suit is not hit by the provisions of Order 2 R 2 CPC as in the case in hand admittedly, the previous suit was instituted during the pendency of the first suit and the filing of the second suit is not barred under any provision of law. The present suit was filed in the Hon’ble High Court of Delhi during the pendency of the previous suit where no relief of Permanent Injunction, as claimed in the previous, was claimed. The matter came up before the Hon’ble High Court of Delhi on 22.03.1999 and it did not order for registration of the suit, rater, it called upon the plaintiff to file the copy of the plaint of the previous suit. The matter was adjourned to 12.04.1999. Before 12.04.1999, an application was filed for withdrawal of the suit with liberty to seek the relief claimed in the first suit in the subsequent suit. The plaintiffs were allowed to withdraw the suit with liberty to claim the relief in the suit filed before the Hon’ble High Court of Delhi. When the matter came up before the Hon’ble High Court of Delhi on 12.04.1999 it was informed to the court that the previous suit has been withdrawn with liberty to get the relief claimed in that suit in the present suit and it was only thereafter the direction for the registration of the plaint as suit was issued. The proposition raised by Ld. Counsel for defendant that the suit is deemed to have been instituted on the date when the plaint is presented is not correct as for the purpose of limitation Act a suit is deemed to have been instituted on that day

when the plaint is presented otherwise the suit is deemed to be filed when the orders are passed for its registration. In this regard a reliance can be placed upon the judgment reported as AIR 1986 Bombay 353, where in para 4 it has been held that:-

“The code itself therefore envisages two stages-first of the presentation of the plaint and the next of the admission of the plaint. The suit is not admitted to the register of the suits and a number given to it merely on the presentation of the suit. After the presentation the plaint is scrutinized. If there are any defects in the same, the plaintiff is required to remove them. The removal of defects is a matter of procedure. It is only after the defects are removed then it becomes eligible for an entry and a number in the register of suits. One of the defects can be the absence of leave of the court to institute the suit where it is necessary including leave under Cl.12 of the Letters Patent. So long therefore as the plaint is not admitted and entered in the register of suits all defects including that of the absence of leave under the said clause can be removed without returning the plaint. There is no question of returning the plaint which is not admitted. It simply remains under objection till it is admitted.”

In **Ammini Kutty and others Vs. George Abraham** reported as **AIR 1987 Kerala 248**, it has been held in para 8 that, *“it is well known that plaints are drafted by counsel; and so long as infallibility is not a universal virtue, a mistake committed by counsel should not be the undoing of the client in every case. Where the court is satisfied that a bona fide error is committed, that high stakes are involved, and that it would be unjust on the facts and circumstances of the case to allow the defendant to take advantage of such an error, it must have the power to do what is just.”*

Further in para 9 of the said judgment, it has been held that, *“The last contention is that the Rule provides for grant of permission to withdraw a suit, only when a fresh suit is to be instituted, and not for grant of permission after the institution of such a second suit. The purpose and object of the Rule has already been considered; and if the court is competent to relieve a plaintiff of the adverse consequences of mistakes committed by him in instituting or proceeding with a suit, it is not really material whether the permission is granted before or after*

the institution of a fresh suit. Even if the institution of the second suit before obtaining of permission to withdraw the first is not proper, that can at best only be an irregularity, which should be considered as cured at least from the time permission is obtained.”

In **AIR 1998 Andhra Pradesh 414** titled as **M.A. Faiz Khan Vs. Municipal Corporation of Hyderabad** it was held:-

“The procedural rigor cannot be allowed to come in the way of substantive justice. Filing of the second suit without actually obtaining permission to withdraw the first suit should only be treated as a procedural irregularity, which is curable. The permission to withdraw the first suit is only to file fresh suit and when such permission is granted, the suit already instituted should not fail. The permission takes away the bar of res judicata. Hence the second suit should be held as maintainable.”

In the light of above, I have come to the considered opinion that the suit of the plaintiff is not hit by the provisions of Order II R 2 of the Code of Civil Procedure, accordingly, issue stands decided against the defendants and in favour of plaintiffs.”

6. The object of Order 2 Rule 2 CPC is that there cannot be one proceeding after another with respect to the same cause of action and a plaintiff must claim all reliefs on the basis of one cause of action in the first suit which is filed. If however the earlier suit is disposed of and thereafter a subsequent suit is filed, the subsequent suit which claims reliefs which are based on the same cause of action which was the subject matter of the earlier suit, then, the said second suit would be barred by provision of Order 2 Rule 2 CPC. Therefore the spirit of Order 2 Rule 2 CPC is to prevent commencement of one legal proceeding after an earlier legal proceeding has come to an end, meaning thereby if a subsequent suit is filed during the

pendency of the earlier suit and the earlier suit is withdrawn with liberty to seek the relief claimed in the first suit in the second suit, and which liberty when granted, in substance, results in consolidation of two suits i.e. the earlier suit and the later suit. The effect therefore is that it is only one suit which is tried i.e. the later suit, as the relief claimed in the earlier suit gets merged in the second suit as the earlier suit is withdrawn with liberty to seek the relief in the subsequent suit. It is also relevant to note that the appellants against whom the suit was filed, and which suit was withdrawn as per the statement of the counsel for the respondents/plaintiffs not to dis-possess the appellants/defendants without due process of law, raised no objection when the earlier suit was being withdrawn with liberty to claim the relief claimed, in the second suit which was already filed. Considering all these aspects, I am of the opinion that the trial Court has rightly held that the present suit i.e. the subject suit was not barred by provision of Order 2 Rule 2 CPC.

7. So far as the issue of ownership is concerned, the present is a stark case as to how in metropolitan cities people in whom trust is reposed commit criminal breach of trust and misappropriate an immovable property. The appellants/defendants except proving the documents, Ex. DW2/1 to Ex.DW2/4, have not been able to prove the complete chain of title documents from the original owner M/s. Delhi Housing Company. Merely because a set of documents are executed in favour of the appellants/defendants cannot make

them the owners of the property, unless the complete chain of title documents has been filed and proved on record, and admittedly and as stated above, the complete chain of documents have not been proved on record by the appellants/defendants. The respondents/plaintiffs, on the other hand, have proved the complete chain of documents i.e. the original sale deed from Delhi Housing Company to Smt. Raj Kumari Bhatnagar as PW1/1, the registered sale deed by Smt. Raj Kumari Bhatnagar in favour of Sh. Birender Kumar Jain as Ex.PW1/2, and then the documentation in the year 1986 in favour of Smt. Indira Kumari Jain, mother of plaintiffs being documents Ex.PW1/3 to Ex.PW1/6. Sh. Birender Kumar Jain appeared as a witness, PW8 and deposed in favour of respondents/plaintiffs.

8. Learned counsel for the appellants/defendants sought to take advantage of the fact that the buyer from Smt. Raj Kumari Bhatnagar in the sale deed, Ex.PW1/2 is written as Sh. Virender Kumar Jain son of Lala Paras Das Jain, however the documentation by which the mother of the respondents/plaintiffs-Smt. Indira Kumari Jain purchased the property state the seller as Sh. Birender Kumar Jain, son of P.D. Goyal. In my opinion, this argument which is raised on behalf of the appellants besides being wholly misconceived is malafide and an endeavour to make a mountain out of a molehill. Firstly, in certain castes persons have a tendency within the same family to write their surnames either as Goyal or Gupta or Bansal, and which

surnames are used even with respect to real brothers in Delhi. Secondly the sale deed is executed by Smt. Raj Kumari Bhatnagar in favour of Sh. Virender Kumar Jain and which Virender Kumar Jain (who is none other than Birender Kumar Jain) has stepped in the witness box as PW-8. Merely because the parentage of Sh. Birender Kumar Jain is written as Lala Paras Das Goyal in the documents executed by Birender Kumar Jain and the parentage of Birender Kumar Jain in the documents executed by Smt. Raj Kumari Bhatnagar is written as Sh. Paras Das Jain cannot take the appellants any further as the appellants never took up such a stand in the trial Court and also did not put any question in the cross-examination of any of the witnesses of the respondents/plaintiffs that Sh. Birender Kumar Jain who executed the documentation on 17.4.1986 is not the person in whose favour the sale deed was executed by Sh. Raj Kumari Bhatnagar. I may note that the initial P. D. in P.D. Goyal can possibly be Paras Das and possibly for this reason this issue was never raised on behalf of the appellants/defendants in the trial Court. The trial Court, after discussing exhaustively various documentary evidence as also the documentation of witnesses of both the parties with respect to ownership of the respondents/plaintiffs has held as under:-

“ISSUE NO.2:-

If issue no.1 is decided in the affirmative, whether the plaintiffs are entitled to a decree of possession in respect of suit land?

OPP.

The onus to prove the issues have been placed upon the plaintiff. In

this case, the plaintiffs have based their title not on any Sale deed but on execution of the usual documents such as Agreement to Sell, General Power of Attorney etc. In order to prove the title, the plaintiffs have proved on record the following documents:-

Ex.PW1/1: Certified copy of the Registered Sale Deed dated 20.08.1959 between Delhi Housing Company and Smt. Rajkumari Bhatnagar.

Ex.PW1/2: Certified copy of the Registered Sale Deed dated 11.07.1966 whereby Smt. Rajkumari Bhatnagar sold the said plot of land to Sh. Birender Kumar Jain.

Ex.PW1/3: Certified copy of a Registered Power of Attorney dated 17.04.1986 executed by Sh. Birender Kumar Jain in favour of Smt. Indira Kumari Jain, whereby all the rights in respect of the said plot of land were transferred by Sh. Birender Kumar Jain in favour of Smt. Indira Kumari Jain.

Ex.PW1/4: Certified copy of the receipt of a sum of ` 15,000/- received by Sh. Birender Kumar Jain in advance from Smt. Indira Kumar in respect of the said plot of land.

Ex.PW1/5: Agreement to Sell dated 17.04.1986 executed by Sh. Birender Kumar Jain in favour of Smt. Indira Kumari Jain. Under Agreement to Sell the consideration has been mentioned as ` 15,000/- . The whole consideration was paid to him vide receipt Ex.PW1/4. In clause I of the said Sale Deed, it is mentioned that “the actual physical vacant possession of the said property has been delivered to party no.2 by the party no.1 on the spot” Smt. Indira Kumari Jain, thus came into possession of the property in part performance of the Agreement to Sell dated 17.04.1986.

Ex.PW1/6: Affidavit signed by Sh. Birender Kumar Jain on 17.04.1986 wherein he has stated that the ownership rights with possession of the plot no.274 in Block-F, measuring 200 sq. yds. situated in the area of Vill. Gharonda Neem Ka Bangar alias Patparganj in the abadi of Pandav Nagar, Illaqa Shahdara, Delhi with one room with boundary wall has been sold to Smt. Indira Kumari Jain.

Accordingly to Ld. counsel for plaintiffs, from these documents it has been established that Sh. Birender Kumar Jain was the owner of the said property and that he had agreed to sell the said property to Smt. Indira Kumar Jain and had placed Smt. Indira Kumar Jain in possession of the said property in part performance of the Agreement to Sell. Sh. Birender Kumar Jain also appeared as a witness and testified that he had entered into the transaction with Smt. Indira

Kumari Jain. It is not disputed that Smt. Indira Kumar Jain died during the pendency of the first suit after leaving behind a Will dated 09.04.1991. The said Will has been exhibited as Ex.PW1/7 by its attesting witness Sh. Vidya Bhushan. Even otherwise, the plaintiffs are the natural heirs of the deceased being her daughters.

On the other hand according to Ld. counsel for the defendants, in the absence of any registered documents like Sale Deed, the plaintiffs are not entitled for relief of declaration as claimed in the suit.

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Power of Attorney sales in Delhi is a common mode of sale of immovable properties to get over the Legislative restriction of transfer of properties.

In the case in hand no Sale Deed was executed, however, the property was transferred by execution of the General Power of Attorney, Special Power of Attorney, Agreement to Sell etc. The concept of Power of Attorney sales have been recognized as mode of transaction. An interest has been created in favour of the purchaser. In **117 (2005) DELHI LAW TIMES-506** it was held that, “*Even if the plaintiffs have not become the owners as provided by execution of the Sale Deed, they have interest in the property and the plaintiffs are entitled to the possession of the property being as they were placed in possession of the property U/s 53A of the Specific Relief Act.*”

The issue no.1 should be answered in favour of the plaintiffs alleging that by virtue of the execution of the aforesaid documents, Smt. Indira Kumari Jain had interest in the property in dispute and that on her death the plaintiffs have acquired interest in the property and that the plaintiffs have possessory title over the property and are entitled to the possession of the property and as such both the issues i.e. issue no.1 & 2 are liable to be decided in favour of the plaintiffs and against the defendants and they stand decided accordingly.”

9. I am aware of the recent judgment of the Supreme Court in the case of ***Suraj Lamp Industries Pvt. Ltd. Vs. State of Haryana and Anr. 183 (2011) DLT 1(SC)*** which holds that these type of documentation executed in favour of Indira Kumari Jain do not confer ‘ownership’ rights in the property, however, a close reading of the judgment shows that in paras 12, 13 & 16 it is

mentioned that rights which are created in terms of Section 53A of the Transfer of Property Act, 1882 and rights which are created by Section 202 of the Contract Act, 1872 are protected. Therefore, of course, specific ownership rights are not created by means of documents being the agreement to sell, general power of attorney etc as these are not 'sales' however on the basis of such documents rights to the extent created by Section 53A of Transfer of Property Act, 1882 and Section 202 of the Indian Contract Act, 1872 are preserved. Therefore, complete ownership rights may not vest with the mother of the respondents/plaintiffs-Smt. Indira Kumari Jain, however, rights under Section 53A of Transfer of Property Act, 1882 and Section 202 of Contract Act, 1872 would surely have vested. Such rights after 12 years transform into ownership rights by law of prescription under Section 27 of the Limitation Act, 1963. Further, as already stated above, appellants have failed to produce the complete chain of title documents in their favour, besides the fact that even the witness from whom the appellants/defendants is said to have purchased the property did not step into the witness box, namely Sh. Shafiq Raja- a person who used to ply rickshaws.

10. A civil case is decided on balance of probabilities. A civil court after complete evidence is led and which is put in a melting pot decides the final picture which has to emerge. The final picture which has emerged in this case in view of the complete chain of title documents in

favour of Smt. Indira Kumari Jain (mother of the respondents/plaintiffs), taken alongwith the fact that the appellants/defendants failed to prove the chain of title deeds, shows that respondents/plaintiffs have duly discharged onus of proof of their ownership including of their mother-Smt. Indira Kumari Jain. One cannot permit such criminal breach of trust, as found in the present case, by persons who are put into possession of the property to take care of the property, but who misappropriate the property by creating forged and fabricated documents.

11. The Supreme Court in the recent judgment of *Ramrameshwari Devi and Others v. Nirmala Devi and Others (2011) 8 SCC 249* has stated that it is high time that actual and realistic costs be imposed. The Supreme Court has said that dishonesty in litigation ought to be dealt with by imposition of actual costs. Earlier a Division Bench of three Judges in the case of *Salem Advocate Bar Association Vs. Union of India (2005)6 SCC 344* has held in para 37 of the said judgment that it is high time that actual costs be awarded. Some of the relevant paras of the judgment in the case of *Ramrameshwari Devi (supra)* read as under:-

“43. We have carefully examined the written submissions of the learned Amicus Curiae and learned Counsel for the parties. We are clearly of the view that unless we ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and

frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases.

47. We have to dispel the common impression that a party by obtaining an injunction based on even false averments and forged documents will tire out the true owner and ultimately the true owner will have to give up to the wrongdoer his legitimate profit. It is also a matter of common experience that to achieve clandestine objects, false pleas are often taken and forged documents are filed indiscriminately in our courts because they have hardly any apprehension of being prosecuted for perjury by the courts or even pay heavy costs. In *Swaran Singh v. State of Punjab* MANU/SC/0320/2000 : (2000) 5 SCC 668 this Court was constrained to observe that perjury has become a way of life in our courts.

52. The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed? In our considered opinion the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials.

A. ...

B. ...

C. Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

.....

54. While imposing costs we have to take into consideration pragmatic realities and be realistic what the Defendants or the

Respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter affidavit, miscellaneous charges towards typing, photocopying, court fee etc.

55. The other factor which should not be forgotten while imposing costs is for how long the Defendants or Respondents were compelled to contest and defend the litigation in various courts. The Appellants in the instant case have harassed the Respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The Appellants have also wasted judicial time of the various courts for the last 40 years.

56. On consideration of totality of the facts and circumstances of this case, we do not find any infirmity in the well reasoned impugned order/judgment. These appeals are consequently dismissed with costs, which we quantify as Rs. 2,00,000/- (Rupees Two Lakhs only). We are imposing the costs not out of anguish but by following the fundamental principle that wrongdoers should not get benefit out of frivolous litigation.” (underlining added)

I am also empowered to impose costs, which may be actual costs, in terms of *Volume V* of the *Punjab High Court Rules and Orders (as applicable to Delhi) Chapter VI Part I Rule 15*. Considering the endeavour of the appellants in collusion with the Chowkidar of the property to misappropriate the property, I find that in the interest of justice and fair play actual costs be imposed.

I may also note at this stage that during the course of hearing I put it to the counsel for the appellants, as per the submission of the counsel

for the respondents, that the appellants can take time to vacate the suit property, and they will be exempted from paying the mesne profits which have been granted under the impugned judgment and decree, since possession of the suit property has already been taken in execution of the impugned judgment and decree, but the counsel for the appellants states that he has instructions to invite a judgment.

12. Accordingly, this appeal is dismissed with costs of ₹ 50,000/- and which I consider to be reasonable actual costs in the facts and circumstances of the present case. The amount deposited in this Court by the appellants be released to the respondents in appropriate satisfaction of the impugned judgment and decree. Trial Court record be sent back.

VALMIKI J. MEHTA, J

JANUARY 16, 2012
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