* **HIGH COURT OF DELHI AT NEW DELHI**

\+ **R.S.A. No.139/2012**

Decided on : 04th September, 2013

HARPAL SINGH ..... Appellant
Through: Mr.G.S.Chaturvedi and Mr.Dipesh Choudhary, Advocates

versus

MAHABIR STEEL ROLLING MILLS & ANR ..... Respondent

Through: Mr.Pravir K.Jain and Mr.Manoj Chauhan, Advocates

WITH

\+ **RSA 141/2012**

RS AZAD ..... Appellant

Through: Mr.G.S.Chaturvedi and Mr.Dipesh Choudhary, Advocates

versus

MAHABIR STEEL ROLLING MILLS & ANR ..... Respondent
Through: Mr.Pravir K.Jain and Mr.Manoj Chauhan, Advocates

CORAM:
HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (*ORAL*)

1. These are two regular second appeals filed by the appellants against the judgment dated 10.05.2012 by virtue of which the

judgment and decree dated 24.09.2009 passed by the trial court for possession and mesne profits in favour of the respondent No.1 and against the present appellants was affirmed.

2. The main question which has been raised by the learned counsel for the appellants, which he terms as the substantial question of law, is with regard to the identification of the suit property in respect of which the decree has been passed. It has been contended by the learned counsel for the appellants that during the pendency of the first appeals bearing Nos.RCA No.75/2009 & RCA No.76/2009, the appellants filed applications under Order 41 Rule 27 r/w Section 151 CPC seeking permission to adduce additional evidence with regard to the demarcation report prepared by M/s. N.K.Engineers at the instance of SDM, Shahdara, on the basis of which the suit property was allegedly falling in Khasra No.414 and not in Khasra No.566, as claimed by the respondents. It has been contended that the said demarcation report of M/s N.K.Engineers is on the record of the SDM, Shahdara and this is a public document which ought to have been looked into by the appellate court. The learned counsel for the appellant, in support of his contention, has also

relied upon the following judgments: i)*Malyalam Plantations Ltd. V.State of Kerala and Anr.;* AIR 2011 SC 559; ii) *Shyam Gopal Bindal and Ors. V.Land Acquisition Officer and Anr.*; (2010) 2 SCC 316 and iii) *C.L.Gupta v.Delhi Development Authority*; 2011 (123) DRJ 377 and urged that this non consideration of the report constitutes a substantial question of law.

3. Before dealing with the submissions made by the learned counsel for the appellants, it may be pertinent to give a brief background of the case.

4. The respondents herein had filed a suit for possession and mesne profits against the appellants more than three decades ago. The case which was set up was that the respondent (M/s Mahabir Steel Rolling Mills) is a duly registered partnership firm and Mr.Uggar Sain Jain was one of its partners who was competent to sue for and on behalf of the firm. The respondent No.2 (one of the partners) had purchased a parcel of land bearing Khasra No.566 and 571 at village Mauja, Siqdar Pur, Shahdara, Delhi, measuring 2 bighas and 5 biswas and 3 bighas and 15 biswas, in a public auction on 20.01.1960 under Section 20 of the

Displaced Persons (Compensation and Rehabilitation) Act, 1954 from the Managing Officer of the Office of Regional Settlement Commissioner, Ministry of Rehabilitation, Government of India. The said parcels of land were under the occupation of the present appellants namely Harpal Singh and Mr.R.S.Azad who are the appellants in the two appeals.

5. In the respective plaints of the two suits, it was averred by the respondents that out of the houses built on Khasra No.566, House No.1/4094 was under the occupation of Harpal Singh while as House No.1/4093 was under the occupation of R.S.Azad and the site plan of both the suit properties were attached along with the plaints which were duly demarcated.

6. The present appellants contested the said suits and disputed the factum of the suit properties that is House No.1/4094 and House No.1/4093 – falling in Khasra No.566. The appellants had stated that both these houses did not fall in Khasra No.566, but they did not specifically aver knowledge of the khasra numbers under which the said properties were falling according to them.

7. On the basis of the pleadings of the parties, various issued were framed. These issues are as under:

> " 1. Whether the plaintiffs have locus standi to institute the present suit? OPP
>
> 2. Whether the suit of the plaintiffs is within the period of limitation? OPP
>
> 3. Whether the suit is properly valued for the purpose of court fee and jurisdiction? OPP
>
> 4. Whether the suit property is subject to jurisdiction of Delhi Land Reforms Act, if so, to what effect? OPD
>
> 5. Whether the defendants have been in possession since 1960 and whether the defendant has acquired the land by adverse possession? OPD
>
> 6. Whether the defendant has acquired title under the Delhi Land Reforms Act? OPD.
>
> 7. Is plaintiff entitled to the possession from the defendant? OPP
>
> 8. Whether the plaintiff is entitled to damage for use and occupation and if so at what rate and to what amount? OPP
>
> 9. Relief."

8. Out of the aforesaid issues, in the present regular second appeals, the only question which has been urged before this court as a substantial question of law, pertains to the identity of the property and, therefore, the present discussion is being confined only to the said issue.

9. The learned trial court, after recording of the evidence of both the parties, arrived at a finding which was recorded as under:

> "16. First of all, I find it worth to mention here that though defendant has raised objection regarding correctness of khasra no., however, no khasra number has been mentioned by the defendant in alternative. Such half hearted plea taken by the defendant show that such objection was taken by the defendant without having any firm belief."

10. The appellants aggrieved by the judgment and decree of possession, which was passed by the learned trial court, preferred appeals before the first appellate court which were dismissed. So far as the question of identity of the suit properties is concerned, the learned ADJ has observed in para 62 of the appellate court's judgment dated 10.05.2012 pertaining to RSA No.139/2012 and para 58 of the appellate court's order pertaining to RSA No.141/2012 as under. For the sake of brevity, only para 62 of RSA No.139/2012 is being reproduced hereinbelow:

> "62. As regards relief, learned counsel for the appellant had contended that suit property was not identified properly as the demarcation report Ex.PW5/A was not as per law. PW-5 Sh.Keshav Ram Jain, Naib Tehsildar, Delhi who produced the records relating to the application of the plaintiff for demarcation of the khasra no.566 and 571 Siqdar Pur and exhibited the same as Ex.PW5/1. In his cross-examination he has stated that he has not given notice to any person including the defendants

> when he carried out the demarcation. There is however no suggestion given to this witness that the suit property does not fall in khasra no.566 or that it falls in any other khasra. As per the demarcation report H.No.1/4094 belonging to Sh.Harpal Singh was situated in Khasra no.566. As recorded above, the defendant in his written statement had contended in para no.5 of the parawise reply that the suit property was not built on khasra no.566. Defendant has not disclosed the khasra no. in which the suit property was situated. Defendant examined himself as DW-2. He has in his cross-examination stated that he was not aware whether the suit property was situated in khasra no.566. He has not stated any other khasra no.on which the suit property stands. It was open for the defendant to bring appropriate evidence to show the location of the suit property. In the absence of any such evidence being proved by the defendant, it cannot be held that the suit property was incorrectly identified."

11. In addition to this, while disposing of the appeal, the appellate court also dealt with the application filed by the appellant under Order 41 Rule 27 r/w Section 151 CPC and dismissed the said application on the ground that the application for adducing additional evidence can be permitted at the appellate stage only in case a party is able to show that despite the due diligence, the evidence which is sought to be produced by them was not within their knowledge or could not, after exercise of due diligence, be produced by him at the time when the decree, against which

appeal was filed, was passed. In this regard, the court observed that the appellants had sufficient opportunity to produce the evidence which was sought to be produced by him at the appellate stage and thereby on the ground of due diligence the appellate court rejected the application for additional evidence.

12. First of all, I will deal with the application filed by the appellants with regard to the question of rejection of the application under Order 41 Rule 27 CPC of the appellants for production of additional evidence, to see as to whether the first appellate court has fallen into an error in not allowing the application of the appellants for producing the additional evidence.

13. In this regard, the parameters for granting permission to produce additional evidence, the learned trial court has rightly observed that the statute envisages two contingencies in which additional evidence can be permitted to be led – where a party despite exercise of due diligence, was not able to lay its hands on the evidence which was sought to be produced or it could not have been produced or alternatively, evidence which was sought to be produced by a party, was not within its knowledge.

14. In the instant case, the nature of evidence which is sought to be produced by the appellant can by no stretch of imagination be said to be a kind of evidence which was not within the knowledge of the appellant. The appellant was aware way back in 1981 onwards that the respondents had filed suits for possession against him making a specific allegation that House Nos.1/4094 and 1/4093 were falling in Khasra No.566 and the said houses were also delineated in red in the plan attached to the suits. Therefore, they could not express their ignorance about the identity of the property and the answer of the appellants in the written statement was evasive denial and not specific denial as in the written statement, while replying to the corresponding portion of the averment in the plaints, not only they simply denied that their houses did not fall in the khasra numbers as alleged by the respondents, but also they failed to mention the number of khasra which their parcel of land or their houses were falling.

15. In addition to this, the demarcation is essentially a job to be done by the revenue authorities and in terms of the Delhi Land Revenue Act, 1954 and the relevant rules, the demarcation is a

statutory duty to be performed by the Revenue Assistant, who happens to be the SDM. In the instant case, the respondents herein have proved the demarcation report as ExPW5/1 and have examined ten witnesses in support of the suit. Two witnesses namely Sh.S.B.Lal and Sh.Uggar Sain were examined as PW-1 and PW-5. Sh.K.R.Jain was examined as PW-7 who testified in favour of the respondents to establish the identity of the parcel of land where the suit properties are falling. No suggestion has been given to the witnesses in the cross-examination that the suit properties do not fall in Khasra No.566. It is a basic rule of cross-examination that while a witness is cross-examined, the party who cross-examines that witness must clearly put its case to the witness. If the party which cross-examines a witness has chosen not to give a particular suggestion, this tantamounts to almost admission of the testimony given by the said witness. By the same analogy, in the instant case, the testimony of these three witnesses cumulatively seen along with the demarcation report ExPW5/1 establishes by a preponderance of probability that there is no dispute about the identity of the parcel of land in question.

16. There is another factor which also goes to establish that the identity of the parcel of land in question can never be disputed in a factual situation like this. This is on account of the fact that the appellants have taken a plea of adverse possession qua not only the respondents but also the world at large. The defence of adverse possession will be available to a party only against the actual owner when his possession of the suit property is hostile to the owner.

17. In the instant case, the respondents have set up a definite case that they are the owners of a parcel of land having purchased the same in an auction from the Government of India and alternatively the defence taken by the appellants is of adverse possession. If the defence of adverse possession is set up by the appellants, the identity of the property could never be disputed by the appellants. Reliance in this regard may be placed on Mahabunnisa Begum & Two Orthes s. Smt.Bhalabhadra Vijayalakshmi; Andhra Pradesh High Court, Appeal Suit No.1646/1998 decided on 03.06.2006.

18. In the light of the aforesaid facts, the demarcation report, which is sought to be relied upon by the appellants and which has been conducted by M/s N.K.Engineers, is of absolutely no value.

19. In the light of the aforesaid facts, firstly the applications of the appellants under Order 41 Rule 27 r/w Section 151 CPC has been rightly rejected by the first appellate court as the evidence which was sought to be produced by the appellant could not be said to be not within the knowledge of the appellants if he had exercised due diligence. He could have produced the same but dehors this the demarcation report which is sought to be relied upon by the appellant is of no value, reason being that the demarcation is a statutory job to be performed only the officials of the Revenue Authorities under the Delhi Land Revenue Act, 1954 and the rules framed thereunder. The job of demarcation could not have been delegated by the SDM to a third party, which was a private party, and curiously enough, in the instant case, during the course of oral submissions, it has been admitted by the appellants that some of the residents of the area including the appellants had made a complaint to the National Commission for Scheduled Castes, which had referred the

matter to the SDM and which prompted the SDM, Shahdara to delegate the power of conducting the survey/demarcation of the area to M/s.N.K.Engineers and that is how the site plan and the report has been prepared which is sought to be taken help of on the plea that the suit properties do not fall in the parcel of land bearing Khasra No.566. Incidentally, the appellant was one such party.

20. These in my view are self-serving documents which do not have any credibility and any number of documents like these can be manufactured. These documents cannot be termed to be as public documents as has been sought to be urged by the learned counsel for the appellants before this court. What is a public document is defined under Section 74 of the Indian Evidence Act, 1872 and the document in question cannot be said to be falling in any of the categories of the said Section.

21. I have gone through the judgments relied upon by the learned counsel for the appellants. There is no dispute about the fact that the additional evidence can be permitted to be taken on record in exercise of provisions of Order 41 Rule 27 CPC provided the requirements of law are met as envisaged in the

said Section and merely because additional evidence was permitted to be led in *Malyalam Plantations Ltd. V.State of Kerala and Anr.'s case* (supra), does not mean that additional evidence ought to be permitted to be led in the present case. Similarly, in the other two cases also, the factual matrix is totally different and merely because in a given case, matter has been remanded back to the trial court for the purpose of taking into consideration the additional evidence, which is sought to be produced by a party, does not *ipso facto* mean that in all the cases, additional evidence if produced, should be taken, irrespective of the credibility of the same.

22. The Apex Court in ***Haryana Financial Corporation and Anr. Vs. Jagdamba Oil Mills and Anr.***; (2002) 3 SCC 496 has held that the law is not to be applied like a mathematical proposition and the facts of the case where the law is laid down have to be correlated to the facts of the case in hand.

23. In the instant case, I do not find that the factual matrix of any of the cases cited by the learned counsel for the appellant comes anyway near to the present case where there is a concurrent

finding returned by the two courts below with regard to the identity of the property in question.

24. In view of the aforesaid facts, I feel that the question of identity of the properties in question, as a matter of fact, is a question of fact and not a question of law.

25. No other substantial question of law is shown to be arising from the present appeals. The appeals are accordingly dismissed.

V.K. SHALI, J

SEPTEMBER 04, 2013/dm