

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

+ **RSA No.250/2016**

% **9th September, 2016**

AMI LAL (DECEASED) NOW REPRESENTED BY LRS. Appellants

Through: Mr. Rohit Kumar, Advocate.

versus

DR. P.N. BAHL (DECEASED)

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellants/defendant against the concurrent Judgments of the courts below; of the Trial Court dated 9.12.1988 and the First Appellate Court dated 10.5.2016; by which the suit for possession filed by the respondent/plaintiff/trust has been decreed. The original defendant in the suit Sh. Ami Lal expired during the pendency of the proceedings and he has been substituted by his legal heirs, who are the present appellants.

2(i) The facts of the case are that the respondent/plaintiff became owner of the suit property viz a plot of land admeasuring 1450 sq. yds.

situated at Jamrudpur, Greater Kailash, New Delhi under a Lease Deed dated 21.1.1981 executed by the President of India. This lease deed has been proved and exhibited as Ex.PW1/4. There was earlier litigation filed by the original defendant Sh. Ami Lal against the respondent/plaintiff claiming easementary rights with respect to the disputed portion of the plot in ownership of respondent/plaintiff and which suit no.359/1977 after contest was dismissed by the Judgment dated 29.10.1979. The present suit pertains to encroachment of a part of the property which is the subject matter of the Lease Deed dated 21.1.1981, and which disputed portion is shown in red colour in the site plan Ex.PW1/5 by the trial court having an area of 1877 sq feet. The subject suit is filed for possession with respect to the encroached area shown in red colour in the site plan Ex.PW1/5.

(ii) The case of the defendant, now represented by the appellants, was that there is encroachment on two sides of the plot belonging to the respondent/plaintiff but the defendant is not guilty of encroachment. One side is the back side of the property of respondent/plaintiff and another is the side which is seen as the right side when the plan is looked in the suit file and which are shown with reference to sides B and A respectively in the site plan Ex.PW1/5. The site plan Ex.PW1/5 was not filed along with the present appeal, but, a copy of the site plan Ex.PW1/5 has been handed over in the Court by the counsel for the appellants during the course of hearing. The

defence of the defendant is best understood by reference to preliminary objection no.6 and reply on merits para 6 and which paras read as under:-

“Preliminary Objection

6. That the suit is bad for nonjoinder of the parties since the alleged encroachment is not made by the defendant on two sides. The land on two sides of the plot belong to different persons of the defendant’s family. As such the suit be dismissed with costs.

Reply on merits

6. Para No.6 of the plaint is wrong and vehemently denied. The defendant has not encroached upon any land belonging to the plaintiff. It is clear from the para that the plaintiff has not intentionally not given measurements. However, on two sides, of the plot of the plaintiff, the defendant had his property which is jointly inherited by the defendant along with his brother which has since been partitioned and as perused from the site plan, the defendant is only at one side of the said plot of the plaintiff. The site plan given by the plaintiff is wrong. On the other side, where the alleged encroachment has been given, the defendant has nothing to do as the said quarters are not owned by the defendant which are situated on the land inherited by the brother of the plaintiff, which abuts the boundary wall of the plaintiff. In such circumstances, there was no question of the plaintiff asking the defendant to vacate any portion. The construction of the defendant is an old one and is in existence for the last more than 40/50 years. The defendant has no unauthorized and illegal possession any where under him.” (underlining added)

(iii) A reading of these paras of written statement shows that the appellants/defendant do not claim any rights with respect to the portion shown on the side as A and which is also conceded before this Court on behalf of the counsel for the appellants/defendant inasmuch as the case of the defendant was that this portion on the right side of the plan referred to as A portion was the portion which fell to the brothers of the deceased defendant as per the settlement between the brothers of the defendant and the defendant. Defendant simultaneously claimed in the written statement that he had not

encroached upon any land belonging to the respondent/plaintiff/trust and which would mean that defendant had not encroached even on the B side/back side portion of the plot of the respondent/plaintiff.

3. After pleadings were completed, the trial court framed the following issues:-

- “1. Whether the suit is properly valued for the purposes of court fee and jurisdiction? OPP
2. Whether the plaint is signed and verified by duly authorized person? OPP
3. Whether the pltf. has locus-standi to file the present suit? OPP
4. Whether the suit is liable to be dismissed under order 7 rule 11 CPC? OPD
5. Whether the suit is bad for non-joinder of necessary parties? OPD
6. Whether the defdt. has encroached upon the suit land as pleaded in para 6 of the plaint? OPP
7. Whether the pltf. is entitled to the possession of the suit property from the defdt.? OPP
8. Whether the pltf. is entitled to the injunction as prayed for? OPP
9. Relief.”

4. The main issue is with respect to ownership of the respondent/plaintiff of the suit land and the fact that defendant had encroached on the property of the respondent/plaintiff. This aspect is dealt with in paras 11 and 15 of the judgment of the trial court and these paras read as under:-

- “11. The onus to prove this issue was on the pltf. The pltf. while examining himself as PW-1 has proved the certified copy of the Lease Deed ExPw1/4 and deposed that the Original Lease Deed which he has brought in the court is signed by him and on behalf of the Society. According to

ExPw1/4, the pltf. obtained the plot measuring 1450 sq. yds. for consideration of Rs.29,958.70. The area of the portion which the defdt. has alleged to have been encroached is about 1877 sq. ft. as per site plan ExPw1/5 proved by the pltf. i.e. about 1/6th of the total area. The pltf. has valued his suit proportionately for Rs.5,000/- which is correct as the plot has been given for specific purpose hence, its value cannot be increased because it cannot be used for any other purpose. The defdt. while examining himself as DW-1 deposed that the rate of plot is now Rs.4000/- to Rs.5000/- per sq. yds. but, his cross shows that his testimony is not useful and believable. On the other hand, the testimony of PW-1 is supported with the documents. I, therefore, hold that the pltf. has valued his suit correctly for the purpose of court fee and jurisdiction. The issue is decided accordingly in favour of the pltf. and against the defdt.

XXXXX

XXXXX

15. Both these issues are connected issues, therefore, I decide both the issues together. The pltf. has examined himself as PW1. He has deposed that after the registration of the Society, the plot of land measuring 1450 sq. yds. was obtained by the D.D.A. on perpetual lease deed basis. The plot is situated at Jamrudpur, Greater Kailash, New Delhi and the lease was given to him in the year 1977 and that the Lease Deed was however, executed in the year 1981. He also brought with him original perpetual lease deed and deposed that it has been signed by him on behalf of the pltf's. society. Certified copy of lease deed is ExPW1/4. He has further deposed that the deft. is in unauthorised occupation of the suit portion of the land and the unauthorised occupation of the suit portion of the land and the unauthorised occupation took place in the year 1979/1980 and that he had been requesting the deft. to vacate his unauthorised occupation, but, he did not listen to him. He has further deposed that he got a plan of the plot prepared from Mr. R.C. Gupta under his instructions and the same is signed by Mr. R.C. Gupta, Architect which is correct according to the site and the portion marked in red lines is in unauthorised occupation of the deft. The plan is ExPW1/5. He has further deposed that he had got a legal notice issued to the defdt. through Sh. V.K. Sharma, Advocate the carbon copy of the said notice is signed by Mr. V.K. Sharma and he identified his signatures. The copy of the same is EXPw1/6. Its receipt is ExPw1/7 and the AD card is ExPw1/8 and the reply dt. 9.11.82 by the advocate of the defdt. was received by him through his advocate and the original reply is ExPw1/9. Nothing important has been revealed in his cross-examination except that he did not raise any boundary wall after taking possession and deposed that they built the main building first, thereafter, boundary was raised. The building is in sanctioned plan except some portion which could not be built because of the unauthorised occupation of the defdt. The defdt. has examined himself as DW1 and Sh. Harbhajan Lal as DW2. Their testimonies show that the defdt. is in possession of the disputed portion but the defdt. could not produce any document to show his title over the disputed land. On the other hand, the testimony of PW1 is supported with

the documents ExPw1/4 which is a lease deed executed by the DDA. It was argued by the counsel for the defdt. that no site plan of DDA or any allotment of letter of DDA has been filed and that no boundary has been given in the site plan filed by the pltf. nor the area of the land alleged to have been encroached has been proved nor described in the plan. I have perused the file and find that the arguments of the ld. Counsel for the defdt. has no force because the description of land has already been given in the lease deed ExPw1/4 which was allotted by the DDA to the pltf. The site plan ExPw1/5 filed by the pltf. shows the portion of land which has been encroached upon by the defdt. It was argued by the ld. Counsel for the defdt. that according to the plan, the land alleged to have been encroached upon by the defdts. 3-4 years before the filing of the suit i.e. in the year 1979 while the Lease Deed was given to the pltf. in the year 1981 when the defdt. was already in possession of the suit land and therefore only the DDA can file a suit against him as at that time, the DDA was the owner of the land, but, this contention of the defdt.'s counsel has no force because the pltf's case is that the land was allotted by the DDA on lease to the pltf. in the year 1977 and in the 1981, only the document of lease deed ExPw1/4 was executed. Hence the pltf. was the owner of the disputed property at the time of its encroachment and the DDA is not a necessary party in the present case. Thus, it is clear from the above discussion that the defdt. has encroached upon the suit land as pleaded in para 6 of the plaint and therefore, the p;ltf. is entitled to the possession of the suit property from the defdt. both these issues are decided in favour of the pltf. and against the defdt."

(underlining added)

5. A reading of the aforesaid paras shows that respondent/plaintiff proved the ownership of the suit land, including the total area of 1450 sq yds by proving the lease deed executed by the Government of India in favour of respondent/plaintiff as Ex.PW1/4. The encroached area was shown in red colour in the site plan which was proved as Ex.PW1/5. Therefore, the respondent/plaintiff duly proved its ownership as also encroached area by the defendant. Also, the issue of year/date of alleged encroachment is immaterial as once the respondent/plaintiff was the owner, the respondent/plaintiff was entitled to possession of the suit land. I note that there is no pleading/case of

the defendant that he is the owner of the suit land by adverse possession and therefore year/date of encroachment by defendant was immaterial in the facts of the present case.

6. As against the aforesaid findings and conclusions of the trial court, based upon the evidence led by the respondent/plaintiff, the only evidence which was led by the defendant Sh. Ami Lal is as under:-

“P.N. BAHL Vs. Ami Lal

DW-1

Mr. Ami Lal defendant on SA:

I am living in ancestral property. I have not made changes in the property for the last 30 years. Skin Institute is in existence for the last 10 years. They had tried to encroach on my land that is why I had instituted a suit for permanent injunction. Firstly they had constructed their building and thereafter the boundary wall was constructed. The quarters with the building do not belong to me. My house is in the backside of plaintiff's building. I have not taken any land of the plaintiff. Now-a-days the land prices in the area are Rs.4000-Rs.5000 per sq. yard. I have not encroached any backside land of the plaintiff. Plaintiff has constructed a boundary wall on its whole/total land.

xxxxx

The land is allotted by DDA to the plaintiff. I do not know the total area of the land. I do not know that the plaintiff's land is 1450 sq. yards plot. I do not know whether this land was allotted by DDA in 1981 for Rs.30,000/- to the plaintiff. I do not know that without the consent of DDA plaintiff cannot sell the plot. I do not know the area of the disputed land. I do not understand the map. I do not know. I do not know the mistake in the map ExPw1/5. I do not purchase any land in this area. I do not know that my previous suit was dismissed. It is wrong to say that I have encroached on plaintiff's any land. I am always in possession. I do not have any title documents because this land fall in Lal Dora. House Tax levies.

RO&AC

sd/-

6.4.87”

7. Obviously, the evidence led by the defendant/Sh. Ami Lal is an apology for any deposition which is given to discharge the onus that there is

no encroachment inasmuch as once the respondent/plaintiff proved the ownership of the complete property of 1450 sq yds as per the Lease Deed dated 21.1.1981 Ex.PW1/4 along with the encroached area shown in red colour in the site plan Ex.PW1/5 then, to discharge the onus which had shifted to the defendant, defendant/Sh. Ami Lal had to lead such evidence to show what is the plot in his possession of which he was the owner i.e the disputed plot forms part of defendant's plot and the details as to how the same came to him under the settlement deed with his brothers, but, the defendant filed no title documents of the property owned by him or the details and area of the plot which came to his ownership under the settlement deed or that the land which is disputed and shown in red colour in the site plan in fact forms part of the land which under the settlement deed of the defendant with his brothers fell to his ownership or defendant's own site plan with regard to the property owned by the defendant and the encroached area not falling in the land which is owned by the respondent/plaintiff etc. etc. Obviously, the defendant led no evidence in this regard because it was clear that the defendant was not the owner of the encroached land and was harassing the respondent/plaintiff/trust right from 1977 when he falsely claimed a right of easement in the land owned by the respondent/plaintiff and which 1977 suit was dismissed in terms of the Judgment of the Trial Court dated 29.10.1979, i.e, the defendants/appellants have enmeshed the

respondent/plaintiff/trust in litigation for now around 40 years, with present suit pending since the year 1983.

8. Learned counsel for the appellants/defendant sought to contend and argue that the respondent/plaintiff has not proved that what is the area which is encroached because there is no evidence led as to the measurement of the plot owned by the respondent/plaintiff, however, this argument is totally misconceived because the respondent/plaintiff has proved the Lease Deed dated 21.1.1981 Ex.PW1/4 showing ownership of 1450 sq. yds and the site plan Ex. PW1/5 showing the encroached portion which is marked in red colour and of which the area designated towards the side B, i.e the back side of the plot of the respondent/plaintiff, being the encroached portion by the defendant. Therefore whereas the respondent/plaintiff discharged its onus by proving ownership and encroachment by the defendant, but, the defendant led no evidence to discharge his onus as the only evidence led by the defendant is reproduced above and which evidence obviously cannot in any manner dislodge the evidence led on behalf of the respondent/plaintiff.

9. In view of the above, it is seen that no substantial question of law arises, and therefore, there is no reason for entertaining this second appeal under Section 100 CPC. Dismissed.

10. I may note that the present litigation is going on since the year 1983, inasmuch as the suit was filed on 19.11.1983 i.e around 33 years back. Trial court had awarded costs and which came to about Rs.654/-. The first appellate court dismissed the appeal filed by the appellants, the legal heirs of the original defendant Sh. Ami Lal, without any order as to costs. Noting that the litigation was initiated by the defendant way back since the year 1977 by claiming easementary rights in a suit which was dismissed, and thereafter the present suit is contested and which is pending since 1983, I hence deem it fit that costs of Rs.2 lacs are awarded in favour of the respondent/plaintiff/trust with respect to the litigation which is pending for now around 33 years. Costs shall be paid by the appellants to the respondent/plaintiff/trust within a period of six weeks from today.

SEPTEMBER 09, 2016
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VALMIKI J. MEHTA, J