

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

+ **RSA No.198/2017**

% **4th August, 2017**

VEENAKSHI SHARMA Appellant
Through: Mr. A.P.S. Ahluwalia, Senior
Advocate with Mr. S.S. Ahluwalia
& Mr. Jatin Teotia, Advocates.

versus

MEERA DEVI VASUDEV Respondent
Through: None.

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 Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the judgment of the First Appellate Court dated 28.3.2017 whereby the first appellate court has decreed the suit for possession and *mesne* profits filed by the respondent/plaintiff. Learned Trial Court by its judgment dated 8.8.2016 has decreed the suit for possession, however, it held that possession can be received by the respondent/plaintiff only if Rs.18 lakhs is paid by the

respondent/plaintiff to the appellant/defendant in discharge of the debt/liability of the respondent/plaintiff's son. The first appellate court by its impugned judgment dated 28.3.2017 has deleted the direction given by the trial court in its judgment of entitlement of the respondent/plaintiff to receive possession only if payment of Rs.18 lakhs is made by the respondent/plaintiff to the appellant/defendant. The suit property is an area of 226 sq. ft. in the upper ground floor of Suneja Tower-1, Plot No.7, District Centre, Janakpuri, New Delhi.

2. The facts of the case are that the respondent/plaintiff filed the subject suit for possession and *mesne* profits of the suit property pleading that she had given the suit property to her son Sh. Sanjay Vasudev to use the property but Sh. Sanjay Vasudev since could not run the business, he therefore closed the same and handed over the suit premises to the respondent/plaintiff on 31.12.2010. The respondent/plaintiff pleaded that she put her lock upon the suit property on 31.12.2010 itself. It is further pleaded in the plaint that in the first week of January 2011, the respondent/plaintiff's son came to her and requested that since some articles have been left in the shop, the keys of the shop be handed over to him and which the

respondent/plaintiff did. It is further pleaded in the plaint that the son of the respondent/plaintiff Sh. Sanjay Vasudev never returned the keys. It is pleaded that the appellant/defendant since 15.1.2011 claims possession of the shop but the possession is illegal and unauthorized and therefore, the suit for possession and *mesne* profits was prayed to be decreed.

3. The appellant/defendant contested the suit by pleading that the respondent/plaintiff's son Sh. Sanjay Vasudev and the appellant/defendant were good old friends and the respondent/plaintiff's son approached the appellant/defendant for financial help. The appellant/defendant pleaded that she agreed to be a financial help of Rs.18 lakhs subject to possession of the suit shop as a security. A Memorandum of Understanding (MOU) dated 17.1.2011 is said to be executed by the respondent/plaintiff's son Sh. Sanjay Vasudev as the attorney of the respondent/plaintiff as also the wife of the son Smt. Anshu Vasudev with the appellant/defendant. As per this MOU, a sum of Rs.18 lakhs was paid to Sh. Sanjay Vasudev and his wife Smt. Anshu Vasudev and if the son of the respondent/plaintiff wished to claim back possession of the shop, the possession was to be

handed over by the appellant/defendant to them only on amount of Rs.18 lakhs being paid by Sh. Sanjay Vasudev and his wife to the appellant/defendant. The suit was, therefore, prayed to be dismissed without the appellant/defendant being paid a sum of Rs.18 lakhs.

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

“ISSUES:

1. Whether the suit of the plaintiff is not maintainable as the plaintiff has no locus-standi to institute the suit on the strength on hand-written, un-registered, un-probated & un-notorized “Will” executed by the husband of the plaintiff? OPD.
2. Whether any memorandum of understanding executed between the son of the plaintiff and the defendant on 17.01.2011? OPD.
3. Whether the plaintiff is entitled for a decree of possession of the suit property? OPP.
4. Whether the plaintiff is entitled for a decree of Rs.30,000/- as mesne profits for the period from 15.01.2011 to 15.04.2011? OPP
5. Whether the plaintiff is entitled for a decree of pendent lite & future mesne profit. If so, for what rate? OPP.
6. Relief.”

5. As already stated above, the trial court decreed the suit subject to payment of Rs.18 lakhs by the respondent/plaintiff to the appellant/defendant. However, the first appellate court as per its impugned judgment deleted this condition and has passed a decree for possession of the suit property along with *mesne* profits at Rs.10,000/-

per month from 15.1.2011 to 15.4.2011 and also *mesne* profits *pendente lite* and future till possession is received.

6. It is seen that the first appellate court has arrived at the finding that MOU dated 17.1.2011/Ex. DW1/A, cannot bind the respondent/plaintiff for two reasons. Firstly, it is held by the first appellate court that if a MOU creates right in the suit property, then such a MOU was required to be registered in view of Section 17 of the Registration Act, 1908 and since it was not the same cannot be looked into in view of Section 49 of the Registration Act. The second reason given by the first appellate court is that the son Sh. Sanjay Vasudev who signed the MOU as the attorney of the respondent/plaintiff has not been proved to be the attorney of the mother/respondent/plaintiff, and therefore, the appellant/defendant can take no benefit of the MOU. It has been observed by the first appellate court, that it is unbelievable that if the son Sh. Sanjay Vasudev signed the MOU as an attorney of the mother/respondent/plaintiff, then the appellant/defendant would not have taken a copy of the power of attorney of the mother/respondent/plaintiff said to have been executed in favour of the son Sanjay Vasudev.

7.(i) I may note that admittedly, the MOU dated 17.1.2011 is between the son and daughter-in-law of the respondent/plaintiff on the one hand and appellant/defendant on the other hand. In this MOU at page 2, the son Sh. Sanjay Vasudev is said to be an attorney with respect to the shop in question. Therefore, once the MOU itself mentions that son Sh. Sanjay Vasudev was the attorney of the suit property, then if this was correct, then such an attorney should have existed, and admittedly the appellant/defendant has failed to prove that any such power of attorney exists. The first appellate court has rightly commented that in a commercial transaction it could not be believable if the MOU stated Sh. Sanjay Vasudev acted as the attorney with respect to the suit property, then why the appellant/defendant did not have with her the copy of this alleged attorney by which Sh. Sanjay Vasudev was made as an attorney with respect to the suit property. I may also add that MOU dated 17.1.2011 in no manner talks that Sh. Sanjay Vasudev and his wife are owners of the suit property and Sh. Sanjay Vasudev is only shown to be an attorney of the suit property, meaning thereby that Sh. Sanjay Vasudev is admittedly not the owner of the suit property.

(ii) Once therefore admittedly the respondent/plaintiff is found to be the owner of the suit property and it is the case of the appellant/defendant that she had rights under the MOU dated 17.1.2011/Ex. DW1/A, then onus was upon the appellant/defendant to show that Sh. Sanjay Vasudev was the attorney of the respondent/plaintiff and in which the appellant/defendant has clearly failed and has rightly been observed by the first appellate court, as discussed above.

8. In my opinion, the first appellate court has also rightly held that since a right is sought to be created by the MOU in favour of the appellant/defendant, and such right is in excess of Rs.100/- because the suit property is secured for a sum of Rs.18 lakhs, the MOU was required to be registered in terms of Section 17 of the Registration Act, and once it is not registered, therefore the MOU cannot be looked in terms of Section 49 of the Registration Act.

9. Learned counsel for the appellant/defendant argued that the son Sh. Sanjay Vasudev should have been made as a party to the suit and it is also pleaded that the son Sh. Sanjay Vasudev as also his wife Smt. Anshu Vasudev were necessary parties, however I cannot agree with this

argument because a necessary party is a party without whom the rights in the suit cannot be decided or as against such a party relief is claimed. In the present case, the issue turns upon the proof of validity of the MOU including for the reason that Sh. Sanjay Vasudev has to be proved to be an attorney of the respondent/plaintiff, and on none of these aspects it is required that son Sh. Sanjay Vasudev and his wife Smt. Anshu Vasudev should be defendants in the suit because proof of a fact, viz existence and validity of the MOU, is a proof of that fact either by a document or by a witness, and that to prove a fact it is not necessary that witness must become a party/defendant in a suit. I, therefore, reject the plea that the suit was bad for non-joinder of necessary parties being the son and daughter-in-law of the respondent/plaintiff Sh. Sanjay Vasudev and Smt. Anshu Vasudev respectively.

10. A second appeal under Section 100 CPC lies only if there arises a substantial question of law. On the admitted terms of the MOU dated 17.1.2011 the first appellate court was justified in arriving at a conclusion that no right could be created in favour of the appellant/defendant not only because son Sh. Sanjay Vasudev has not proved to be an attorney of the respondent/plaintiff but also that the

MOU cannot be looked into in view of the provisions of Section 17 and 49 of the Registration Act.

11. No substantial question of law arises. Dismissed.

AUGUST 04, 2017
srb

VALMIKI J. MEHTA, J

