

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

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Date of decision: 4th September, 2013

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RFA No.456/2004

SHRI BIND PRAKASH

.....Appellant

Through: Mr. Murari Choudhary, Adv.

Versus

SMT. SAVITRI DEVI & ORS.

.....Respondents

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This appeal impugns the common judgment and decree dated 8th January, 2004 of the Court of the Addl. District Judge, Delhi dismissing the Suit No.31/2002 filed by the appellant/plaintiff for redemption of mortgage as well as Suit No.30/2002 filed by the appellant/plaintiff for recovery of possession of immovable property and for damages.

2. Notice of the appeal was issued. The appeal was admitted for hearing on 27th May, 2008. None has been appearing for the respondents/defendants despite service since 3rd May, 2012. Vide order dated 31st July, 2013, on which date the counsel for the appellant/plaintiff also had not appeared, the appeal was directed to be listed in the cause list of this Court w.e.f. 1st

August, 2013 with the notation of “Notice of Default to the counsels for the parties”. The appeal is being so listed in the cause list of this Court since then. Though the counsel for the appellant/plaintiff has appeared but none appears for the respondents/defendants. It is not deemed necessary to await the respondents/defendants any further and the counsel for the appellant/plaintiff has been heard and the records perused.

3. Though the appellant/plaintiff ought to have filed two separate appeals against the judgments and decrees of dismissal of the two suits but since the said objection has not been taken for the last nine years since when this appeal is pending, it is now not deemed expedient to raise the same.

4. The appellant/plaintiff filed the suit No.30/2002 in or about January, 2000, for the relief of possession and damages against the respondent/defendant Shri Satbir only, pleading:-

- (i). that the appellant/plaintiff is the owner of property *ad measuring* 25 ft. x 40 ft. at B-Block Market, Nangloi, Delhi which is a site for Coal Depot, by purchase in the year 1970 from the original allottee Shri Wazir Chand vide affidavit dated 1st August, 1970 and General Power of Attorney (GPA), Agreement to Sell, affidavit, receipt all dated 31st August, 1992;

- (ii). that the appellant/plaintiff in the year 1986 let out a small shop measuring 9 ft. x 8 ft. on the eastern side of the property to the respondent/defendant Shri Satbir at a rent of Rs.600/- per month;
- (iii). that the respondent/defendant Shri Satbir, soon after letting, in September, 1986 itself, forcibly took possession of the entire property;
- (iv). that the respondent/defendant Shri Satbir however on 13th September, 1997 vacated the entire property and handed back possession to the appellant/plaintiff;
- (v). that the appellant/plaintiff on 6th October, 1997, learning that the respondent/defendant Shri Satbir was intending to sell/transfer the property, filed a suit for permanent injunction to restrain him from doing so;
- (vi). that during the pendency of the suit for permanent injunction the respondent/defendant Shri Satbir took forcible possession of the property on 18th November, 1997 and the father of the appellant/plaintiff under pressure of Police handed over keys of the suit premises to the respondent/defendant Shri Satbir and

since when respondent/defendant Shri Satbir was in possession of the property;

(vii). that a complaint, on which an FIR No.999/99 was ultimately registered, was lodged on 18th November, 1997 itself with PS-Nangloi;

(viii). that the suit for permanent injunction filed by the appellant/plaintiff against the respondent/defendant Shri Satbir was disposed of on 11th November, 1999 after recording the statement of the respondent/defendant Shri Satbir not to sell, alienate or part with possession of the suit property; and,

(ix). that the appellant/plaintiff as lawful owner was entitled to recover possession from the respondent/defendant Shri Satbir and was also entitled to *mesne* profits/damages for use and occupation at the rate of Rs.6,000/- per month;

5. The counsel for the appellant/plaintiff on enquiry states that the prosecution pursuant to FIR No.999/99 supra is still pending, at the stage of evidence of the accused.

6. The respondent/defendant Shri Satbir contested the suit for possession aforesaid and filed a written statement,

- (a). denying the ownership of the appellant/plaintiff of the suit property;
- (b). claiming to be in possession of the property on behalf of M/s Sharma Timber Store proprietor Smt. Savitri Devi, owner of the property; and pleading:
- (c). that the appellant/plaintiff had falsely pleaded that the respondent/defendant Shri Satbir had on 13th September, 1997 delivered back possession of the property to the appellant/plaintiff, to bring the suit for possession within time;
- (d) that in the earlier suit for permanent injunction the appellant/plaintiff had not pleaded that only one shop was let out to the respondent/defendant Shri Satbir and the respondent/defendant Shri Satbir had forcibly taken possession of the remaining property;
- (e). that the appellant/plaintiff in the suit earlier filed for permanent injunction had pleaded the respondent/defendant Shri Satbir to be a tenant in the property and hence the jurisdiction of the Civil Court was barred.

7. The appellant/plaintiff filed replication denying that M/s. Sharma Timber Store was the owner of the property and otherwise reiterating his claim.

8. Though the counsel for the appellant/plaintiff at this stage states that he is not challenging the judgment and decree of dismissal of Suit No.31/2002 for redemption of mortgage but since the judgment impugned in the appeal is common to the two suits it is deemed expedient to summarily notice the pleadings in Suit No.31/2002 also.

9. The Suit No.31/2002 was filed in or about January, 2001 i.e. after nearly one year of the institution of the suit for possession aforesaid, against Smt. Savitri Devi proprietor of M/s Sharma Timber Store and Shri Satbir, pleading:-

(A). that the appellant/plaintiff after purchase of the property in the year 1970 had mortgaged the same with the respondent Smt. Savitiri Devi on 26th July, 1979 and a Mortgage Deed (General Power of Attorney) on behalf of the appellant/plaintiff was signed by his father Shri Ram Sahai against receipt of Rs.9,000/-;

- (B). the mortgage was effected by handing over original receipt dated 7th December, 1978 issued by the DDA for Rs.262.50p towards rent of the suit property;
- (C). that the vacant peaceful physical possession of the property in lieu of mortgage was also handed over to the respondent/defendant Smt. Savitri Devi;
- (D). that the mortgagee Smt. Savitri Devi was during the mortgage entitled to profits of the property;
- (E). that the property so remained in possession of the mortgagee Smt. Savirti Devi till the year 1981 when the appellant/plaintiff took back the possession thereof as well as the custody of the receipt for Rs.262.50p deposited by way of equitable mortgage; and,
- (F). that in the year 1986 a shop in the property as aforesaid was let out to the respondent/defendant Shri Satbir and against whom the suit for possession as aforesaid had been filed.

10. Smt. Savitri Devi and Shri Satbir filed a joint written statement in the said suit for redemption of mortgage *inter alia* pleading:-

- (I). that Shri Wazir Chand from whom the appellant/plaintiff claimed to have purchased the property was not the owner thereof;
- (II). the allotment of the suit property was given by Slum & JJ Department of MCD on license basis to Shri Wazir Chand for running a Coal Depot with the condition that he will not transfer or part with possession of the same;
- (III). that the license in favour of Shri Wazir Chand was cancelled vide order dated 21st August, 2000 as Shri Wazir Chand had transferred the suit property in violation of the license terms;
- (IV). that the claims of the appellant/plaintiff, in the suit for permanent injunction, the suit for possession and in the suit for redemption of mortgage were contradictory; and,
- (V). that neither was the appellant/plaintiff competent to mortgage the property with the respondent/defendant Smt. Savitri Devi nor had so mortgaged the property.

11. The appellant/plaintiff filed replication but need is not felt to refer thereto.

12. On the pleadings aforesaid, the following issues were framed on 6th August, 2002 in Suit No.30/2002 for the relief of possession:-

- “1. Whether the other suit and suit No.30/2002 being suit for the same relief are not maintainable or one of the same should be withdrawn? OPD*
- 2. Whether the suit is time barred? OPD*
- 3. Whether the plaintiff is entitled to possession and damages as prayed for? OPP*
- 4. Whether the plaintiff is the owner of the suit property or had any right to mortgage the same? OPD*
- 5. Whether the plaintiff is entitled to damages, if so, at what rate and for what period? OPP*
- 6. Whether Smt. Savitri Devi is owner of the plot, if so, its effect? OPD*
- 7. Relief.”*

13. On the same day i.e. 6th August, 2002, the following issues were framed in the suit No.31/2002 for redemption of mortgage:-

- “1. Whether this suit and suit No.30/2002 being suit for the same relief are not maintainable or the one of the same should be withdrawn? OPD*
- 2. Whether the suit is time barred? OPD*
- 3. Whether the plaintiff is entitled to the relief of redemption as prayed for? OPP*
- 4. Whether the plaintiff is the owner of the suit property or had no right to mortgage the same? OPD*
- 5. Whether Smt. Savitri Devi is owner of the plot, if so, its effect? OPD*
- 6. Relief.”*

14. Consolidated evidence was recorded in the two suits.

15. The learned Addl. District Judge in the impugned judgment dismissing both the suits has held:-

- (a). that the suit for redemption of mortgage was misconceived as according to the appellant/plaintiff himself the mortgage had come to an end by the appellant/plaintiff being put back into possession of the property and being returned the receipt for Rs.262.50p handed over to respondent/defendant Smt. Savitri Devi by way of equitable mortgage;
- (b). that the appellant/plaintiff had not placed on record any document of ownership except one affidavit of the year 1970 and GPA and Agreement to Sell, executed by Shri Wazir Chand in the year 1992; however Shir Wazir Chand himself was only a licensee and could not have sold the property to anyone; that even if it were to be held that he could have sold his interest in the property, the same could not have been done without a registered instrument and in the absence of any registered document no transfer of rights in immovable property could take place;

- (c). that the documents executed by Shri Wazir Chand in favour of the appellant/plaintiff in the year 1992 had no value and appeared to have been procured by the appellant/plaintiff from Shri Wazir Chand only to create a ground to make a claim over the property the possession of which had already been parted away by Shri Ram Sahai father of the appellant/plaintiffs in the year 1979 itself;
- (d). that though Shri Ram Sahai father of the appellant/plaintiff appearing as PW2 stated that a registered Mortgage Deed was executed but neither any particulars thereof were given nor any such deed filed nor was there any plea to the said effect;
- (e). that the appellant/plaintiff though not the owner could have claimed possession on the basis of previous possessory rights; however the appellant/plaintiff had never been in possession of the property after 1979 when his father handed over the property in question to the respondent/defendant Smt. Savitri Devi in the same manner in which he had taken it from Shri Wazir Chand; he had taken possession of the property from Shri Wazir Chand in the year 1970 on payment of Rs.5,000/-

and in the year 1979 he gave possession to the respondent/defendant Smt. Savitri Devi of M/s. Sharma Timber Store for Rs.9,000/-;

- (f). that the appellant/plaintiff had been unable to establish that the respondent/defendant Smt. Savitri Devi had handed back possession of the property in the year 1981 or that the appellant/plaintiff had in the year 1986 let out one shop to the respondent/defendant Shri Satbir;
- (g). that the appellant/plaintiff had in the legal notice got issued in the year 1995 to the respondent/defendant Smt. Savitri Devi had asked respondent/defendant Smt. Savitri Devi to hand back possession of the property against receipt of Rs.9,000/-; from the same it is clear that the appellant/plaintiff had not been in possession of the property from 1979 onwards;
- (h). that though the appellant/plaintiff claimed that respondent/defendant Shri Satbir though let out only one shop in the property had in September, 1986 itself forcibly taken possession of the entire property but had not disclosed any efforts made till 1997 to take back possession of the property;

from the said fact alone the said plea of the appellant/plaintiff could not be believed;

- (i). that the plea of the appellant/plaintiff that the respondent/defendant Shri Satbir had in the year 1997 delivered back possession of the property was also strange and is falsified from the appellant/plaintiff's notice to the respondent/defendant Smt. Savitri Devi of the year 1995 to hand back the possession of the property;
- (j). the appellant/plaintiff thus neither had any ownership nor any possessory rights over the property; and,
- (k). the ownership of the property still vested in the MCD to whom license fee had been paid up to the year 1998 in the name of Shri Wazir Chand.

16. The counsel for the appellant/plaintiff fairly admits that he is not claiming the right of possession on the basis of title to the property as no ownership has been claimed and is claiming the right of possession only on the basis of prior possession.

17. The counsel for the appellant/plaintiff has argued that from the receipts, proved by PW5 Shri Inder Pal Chawla, UDC from Slum & JJ

Deptt. of payment of license fees with respect to the property, in the name of “Shri Wazir Chand Son of Shri Gian Chand, C/o Shri Bind Parkash Son of Shri Ram Sahai” the possession of the appellant/plaintiff should be believed.

18. I may mention, that of the three receipts proved as Ex.PW5/1 to Ex.PW5/3, only one mentions “C/o Shri Bind Prakash S/o Shri Ram Sahai” and that too in a different handwriting though all three bear the signatures in receipt of original, of Ram Sahai/Bind Prakash. The said receipts are dated 2nd January, 1998, 9th February, 1998 and 22nd June, 1998 i.e. of shortly prior to the institution of the suit for possession in the year 2000. The originals of the said receipts which should have been in the custody of the person who made payment i.e. the appellant/plaintiff have not been filed and it is PW-5, the witness from the Slum & JJ Deptt. who has produced the said receipts. Ordinarily if the appellant/plaintiff had made payment, the original receipts would have been in his custody. The possibility of the signatures having put on counterfoil of the receipt and the words “C/o Bind Prakash S/o Ram Sahai” having been inserted in the counterfoil of the receipt in the records of the Slum & JJ Deptt. cannot be ruled out. Moreover the said receipts in no way prove the possession of the appellant/plaintiff of the property.

19. Though no other argument has been made by the counsel for the appellant/plaintiff but I have still perused the documentary and oral evidence. I am unable to find any error whatsoever in the reasoning given in the impugned judgment. I may record that the only document executed by Shri Wazir Chand in the year 1970 evidencing the sale, filed by the appellant/plaintiff is an affidavit and in which there is no mention of Shri Wazir Chand having handed over vacant peaceful physical possession of the property to the appellant/plaintiff. However the Agreement to Sell of the year 1992 executed by Shri Wazir Chand in favour of the appellant/plaintiff does record Shri Wazir Chand having delivered vacant peaceful possession of the property to the appellant/plaintiff.

20. I also find on Trial Court record notice issued between 25th May, 2000 and 21st August, 2000 by the Slum & JJ Deptt. of the MCD of cancellation of allotment in the name of Shri Wazir Chand of the property aforesaid and the same is also found to be addressed to Shri Satbir Sharma and which also proves that Shri Satbir Sharma was treated by the MCD as the unauthorized occupant of the property.

21. A suit for possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the

property has been dispossessed, under Article 64 of the Schedule to the Limitation Act, 1963 can be filed within 12 years from the date of dispossession. The suit for possession from which this appeal arises was as aforesaid filed in January, 2000. It was incumbent upon the appellant/plaintiff to establish that he was in possession of the property within 12 years prior to the institution of the suit i.e. till January, 1988. The appellant/plaintiff has not placed a single document on record to show his possession of the property at any stage of time except for the Agreement to Sell executed in his favour by Shri Wazir Chand in the year 1992 recording that possession had been delivered to him in the year 1970. The appellant/plaintiff as per his own case had delivered possession of the property to the respondent/defendant Smt. Savitri Devi as mortgagee in 1979 and which possession was demanded back vide notice of the year 1995. The appellant/plaintiff thus cannot be held to be in possession at any time between January, 1988 and till the institution of the suit in January, 2000. The case built up by the appellant/plaintiff, of respondent/defendant Smt. Savitri Devi having returned possession to him in 1981, the appellant/plaintiff having let out a shop to the respondent/defendant Shri Satbir in 1986, Shri Satbir unauthorizedly taking possession of the entire

property in the year 1986 itself, Shri Satbir having delivered back possession in 1987, has not been established. The Supreme Court in *Ramiah Vs. N. Narayana Reddy* (2004) 7 SCC 541 has held that where the plaintiff is unable to show/establish being in possession of the property in 12 years preceding the institution of the suit, he cannot recover possession on the basis of prior possession.

22. There is thus no merit in the appeal which is dismissed; however the respondents/defendants having not contested, no order as to costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 4 2013

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