

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

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Date of decision: 9th December, 2014

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LPA No.775/2014

SHYAM LAL & ORS.

..... Appellants

Through: Mr. Ashish Aggarwal with Mr. Ashish
Virmani & Ms. Kritika Khanijo, Adv.

Versus

THE FINANCIAL COMMISSIONER & ORS.

..... Respondents

Through: Ms. Ferida Satarawala, Adv. for R-1 &
2/GNCTD.

CORAM:-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

CM Nos. 19942/2014 & 19943/2014 (both for exemptions)

1. Allowed, subject to just exceptions.
2. The applications are disposed of.

**LPA 775/2014 & CM Nos.19940/2014 (for filing additional documents)
& 19941/2014 (for stay)**

3. This intra-court appeal impugns the judgment dated 25th September, 2014 of the learned Single Judge of this Court, allowing W.P.(C) No.13695-13706/2005 filed by the respondents No.3 to 14, by remanding the matter to the Court of Revenue Assistant.

4. We have heard the counsel for the appellants no.1 and 2 and the four legal heirs of the deceased appellant No.3 and are unable to find any merit in the appeal to entertain and issue notice of the same.

5. The writ petition from which this appeal arises was filed impugning the order dated 13th May, 2003 of the Financial Commissioner, Delhi of dismissal of revision petitions (being Case Nos.159/2001-CA,160/2001-CA and 161/2001-CA) under Section 187 of the Delhi Land Reforms Act, 1954 (Reforms Act) preferred by the respondents No.3 to 14.

6. The said revision petitions were preferred against the order dated 12th April, 2001 of the Sub-Divisional Magistrate-cum-Revenue Assistant, Hauz Khas by which he disallowed the application moved by the respondents No.3 to 14 to set aside the *ex parte* order dated 28th May, 1992 allowing the application of the appellants / their predecessor under Section 85 of the Reforms Act and thereby declaring the appellants / their predecessor as *bhumidhars* of land measuring 4 bighas 6 biswas in khasras no.123, 128 and part of khasra no.124 and land measuring 1 bigha 10 biswas in khasra no.124, of village Kishangarh, Tehsil Mehrauli, New Delhi.

7. The undisputed facts are that:

- (i) The respondents No.3 to 14 / their predecessors had in or about March-May, 1989 entered into Agreements to Sell qua the said land to the appellants / their predecessors.
- (ii) However, the sale remained to be completed.
- (iii) The appellants / their predecessors in or about 1991 filed CS(OS) No.2888/1991 in this court claiming to be in possession of the land in pursuance to the Agreements to Sell and, seeking to restrain the respondents No.3 to 14 / their predecessors from dispossessing the appellants from the said land, and for declaration that the appellants are the purchasers of the said land.
- (iv) The respondents No.3 to 14 / their predecessors filed an application *inter alia* under Order VII Rule 11 of the CPC in the said suit contending that the remedy if any of the appellants was of specific performance.
- (v) Upon the aforesaid objection being taken by the respondents No.3 to 14, though the appellants contended that they will

amend the plaint but did not do so and the suit continued to languish.

- (vi) In the meanwhile, the appellants filed the application aforesaid under Section 85 of the Reforms Act before the Revenue Assistant claiming themselves to be in adverse cultivatory possession of the land and contending that the respondents No.3 to 14 being recorded *bhumidhars* of the said land having not taken any action for their ejectment, the appellants had become entitled to be declared as *bhumidhars* of the said land.
- (vii) The respondents No.3 to 14 were proceeded against *ex parte* in the said proceeding under Section 85 of the Reforms Act and vide *ex parte* orders dated 28th May, 1992 (*supra*), the said application of the appellants under Section 85 of the Reforms Act was allowed and the appellants were declared as the *bhumidhars* of the said land.
- (viii) The appellants in or about the year 2000, for the first time in CS(OS) No.2888/1991 aforesaid, took a stand that they had vide order dated 28th May, 1992 been declared as the

bhumidhars of the subject land and were thus not required to sue for specific performance.

- (ix) The respondents No.3 to 14 thereafter filed the application before the Revenue Assistant for setting aside of the *ex parte* order dated 28th May, 1992 contending that they had never been served with the notice of the said proceedings under Section 85 of the Reforms Act and the appellants had manipulated to show that the notices have been served upon them and had thereby obtained an *ex parte* order dated 28th May, 1992.
- (x) The Revenue Assistant vide order dated 12th April, 2001 *supra* dismissed the said application of the respondents No.3 to 14 for setting aside of the *ex parte* order dated 28th May, 1992, solely on the ground that the application had not been filed within the prescribed period of limitation.
- (xi) The respondents No.3 to 14 preferred the revision petitions (*supra*) to the Financial Commissioner which were also dismissed vide order dated 13th May, 2003 (*supra*) also on the ground of the application for setting aside of the *ex parte* order dated 28th May, 1992 being barred by time and also observing

that considering the long history of litigation, it was difficult to believe that the respondents No.3 to 14 were unaware of the order dated 28th May, 1992.

(xii) Aggrieved therefrom, as aforesaid, the respondents No.3 to 14 preferred the writ petition from which this appeal arises.

8. The learned Single Judge has allowed the writ petition and set aside the order of the Revenue Assistant and the Financial Commissioner dismissing the application of the respondents No.3 to 14 for setting aside of the *ex parte* order dated 28th May, 1992 and has set aside the said order dated 28th May, 1992 and remanded / ordered the Revenue Assistant to decide the application of the appellants under Section 85 of the Reforms Act after giving both the parties sufficient opportunity for adducing evidence and on merits.

9. The learned Single Judge has reasoned that the appellants had played fraud in obtaining the *ex parte* order dated 28th May, 1992 inasmuch as while in the proceedings under Section 85 of the Reforms Act, they contended that they were in adverse cultivatory possession of the land and did not disclose the Agreement to Sell in their favour, in the CS(OS) No.2888/1991 pending before this Court, their stand was of being in

possession of the land under the Agreement to Sell. It was held that the claim of being in unauthorized / adverse possession was diametrically inconsistent to the claim of being an agreement purchaser. It was yet further held that the appellants did not disclose about the pendency of CS(OS) No.2888/1991 in this Court to the Revenue Assistant.

10. The counsel for the appellants has challenged the order of the learned Single Judge contending that:

- (a) The appellants have now been in possession of the land for the last nearly 25 years and have been regularly getting their possession recorded in the revenue records and it will be unfair to unsettle the settled state of affairs by directing the application under Section 85 of the Reforms Act to be now re-adjudicated.
- (b) The respondents No.3 to 14 had themselves, in or about the year 2001, filed a suit in the Court of the Additional District Judge, Delhi for declaration that they are the *bhumidhars* in actual possession of the said land and for declaration of the *ex parte* order dated 28th May, 1992 of the Revenue Assistant as *non est* and for permanent injunction restraining the appellants from interfering with the respondents no.3 to 14's possession

of the said land and which suit also has since been dismissed and in view thereof, no purpose would be served in directing the Revenue Assistant to now re-decide the proceedings under Section 85 of the Reforms Act.

- (c) The application filed by the respondents No.3 to 14 for setting aside of the *ex parte* order dated 28th May, 1992 had been filed after a long delay of eight years and the learned Single Judge has erred in condoning the delay without considering that there was no ground therefor .

11. We however, from a reading of the plaint in the suit supra filed by the respondents No.3 to 14 / writ petitioners in the year 2001 find that the said respondents in the plaint therein also were claiming to be in actual possession of the land and controverting that the appellants were in possession even on that date. We have thus enquired from the counsel for the appellants, whether not the respondents No.3 to 14 / writ petitioners till date are controverting / disputing the possession of the appellants of the said land, and claiming themselves to be in possession.

12. Though the counsel for the appellants is not able to controvert but contends that it is the appellants who have been getting their possession of

the subject land recorded in the revenue records for the last 25 years and on the basis thereof contends that there is no dispute today that it is the appellants who are in possession of the said land.

13. This Court in this proceeding is not to decide as to who is in actual possession or the effect if any of the entries in the revenue record of possession as claimed by the appellants. The scope of the writ petition from which this appeal arises was confined to the correctness of the decision of the Financial Commissioner in refusing to entertain the application of the respondents No.3 to 14 / writ petitioners for setting aside of the *ex-parte* order dated 28th May, 1992. We have thus refused to look into the revenue entries as the counsel for the appellants want us to. However from the fact that the respondents no.3 to 14 till date are controverting that the appellants are in possession, it is evident that there is no merit in the first of the aforesaid contentions of the counsel for the appellants that the matter should not be allowed to be re-opened after this long time. Moreover it cannot also be lost sight of that the parties have throughout been litigating. It is thus not as if the matter had attained quietus at any stage.

14. As far as the second contention aforesaid of the counsel for the appellants is concerned, we find that the suit aforesaid filed by the

respondents No.3 to 14 / writ petitioners in the year 2001 was dismissed by the learned Additional District Judge on 3rd March, 2012 on the ground of being not maintainable before the Civil Court. Rather, the plaint was rejected on the said ground. The said judgment thus does not come in the way of the respondents No.3 to 14 / writ petitioners seeking reopening of the *ex-parte* order dated 28th May, 1992 *supra*.

15. We have enquired from the counsel for the appellants, whether the appellants during the pendency of CS(OS) No.2888/1991 in this Court, at any time informed that they had after the institution of the said suit, applied to the Revenue Assistant under Section 85 of the Reforms Act or whether they had after the *ex-parte* order dated 28th May, 1992 in their favour ever informed in the said suit of the same.

16. The counsel for the appellants admits that the appellants had never so informed till the year 2000 as aforesaid and immediately whereafter the respondents No.3 to 14 / writ petitioners had filed the suit aforesaid before the learned Addl. District Judge and applied for setting aside of the *ex-parte* order. No reason has been forthcoming, for not so informing during the proceedings in CS(OS) No.2888/1991 which the respondents No.3 to 14 / writ petitioners were contesting.

17. In the face of the aforesaid, we do not find any reason to interfere with the conclusion arrived at by the learned Single Judge, of the appellants having acted fraudulently in the matter of obtaining *ex-parte* order dated 28th May, 1992 and in taking contradictory stand in the said proceeding before the Revenue Assistant and in CS(OS) No.2888/1991, pending at the same time and which they were not entitled to do and which contradictory stand they concealed from both the proceedings. We may add that a person is entitled to apply under Section 85 of the Reforms Act for being declared as a *bhumidhar*, only when he has taken or retained possession of land in *bhumidari* of another, otherwise than in accordance with the provisions of the law in force and the *bhumidar* has not taken action for ejectment of such person within the time prescribed therefor, under Section 84 of the Reforms Act. A claim under Section 85 thus has an element of adverse possession i.e. of entry by force. Such a claim is contradictory to the claim made by the appellants in CS(OS) No.2888/1991 of being in possession of land under an Agreement to Sell and which is lawful possession. Reference in this regard can be made to *Mohan Lal Vs. Mirza Abdul Gaffar* (1996) 1 SCC 639, *Karnataka Board of Wakf Vs. Government of India* (2004) 10 SCC 779, *Anna Saheb Babusaheb Patil Vs. Balwant @ Bala Saheb Babu Saheb*

Patel (1995) 2 SCC 543 and *L.N. Aswathama Vs. P. Prakash* (2009) 13 SCC 229 laying down that the person claiming lawful title to the property cannot simultaneously take the plea of adverse possession

18. The counsel for the appellants at this stage states that the learned Single Judge, while remanding the proceedings vide para 39 of the impugned judgment has referred to the proceedings before the Revenue Assistant as under Section 84 of the Reforms Act; it is stated that they were not proceedings under Section 84 and the proceedings were under Section 85. It is further stated that though the learned Single Judge in para 1 of the impugned judgment has noticed that the writ petition initially had been filed by 12 petitioners i.e. respondents No.3 to 14 herein but except the petitioner No.8 (stated to be respondent No.10 Sh. Sanjeev Jain herein) all other petitioners had compromised with the appellants and stopped appearing in the Court but has while remanding the proceedings, not clarified that the said remand is qua the said Sh. Sanjeev Jain only. He thus contends that at least the said aspects be clarified.

19. The counsel for the respondents No.1 & 2 i.e. the Financial Commissioner and the Revenue Assistant, appearing on advance notice states that the reference in para 39 of the impugned judgment to the

“application under Section 84 of the Delhi Land Reforms Act, 1954” is a typographical error, as the proceedings were under Section 85. She thus has no objection to the said clarification.

20. For the said purpose, we do not deem it necessary to issue notice to the respondents No.3 to 14. Accordingly, while dismissing the appeal, we clarify that the proceedings which have been remanded by the learned Single Judge for fresh adjudication before the Revenue Assistant are the proceedings which culminated in the *ex-parte* order dated 28th May, 1992; we further clarify that the decision by the Revenue Assistant in the said remanded proceedings would be qua such of the respondents No.3 to 14 who contest the said proceedings and axiomatically would govern the share of the said contesting respondents only.

The appeal having been dismissed at the initial stage, no costs.

RAJIV SAHAI ENDLAW, J

CHIEF JUSTICE

DECEMBER 9, 2014

‘gsr/bs’