

HIGH COURT OF DELHI AT NEW DELHI

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RSA No.51/2011 & CM No.19889/2012

Decided on : 8th November, 2013

ASHOK KUMAR

..... Appellant

Through: Mr.Ashok Kumar and Mr.R.M.Tatia,
Advocates.

Versus

PUSHPA RANI DECEASED THROUGH LRS. Respondents

Through: Mr.Naveen Kumar Goyal, Advocate for
LRs of R-2 to R-4.

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (ORAL)

1. This is a regular second appeal filed by the appellant against the judgment and decree dated 10.09.2010 passed by Sh.Suresh Kumar Gupta, ADJ in RCA No.76/2009 dismissing the first appeal of the appellant.

2. I have heard the learned counsel for the appellant.

3. The contention of the learned counsel for the appellant is that he had filed a suit for declaration to the effect that the sale

deed dated 14.06.1989 purported to have been executed by him in favour of his mother is a fabricated document and the same is an outcome of fraud and therefore should be declared as null and void. It has been stated by the learned counsel for the appellant that the trial court has not summoned any of the attesting witnesses in order to establish as to whether the sale deed purported to have been executed by the appellant was genuine or not.

4. The learned counsel for the appellant has also drawn the attention of the court to Section 68 of the Indian Evidence Act, 1872 in order to support his submission. He has also referred to the judgment of the Apex Court in *Shyam Gopal Bindal and Ors. v. Land Acquisition Officer & Anr.*; (2010) 2 SCC 316 in order to canvass an alternative submission to the effect that the matter be remanded back to the trial court for recording additional evidence and deciding the issue afresh with regard to the genuineness of the sale deed dated 14.06.1989 purported to have been executed by the appellant.

5. I have carefully considered the submission made by the learned counsel for the appellant and gone through the impugned judgment and perused the record.

6. Before dealing with the submission, it may be pertinent to mention that a regular second appeal in terms of Section 100 CPC can be entertained by the court only if the counsel for the appellant is able to show that any substantial question of law is involved in the matter or alternatively the court feels that the matter does involve any substantial question of law. In the instant case, I am not convinced by the submission made by the learned counsel for the appellant that any substantial question of law is involved nor do the facts of the matter show that any substantial question of law is involved in the matter. However, in order to appreciate the contention, it may be pertinent here to give a brief background of the case.

7. The appellant filed a suit for declaration with the consequential relief of possession and perpetual injunction in November, 2005 against his mother (since deceased). It was

alleged in the plaint that the appellant is the owner of ½ portion of the premises in question being 51/1A, East Azad Nagar, Delhi consisting of two rooms, one kitchen, courtyard with boundary wall and two shops built up on plot no.28. The total area of the plot was alleged to be 90 square yards. The appellant had stated that he got married in January, 1988 and thereafter shifted to a rented accommodation on account of his mother not being able to pull on well with his wife. Sometime in August, 2005, he requested his mother to partition the property in question whereupon he came to know that he is alleged to have executed a sale deed dated 14.06.1989 in respect of his one half portion of the property in question on 14.06.1989 in favour of his mother (deceased respondent herein) as a consequence of which he was constrained to file the suit in question.

8. The deceased respondent herein contested the suit and filed the written statement. On the pleadings of the parties, the following issues were framed:

“1. Whether the court has no pecuniary jurisdiction to try and entertain the present suit?

OPD

2. Whether the suit of the plaintiff is barred by limitation? OPD

3. Whether the suit of the plaintiff is not maintainable since the plaintiff has not come before the court with clean hands? OPD

4. Whether the plaintiff is entitled for the relief of possession as prayed for? OPP

5. Whether the plaintiff is entitled for relief of permanent injunction as prayed for? OPP

6. Whether the plaintiff is entitled for decree for possession as prayed for?

7. Relief.”

9. So far as the question of declaration is concerned, curiously the trial court did not frame any issue in this regard. However, the issues with regard to the consequential relief of possession and permanent injunction were framed but while dealing with the issues pertaining to possession and permanent injunction, the trial court has dealt with the evidence which has been adduced by the

appellant as a witness to contend that the sale deed dated 14.06.1989 is a document which is void on account of fraud and fabrication. It may be pertinent here to refer to Section 102 of CPC which confers powers on the appellate court while entertaining the second appeal to frame an issue in case the same has been omitted by the court below provided the evidence in this regard has already been brought on record. Therefore, the issue with regard to the declaration can be framed by this court because evidence which was produced by the appellant not only encompasses the evidence with regard to the consequential relief but also with regard to the declaration which is sought by him. The trial court has not accepted the plea of the appellant that the sale deed dated 14.06.1989 is null and void on account of the fact that the appellant had failed miserably to show that any fraud or fabrication was done in this regard. The basic dictum of rule of evidence is that one who asserts must prove. If a party alleges fraud, then not only he must give the date, time and the manner in which the fraud has been perpetrated but the onus is also primarily on him to discharge that the document in question has been signed by him under fraud.

10. In the instant case, there is no such evidence adduced by the appellant which could have been accepted by the trial court and a finding has been returned that no fraud has been played. This finding of fact that the sale deed dated 14.06.1989 is not an outcome of fraud has also been accepted by the first appellate court. Thus, there is a concurrent finding with regard to the fact that the sale deed dated 14.06.1989 is not an outcome of fraud or fabrication. This being a finding of fact can hardly be said to be a question of law which involves adjudication by this second appellate court to decide as to whether the sale deed dated 14.06.1989 is genuine or not.

11. The other contention urged by the learned counsel for the appellant that no attesting witness has been produced in order to prove the sale deed in terms of Section 68 of the Indian Evidence Act, 1872 is not at all tenable because a plain reading of Section 68 of the Indian Evidence Act, 1872 would clearly show that the said Section requires production of one of the attesting witnesses if both of them are alive when the document is required by any law to be

attested. So far as the sale deed is concerned, it is not required to be attested but what is required to be done in respect of a sale deed is that there must be a vendor and a vendee and the property which is transacted must be got registered in terms of Section 17 of the Registration Act, 1908.

12. So far as the judgment with regard to the issue of remanding the matter to the trial court is concerned, no doubt the apex court in *Shyam Gopal Bindal's case (supra)* has remanded the matter to the trial court for the purpose of permitting the parties to adduce evidence afresh, that is a case where admittedly the apex court has taken note of the fact that the evidence which was sought to be adduced by way of additional evidence was not within the knowledge of the appellants therein and it formed a part of the court record by way of certified copies which showed the ownership of the parties concerned. There are judgments galore to the effect that the provision of Order 41 Rule 27 CPC is not for the purpose of filling up the lacuna. The basic requirement of remanding the matter back to the trial court is that either the

evidence which is sought to be produced by way of additional evidence should not be in existence at the time of passing of the order or it must not be in the knowledge of the appellant. In the instant case, the appellant is not alleging that the evidence which is sought to be produced by him was not within his knowledge or it has come into existence after passing of the order. Therefore, the facts of the present case are totally distinguishable.

13. In the totality of the circumstances, I feel that the present appeal does not involve any substantial question of law and accordingly the same is dismissed.

V.K. SHALI, J

NOVEMBER 08, 2013/dm