

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

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Date of decision: 2nd December, 2013.

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RFA 537/2013

YOGESH JAIN

..... Appellant

Through: Mr. J.K. Jain, Adv.

Versus

SATISH KUMAR DHANKAR & ORS.

..... Respondents

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree dated 9th November, 2010 of the Court of the Additional District Judge (Central-13), Delhi of dismissal of CS No.50/2009 filed by the appellant consequent to the appellant having failed to lead any evidence inspite of repeated opportunities. The appeal is accompanied with application for condonation of 984 days delay in filing the same. The reason given for the delay is that the appellant, after dismissal of the suit, first filed a petition under Section 85 of the Delhi Land Reforms Act, 1954 and during the pendency of that proceeding was advised to file a CM(M) petition under Article 227 of the

Constitution of India against the impugned judgment and decree and on 2nd July, 2012 filed CM(M) 806/2012 and which was withdrawn on 24th September, 2013 with liberty to prefer this appeal.

2. The appeal came up before this Court first on 20th November, 2013 when the counsel for the appellant was asked to satisfy the judicial conscience of this Court that the appellant/plaintiff had a good case on merits. Though the appellant/plaintiff, in the Memorandum of Appeal, has challenged the impugned judgment / order on the ground that the learned Additional District Judge could not have dismissed the suit but should have returned the plaint under Order 7 Rule 10 of the CPC and for which purpose an application had been filed, but the counsel for the appellant/plaintiff on 20th November, 2013 did not urge the said argument and instead contended that the learned Additional District Judge, on the failure of the appellant/plaintiff to lead any evidence, should have only closed the evidence of the appellant/plaintiff and listed the suit for evidence of respondents/defendants, instead of on the same day dismissing the suit.

3. It was however inquired from the counsel for the appellant/plaintiff that if the onus of all/main issues was on the appellant/plaintiff, where was

the need to list the suit for evidence of the respondents/defendants, upon the appellant/plaintiff having failed to adduce evidence.

4. The counsel for the appellant/plaintiff on 20th November, 2013 sought time to file the copy of the order framing the issues. While so adjourning the matter, the trial court record was also requisitioned.

5. The counsel for the appellant/plaintiff has filed copy of the order dated 23rd February, 2010 in the suit, whereby the following issues were framed:

- “1. Whether the suit is not maintainable as against the defendant No.1 in view of the facts that no prior notice under Section 80 CPC has been given? OPD*
- 2. Whether the plaintiff has not come before this Hon’ble Court with clean hands and suppressed the material facts as mentioned in preliminary objection 1(a) to 1(f) of the written statement of defendants No.2 and 3? OPD 2 and 3.*
- 3. Whether the plaintiff is entitled for the relief of declaration as asked for in the plaint? OPP*
- 4. Whether the plaintiff is entitled for the relief of mandatory injunction as asked for in the plaint? OPP*
- 5. Whether the plaintiff is entitled for the relief of permanent injunction as asked for in the plaint? OPP*
- 6. Relief.”*

6. The counsel for the appellant/plaintiff has argued that the appellant/plaintiff in the plaint had sought relief of declaration that the Will dated 13th August, 2002 of Shri Gian Chand Jain, father of the appellant/plaintiff and defendants/respondents 4 and 5 and husband of the respondent/defendant No.3 in respect of land measuring 1 bigha comprised in khasra no. 430 min (0-4), 431 min (0-11), 427 min (0-5) situated in the revenue estate of Village Malikpur Kohi @ Rangpuri, Tehsil Mehrauli, (now Tehsil Vasant Vihar), New Delhi to be forged, fabricated and null and void and further declaring the appellant/plaintiff to be the owner in possession thereof and for mandatory injunction directing the Tehsildar to carry out mutation thereof in the name of appellant/plaintiff and for injunction restraining the Tehsildar from carrying out mutation in favour of the defendants /respondents No. 1 and 2 on the basis of the said Will and for injunction restraining the respondents/defendants No. 1 and 2 from interfering with the possession of the plaintiff thereof. It is the further contention of the counsel for the appellant/plaintiff that the factum of Shri Gian Chand Jain being the owner of the said land and the appellant/plaintiff being the son of Shri Gian Chand Jain is not in dispute; that thus in the absence of the Will, the appellant/plaintiff would admittedly have a share in

the said land; that since the respondents/defendants had set up a Will of Shri Gian Chand Jain in their favour, in defence to the claim of the appellant/plaintiff for declaration, it was for the respondents/defendants to prove the said Will and without their proving the said Will, the appellant/plaintiff is entitled to the declaration and other reliefs claimed by him.

7. It is however pointed out to the counsel for the appellant/plaintiff that there is no issue framed qua the said Will.

8. The counsel for the appellant/plaintiff blames the Court therefor.

9. The litigants represented through counsels cannot put the blame for an issue being not framed on the Court alone. If it was for the Court alone to frame the issues, there would be no need for the counsels in the justice dispensation system. The Supreme Court in *Makhan Lal Bagal Vs. Manas Bhunia* (2001) 2 SCC 652 has held that the stage of framing of issues is an important one in as much as on that day the scope of the trial is determined by laying the path on which the trial shall proceed. It was further held that by framing issues, the real dispute between the parties is determined, the area of conflict is narrowed and the concave mirror held by the Court

reflecting the pleadings of the plaintiffs. It was yet further held that the correct decision of civil lis largely depends upon correct framing of issues correctly determining the real points in controversy which need to be decided. The Supreme Court also laid down that the parties and their counsel are bound to assist the Court in the process of framing of issues. It was for the appellant/plaintiff to, at the time of framing of issues, have an issue framed and not only did the counsel for the appellant/plaintiff then did not have an issue framed qua the Will but even while seeking adjournment after adjournment for leading evidence, did not point out that the issues were required to be amended or modified. The counsel cannot in the hindsight be permitted to take such a plea. Issues are framed for the purposes of guiding the trial and form an important stage of the progress of the suit towards trial and no error can be found in the impugned judgment/order dismissing the suit upon closing the evidence of the appellant/plaintiff, as the onus of the main factual issues was on the appellant/plaintiff and in support whereof the appellant/plaintiff had failed to lead any evidence.

10. Not only so, a perusal of the written statement filed by the contesting respondents/defendants No. 1 and 2 also shows them to have pleaded:

- i. that the appellant/plaintiff had concealed material facts from the Suit Court;
- ii. the appellant/plaintiff had earlier filed a suit No. 2/02 in respect of the land in suit seeking relief of injunction against his father late Shri Gian Chand Jain, who had purchased the land in suit by virtue of registered sale deed dated 22nd June, 1992 and who had sold the said land to the respondents/defendants 1 and 2 on 9th August, 2002, from delivering possession of the suit land to the respondents/defendants 1 and 2;
- iii. though the said suit was accompanied with an application for interim relief but no interim relief was granted to the appellant/plaintiff;
- iv. that the father of the appellant/plaintiff Shri Gian Chand Jain died on 10th December, 2003 and the appellant/plaintiff sought substitution of himself and the respondents/defendants 3 to 5 as his legal heirs;

- v. however such substitution was denied holding that the father of the appellant/plaintiff Shri Gian Chand Jain had sold the property and also executed a Will dated 21st June, 2003 with respect to the land in favour of the respondents/defendants 1 and 2;
- vi. that yet another application filed by the appellant/plaintiff in the earlier suit, for impleadment of the respondents/defendants 1 and 2 in that suit was also dismissed;
- vii. that the appellant/plaintiff had thereafter fabricated a relinquishment deed by defendants/respondents No. 3 to 5 in respect of the said land in his favour;
- viii. that Shri Gian Chand Jain, father of the appellant/plaintiff, in his life time having in the written statement filed in the earlier suit admitted sale and delivery of the possession of land in suit to the respondents/defendants 1 and 2, the appellant/plaintiff had no right to maintain the subject suit.

11. The concerned Tehsildar who also was wrongly impleaded as appellant/defendant in the suit (and was subsequently deleted) filed a written statement in the suit, pleading-

- a. that as per revenue record Shri Gian Chand Jain was the recorded bhumidar of the subject land;
- b. that after the death of Shri Gian Chand Jain, the respondents/defendants 1 and 2 filed an application for mutation in their favour on the basis of registered Will of Shri Gian Chand Jain;
- c. that the appellant/plaintiff filed objections to the said Will;
- d. that while he was in the process of establishing whether the objections are sustainable or not, so as to forward the matter under Section 23 of the Delhi Land Reforms Act, 1954 to the Revenue Assistant for further adjudication, notice of the suit and of the interim order therein of stay of mutation proceedings was received.

12. It thus appears that the matter of mutation was at large before the concerned Revenue Authorities.

13. A perusal of the trial Court record shows that the application of the appellant/plaintiff for interim relief was dismissed vide order dated 29th April, 2010. The said order records that the earlier suit No.2/02 filed by the appellant/plaintiff abated on 22nd January, 2005.

14. The counsel for the appellant/ plaintiff has invited attention to Section 41 of the Delhi Land Revenue Act and has contended that the mutation order by the Revenue Authorities do not affect the right of the appellant/plaintiff to claim and establish in the Civil Court any interest in land. He has thus contended that the issue of Will is to be finally decided by the Civil Court only.

15. However what the counsel for the appellant/plaintiff ignores is the pleading in the earlier suit No.2/02 filed by the appellant/plaintiff against his father and in which the appellant/plaintiff failed to establish any right in the said land and in which the father of the appellant/plaintiff confirmed the sale of the subject land to the respondents/defendants 1 and 2. The father of the appellant/plaintiff having admitted the said sale, the challenge to his Will

loses any significance inasmuch as the appellant/plaintiff as a natural heir of his father can inherit only such rights in the property which the father has left and cannot inherit any rights in the property which the father sold in his life time.

16. In this view of the matter, it cannot be said that it was for the respondents/defendants 1 and 2 to prove the Will. The onus of the issues had been correctly placed on the appellant/plaintiff and it was for the appellant/plaintiff to in the first instance prove that notwithstanding his father having in the pleadings in the earlier suit admitted sale to the respondents/defendants 1 and 2, the appellant/plaintiff inherited the subject land. The appellant/plaintiff having not led any evidence, the learned Additional District Judge was absolutely justified in dismissing the suit.

17. Though the counsel for the appellant/plaintiff has not found fault with the order closing the evidence of the appellant/plaintiff but I have still, again to satisfy my own conscience, perused the order sheet to see that the evidence of the appellant/plaintiff has not been closed in haste. It is found that after the issues were framed on 23rd February, 2010, the suit was posted for the evidence of the appellant/plaintiff on 29th April, 2010. Neither any

evidence by way of affidavits was filed by the appellant/plaintiff till then nor did any witness of the appellant/plaintiff appear on the said date; on the contrary an application under Order 1 Rule 10 of the CPC was filed which was dismissed vide order dated 5th June, 2010 and the suit again listed for evidence of the appellant/plaintiff on 18th August, 2010. No affidavit by way of examination-in-chief was filed by then also and no witness of the appellant/plaintiff appeared on 18th August, 2010 and the matter was posted to 28th September, 2010 and on which date also the position remained the same. Yet another opportunity was given and the suit posted for evidence on 9th November, 2010 subject to cost. The position however remained the same, when evidence was closed and the suit dismissed.

18. Resultantly, there is no merit in the appeal which is dismissed. However the appeal having been dismissed *in limine*, though after full hearing and perusing of the record, no costs. Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

DECEMBER 02, 2013
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