

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

+ **RFA No.468/2010**

% **24th May, 2012**

DEWAN CHAND BATRA & ANR. Appellants

Through: Mr. P.S.Bindra with
Mr. Ketan Madan, Advs.

VERSUS

HARISH TANDON Respondent

Through: Mr. J.K.Seth, Sr. Adv. with
Ms. Shalini Kapoor, Ms. Promil Seth Mago
& Ms. Kriti Arora, Advs.

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 filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 23.2.2010 decreeing the suit for possession and mesne profits filed by the respondent/plaintiff qua the half portion (front) of property being D-3, Green Park Extension, New Delhi (hereinafter referred as 'suit property').

2. The admitted facts of the case are that the suit property was owned by Sh. Rang Behari Lal Tandon. Sh. Rang Behari Lal Tandon had a real brother namely Sh. Ratan Chand Tandon. Sh. Ratan Chand Tandon had two sons namely Sh. Vijay Kumar Tandon/defendant no.1 and Sh. Harish Chand Tandon/respondent/plaintiff. Respondent/plaintiff-Sh.Harish Chand Tandon was given in adoption by his natural father-Sh. Ratan Chand Tandon to his brother-Sh. Rang Behari Lal Tandon. The wife of Sh.Ratan Chand Tandon is Smt. Kashmiri Devi Tandon and the wife of Sh. Rang Behari Lal Tandon is Smt. Kamla Devi Tandon. There is no dispute before me that Sh. Rang Behari Lal Tandon was the owner of the suit property and Sh. Harish Chand Tandon was adopted by Sh. Rang Behari Lal Tandon and Smt. Kamla Devi Tandon.

3. The subject suit for possession came to be filed by the respondent/plaintiff/Sh.Harish Chand Tandon claiming that the defendant no.1/Sh.Vijay Kumar Tandon, his natural brother, and after adoption his cousin brother, was allowed as a licensee to stay in the suit property alongwith his mother-Smt. Kashmiri Devi Tandon, and who was also the natural mother of the respondent/plaintiff-Harish Chand Tandon. It was pleaded that the defendant no.1/Sh.Vijay Kumar Tandon was allowed to stay in the suit property alongwith his mother inasmuch as the defendant

no.1 had to vacate the government flat allotted to him at Gol Market, New Delhi.

4. The appellants/defendant Nos.3 and 4 are the subsequent purchasers of the suit property from the defendant no.1/Sh.Vijay Kumar Tandon. In their written statement the plea of the defendant Nos.3 and 4 was that the entire property D-3 was actually owned jointly by Smt. Kamla Devi Tandon (wife of Sh. Rang Behari Lal Tandon) and Smt. Kashmiri Devi Tandon (wife of Sh. Ratan Chand Tandon) by virtue of a Will dated 23.1.1979 which is said to have been executed by Sh.Rang Behari Lal Tandon. It was pleaded that on account of this Will dated 23.1.1979 executed by Sh. Rang Behari Lal Tandon, Smt. Kashmiri Devi Tandon became half owner of the entire property i.e. the suit property. After the death of Smt. Kashmiri Devi Tandon her son the defendant no.1/Sh.Vijay Kumar Tandon is pleaded to have become owner of her half portion. These rights in the suit property were transferred by defendant No.1 to defendants no. 3 and 4 under an Agreement to Sell dated 11.6.1995 after receiving consideration. Defendant No.1 did not appear in the suit and was proceeded ex parte.

5. The only issue which is argued before this Court is as to whether Smt. Kashmiri Devi Tandon, wife of Sh. Ratan Chand Tandon and

the mother of Sh. Vijay Kumar Tandon/defendant no.1, was the owner of the suit property i.e. half of the property no. D-3, Green Park Extension, New Delhi pursuant to the Will dated 23.1.1979 of Sh. Rang Behari Lal Tandon or in terms of a subsequent document dated 3.11.1980 executed by the executor to the Will dated 23.1.1979 and said to have been signed by the respondent no.1/plaintiff-Sh.Harish Chand Tandon as also his adoptive mother-Smt. Kamla Devi Tandon, allegedly giving the suit property to Smt. Kashmiri Devi Tandon.

6. So far as the claiming of title to the suit property on the basis of the Will dated 23.1.1979 is concerned, trial Court disbelieved this stand inasmuch as neither the original Will dated 23.1.1979 was filed nor were any of the attesting witnesses to this Will examined to prove the due execution of this Will. Thus, in my opinion, no fault can be found with the finding and conclusion of the trial Court that the Will dated 23.1.1979 cannot be said to have been proved in the absence of original and in the absence of having proved the same through the attesting witnesses.

7. The only other issue which remains is as to whether the ownership of the suit property, being approximately half portion of the property being D-3, Green Park Extension New Delhi, came to be vested with Smt. Kashmiri Devi Tandon in terms of the document dated

3.11.1980. Firstly, I must note that this document has not been proved before the trial Court and hence no reliance can be placed on the same. When the respondent no.1/plaintiff-Sh.Harish Chand Tandon was confronted with this document, he denied the execution of this document. In the affidavit by way of evidence which was filed on behalf of the defendant no.3/appellant no.1, it is simply stated that this document dated 3.11.1980 be exhibited as Ex.DW1/2, however, there is no deposition as to identification of the signatures of the executants of this document namely the plaintiff/respondent no.1-Sh.Harish Chand Tandon and his adoptive mother-Smt. Kamla Devi Tandon. The minimum requirement before a document can be proved in terms of Section 47 of the Indian Evidence Act, 1872 is that it must be stated if the document is executed in presence of the person who is deposing or whether the witness is conversant with the signatures of the executants, or whether the witness has otherwise received correspondence of the executants under their signatures. None of these essential ingredients as required under Section 47 of the Indian Evidence Act, 1872 have been averred in the affidavit by way of evidence filed by appellant no.1/defendant no.3. In fact, the appellant no.1/defendant no.3 could not even have made this averment because he is not in any way related or connected to any of the original parties to the suit and he was

simply a purchaser claiming through the defendant no.1. Surprisingly, and without any reason, the appellants/defendants no.3 and 4 have chosen not to make the defendant no.1 as a party to the present appeal.

I therefore hold that this document which is referred to in the affidavit by way of evidence of the appellant no.1/defendant no.3 as Ex.DW1/2 cannot be said to have been proved on record.

8. Learned counsel for the appellants very strenuously argued that Smt. Kamla Devi Tandon should have stepped into the witness box to deny her signatures inasmuch as the document dated 3.11.1980 bears Smt. Kamla Devi Tandon's signatures, however, I do not find any provision in law which mandates that a person must step into the witness box merely because signatures are denied. Admittedly, denial of signatures have taken place through the pleadings, and which is in law sufficient, and if the appellants/defendant Nos.3 and 4 or the defendant no.1 wanted to establish that the signatures on the document dated 3.11.1980 were of Smt. Kamla Devi Tandon, then, they ought to have either summoned other admitted signatures of Smt. Kamla Devi Tandon or filed a handwriting expert's report to prove that the document dated 3.11.1980 bore the signatures of Smt. Kamla Devi Tandon. Admittedly, the appellants did not take any steps to get the signatures on the document dated 3.11.1980 proved to be of

Smt. Kamla Devi Tandon. In my opinion, in fact since this document dated 3.11.1980 bears the signatures of as many as four executants and three witnesses, at least one of the executants, or one of the witnesses could surely have been summoned, however, not a single of the four executants or even a single of the three witnesses were summoned to prove this document dated 3.11.1980. Of course, it was not at all difficult for the appellants to have summoned at least two of the executants and witnesses to the document, namely Smt. Kashmiri Devi Tandon and Sh. Vijay Kumar Tandon/defendant no.1, inasmuch as these persons would have surely deposed in favour of the appellants, however, appellants have failed to do the needful and consequently, this document dated 3.11.1980 is not proved.

Learned counsel for the appellants argues that the trial Court vide its order dated 3.9.2009 has wrongly dismissed an application filed under Section 73 of the Indian Evidence Act, 1872, (assuming this provision applies when it does not) and which application was filed to send document dated 3.11.1980 to CFSL, however, I do not find any error in the order dated 3.9.2009 inasmuch as appellants had complete opportunity during leading of the evidence to do the needful, however, they failed to get the signatures on the document dated 3.11.1980 proved to be those of Smt. Kamla Devi Tandon or the respondent no.1/plaintiff-Sh. Harish Chand

Tandon. Also, the least which the appellants could have done was to at least summon their own handwriting expert and file his report, and which would have given some help, though trial Court need not have attached too much weight to private expert's report, however, even this minimum requirement of leading evidence of a handwriting expert has not been complied with on behalf of the appellants. Since the appellants/defendants no. 3 and 4 failed to lead evidence when they were required to do so during trial to prove the document dated 3.11.1980, I refuse to exercise my discretionary power under Order 41 Rule 27 CPC to set the clock back almost by 14 odd years. The object of Order 41 Rule 27 CPC is not to allow a party to fill up lacuna in his case although he was not in any manner handicapped to do so during the trial.

9. In my opinion, there is another very important reason to doubt that the document dated 3.11.1980 was executed or that rights were created by the said document. This reason is that this document is of the year 1980, and if really the same was executed and rights under the same were created, then at the very least defendant no.1 or Smt. Kashmiri Devi Tandon ought to have applied for mutation of the property in the House Tax Record and would have also thereafter paid their share of house tax of the property i.e. 50% of the house tax. Counsel for the appellants on a

query put by the Court admits that neither the defendant no.1 nor Smt. Kashmiri Devi Tandon ever applied for mutation of the property till the disputes arose between the parties in around the year 1995, i.e. for a period of not less than 15 years. If the document dated 3.11.1980 was really executed, rights were created thereby, and the said document acted upon, surely, the minimum which would be expected if such document dated 3.11.1980 created rights in favour of Smt. Kashmiri Devi Tandon was that she would have applied for mutation and paid 50% of the house tax for the property. Admittedly, not only was mutation not applied for, no payment towards property taxes has also been made by Smt. Kashmiri Devi Tandon even after allegedly becoming owner of the suit property and which is approximately half of the property bearing no.D-3. Green Park Extension, New Delhi. I may further state that neither Smt. Kashmiri Devi Tandon nor the defendant no.1/Sh.Vijay Kumar Tandon even filed any Income Tax Returns to show ownership of the suit property in their name pursuant to the alleged document dated 3.11.1980.

10. I must also take on record the statement of the counsel for the respondent/plaintiff that the appellants were not living in the suit property and have kept it simply locked i.e. the appellants are speculating by this litigation.

11. A civil case is decided on balance of probabilities. Indubitably, the onus to prove alleged Will dated 23.11.1979 and the document dated 3.11.1980 was on the appellants, and which they have miserably failed to do. I may also state that the document dated 3.11.1980 is neither a partition deed nor a family settlement and once the Will dated 23.11.1979 itself was not proved, I fail to understand as to what would be the legal validity or effect to this so-called document dated 3.11.1980. Merely because two views are possible, an Appellate Court will not interfere in the findings of the Court below unless such findings are illegal or perverse. I do not find any illegality or perversity in the impugned judgment which calls for interference in this appeal.

12. In view of the above, appeal is therefore dismissed leaving the parties to bear their own costs.

13. Amount deposited in this Court by the appellants towards mesne profits decreed by the trial Court, be released to the respondent no.1/plaintiff-Sh.Harish Chand Tandon in appropriate satisfaction of the impugned judgment and decree.

VALMIKI J. MEHTA, J

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