

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

% **Judgment delivered on: 8<sup>th</sup> May, 2017**

+ **RSA 263/2015**

1. DINA NATH PANDEY

2. RAJ KUMAR PANDEY

3. SHARMILA PANDEY ..... Appellants

Through: Mr.V.P.Yadav and Mr.Dinesh Kumar,  
Advocates.

versus

1. ADYA PANDEY

.....Respondent

Through: Mr.Murari Tiwari and Mr.Rahul  
Kumar, Advocates.

**CORAM:**  
**HON'BLE MR. JUSTICE I.S.MEHTA**

**JUDGMENT**

**I.S. MEHTA, J.**

1. The instant Regular Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908 against the judgment and decree dated 20.04.2015 passed by the learned Additional District Judge, East, Karkardooma Courts, Delhi in Regular Civil Appeal No. 58 of 2012, wherein the learned ADJ by setting aside the trial Courts order dated 22.03.2012 in suit No. 222/07 allowed the said appeal,

directing the appellants/defendants to handover the possession of the suit property to the respondent/plaintiff.

2. Aggrieved by the said order, the Appellant preferred the present regular second appeal on the following grounds:-

- a) That there is a substantial ground of law involved in the present appeal which requires the indulgence of this Court.
- b) That the learned First Appellate Court failed to consider that there is not a single document on record to show that the respondent/plaintiff was in the possession of the suit property.
- c) That as per Section 101 of the Indian Evidence Act, 1872 the onus of proving the ownership of 100 sq. yards of the suit property and its right and entitlement rests with the respondent/plaintiff.
- d) That the impugned order was passed without any merits and was based on conjectures and surmises.

3. The brief facts of the present case stated are that the respondent/plaintiff had filed a suit for declaration, possession, permanent injunction and damages qua against the appellants/defendants, i.e. (i) Dina Nath Pandey, (ii) Raj Kumar Pandey, (iii) Smt. Sharmila Pandey, alleging therein that the respondent/plaintiff had purchased a plot admeasuring 100 square yards, bearing Khasra No. 40/5, situated at Gali No.3, Main 25 Fts. Road, Indraprastha Colony, Part-I, Amrit Vihar, Burari, Delhi from

one Baccha Ram, s/o Sh. Jagan Nath vide GPA executed on 29.02.1992.

4. The respondent/plaintiff in its plaint at para No.3 has stated that the appellant/defendant No.1 Dina Nath Pandey is in his near relation and the appellant/defendant No.2 Raj Kumar Pandey is the son of the appellant/defendant No.1 and the appellant/defendant No.3 Sharmila Pandey is the daughter-in-law of the appellant/defendant No.1 and they all were having usual visiting terms at the house of the respondent/plaintiff.
5. It is further alleged in the plaint at para No.4 that in the month of September, 1999, the appellant/defendant No.1 along with appellants/defendants No.2 & 3 came to the house of respondent/plaintiff and approached him to adjust the appellants/defendants No.2 & 3 in his house for a short period till they arrange residential accommodation for themselves. Consequently, on their request they were accommodated and a licence was created by the respondent/plaintiff in favour of the appellants/defendants No.2 & 3.
6. After the appellants/defendants No.2 & 3 purchased a plot for themselves, the respondent/plaintiff made several requests to the appellants/defendants to shift/vacate his property but when the appellants/defendants No.2 & 3 failed to vacate the said property despite the requests of the respondent/plaintiff, he made a complaint on 26.02.2009 at Police Station Timar Pur and thereafter the appellants/defendants No.2 & 3 gave assurance in presence of respectable persons to vacate the said house within 2-3 months.

However, even after 2-3 months the appellants/defendants No.2 & 3 failed to vacate the said house and refused to vacate the house under the pretext that the appellant/defendant No.2 has got prepared some documents and had transferred the property in the name of his wife, i.e. appellant/defendant No.3, and later in the month of March, 2004 the appellant/defendant No.2 instituted a false case against the respondent/plaintiff.

7. Further, the appellant/defendant No.2 agreed to handover the peaceful possession of the suit property on 15.10.2004 in presence of the respectable persons. But the appellants/defendants despite repeated given assurance failed to vacate the said house. Consequently, the respondent/plaintiff issued a legal notice dated 19.10.2004 to the appellant/defendant No.1. Thereafter the respondent/plaintiff further approached the appellants/defendants on 31.12.2004 so that the appellants/defendants handover the peaceful possession of the suit property but when nothing came out the respondent/plaintiff went to the police station Timar Pur on 14.01.2005 for registration of a case against the appellants/defendants, but the police officials refused to register the case against the appellants/defendants and advised him to file a civil suit as the complaint is of civil in nature. Consequently, the respondent/plaintiff had filed a civil suit against the appellants/defendants for declaration, possession, permanent injunction and damages before the Court of Commercial Civil Judge/A.R.C., East District, Karkardooma Courts, Delhi.

8. The appellants/defendants had filed the written statement and raised the plea that the respondent/plaintiff is not entitled to the possession as well as the damages on the ground that the suit property was purchased from one Baccha Ram by spending money equally in equal share by the respondent/plaintiff and the appellant/defendant No.1 and the appellant/defendant No.1 is the owner of his respective 50% share in the suit property. The respondent/plaintiff has carried out construction on his 50% share and the appellant/defendant No.1 had carried out construction on his 50% share in the suit property. Hence, the appellant/defendant No.1 is the lawful owner of his respective 50% share. The said Baccha Ram had executed GPA, Agreement to Sell, Receipt, Affidavit and Registered Will dated 29.05.1992 in favour of both the respondent/plaintiff and the appellant/defendant No.1.
9. It is further stated in the written statement that the respondent/plaintiff by misleading Baccha Ram got a Will executed in his favour on 30.09.1994 but when Baccha Ram realized this fraud, he cancelled/ revoked the said Will on 27.04.2005. Further it is stated that the appellant/defendant No.2 is residing in the suit property since 1992 onwards and paying the electricity & development charges. Therefore, the plaint filed by the respondent/plaintiff is without cause of action and is not maintainable as per the provisions of Section 7 Rule 11 CPC; barred by time and not maintainable in view of Section 41(h) of Specific Relief Act; not maintainable in view of Section 110 of Indian Evidence Act and Section 52 & 54 of Transfer of Property Act and also Section 17 of

Registration Act as an immovable property can be legally and lawfully transferred only by a registered deed.

10. The appellants/defendants further admit the near relationship between them and the respondent/plaintiff and that they were having usual visiting terms at the house of the respondent/plaintiff.

11. The respondent/plaintiff filed replication to the written statement of the appellants/defendants denying their averments and reaffirmed the statement made in his plaint. The suit was filed on 02.04.2005 and on 20.08.2005 the following issues were framed by the trial Court:-

- 1) *Whether the plaintiff is entitled for the relief of permanent injunction, as prayed for? OPP*
- 2) *Whether the plaintiff is entitled for the relief of declaration, as prayed for? OPP*
- 3) *Whether the plaintiff is entitled for the relief of mandatory injunction, as prayed for? OPP*
- 4) *Relief.*

and the trial Court further framed the following additional issue on 08.11.2010:-

*Whether suit has been properly valued for the purpose of jurisdiction and court fee in respect of reliefs sought in this plaint?*

On 28.01.2012 on the basis of the amended plaint and written statement one more additional issue was framed:-

*Whether the plaintiff is entitled to recover the possession of the suit property? OPP*

12. The respondent/plaintiff examined himself as PW-1, Bhupender Singh as PW-2 and Baccha Ram as PW-3 as witnesses and the

documents relied upon by the respondent/plaintiff are Ex PW-1/A, Ex PW 1/B, Ex PW-1/C and Ex PW-1/D.

13. The appellants/defendants examined Dina Nath Pandey as DW-1, Raj Kumar Pandey as DW-2, K.P. Pandey as DW-3 and M.S. Rawat as DW-4 as witnesses and the documents relied upon by the appellants/defendants are Ex DW-1/1 to Ex Dw- 1/3, Ex Dw-1/A to Ex DW-1/B, Ex DW 2/A to Ex DW-2/H and Ex DW-3/1 to Ex DW-3/2.
14. The trial Court after perusal of the records and considering the contentions of the learned counsels for the parties dismissed the suit of the respondent/plaintiff vide judgment dated 22.03.2012 with the observation that there is no proof to show that the appellants/defendants were inducted as licensee in the suit property. Also, the respondent/plaintiff has not been able to prove that he is the owner of the entire suit property measuring 100 sq. yards.
15. Aggrieved by the said judgment dated 22.03.2012, the respondent/plaintiff preferred the first appeal on 08.05.2012 before the Court of Additional District Judge- East District, Karkardooma Courts, Delhi and the learned ADJ after hearing the parties passed the impugned judgment and decree dated 20.04.2015 thereby setting aside the trial Court's judgment dated 22.03.2012 and decreeing in favour of the respondent/plaintiff.
16. Aggrieved by the aforesaid impugned judgment and decree dated 20.04.2015, the appellants/defendants have preferred the present second appeal before this Court wherein the following substantial question of law was raised :-

*"Whether the judgment of the First Appellate Court suffers from any perversity."*

17. The learned counsel for the appellants/defendants has submitted that the impugned judgment and decree suffers from perversity and the same is liable to be rejected. It is further submitted that all the issues framed by the learned Trial Court were held against the respondent/plaintiff and that all the documents relied upon by the respondent/plaintiff were not found to be admissible and there is no evidence to support the respondent/plaintiff's plea.
18. The learned counsel for the appellants/defendants further submitted that the learned Civil Judge was right in holding all the issues whatsoever legally enforceable in favour of the appellants/defendants and the judgment and decree dated 20.04.2015 passed by the learned Appellate Court is based on surmises and conjectures and suffers from perversity. It is further submitted that the statement of PW-3 is not to be relied upon as the same suffers from its reliability and the document ExPW-1/3 is not admissible in evidence for want of impounding as per law. He further submits that as per Evidence Act there is specific admission on the part of the respondent/plaintiff. However, the respondent/plaintiff is debarred and the evidence led by him has to be seen in favour of the appellants/defendants under Section 17 of the Indian Evidence Act (admission).
19. The PW-3 has specifically and unequivocally has stated in the examination-in-chief and cross-examination that he had sold the suit property in favour of the appellant/defendant No.1. Since this fact

has emerged on the record, Section 58 of the Indian Evidence Act says that once the fact has been admitted it need not be proved, meaning thereby that the property in question has been sold to the appellant/defendant No.1 and the respondent/plaintiff is not the owner of the same. The Exhibit PW-1/A, i.e. GPA, requires attestation and the same has not been attested by any witness, therefore the same cannot be relied upon and none of the contents were proved by the respondent/plaintiff. Moreover, the burden of proof lies always on the person who alleges it and in the present case the respondent/plaintiff has failed to prove the same.

20. The learned counsel for the respondent/plaintiff at the very outset has rejected the arguments of the learned counsel for the appellants/defendants and has supported the impugned judgment and decree dated 20.04.2015. It is further submitted that the respondent/plaintiff is in the possession of the suit property measuring 100 sq yards and the suit of the respondent/plaintiff is based on the prior possession as he was in prior possession and he still is in present possession of the suit property.

21. The learned counsel for the respondent/plaintiff has further submitted that there is no evidence qua against the present appellants/defendants till date that they ever remained in possession of the suit property, had it been so there would have been a suit under Section 6 of the Specific Relief Act to recover the possession from either of the party since absence of suit under Section 6 of the Specific Relief Act *ipso facto* shows that the respondent/plaintiff was/is in the possession of the suit property on the basis of the

possession and the claim of the appellants/defendants is baseless as he never remained in possession of the suit property.

22. Instant regular second appeal is filed under Section 100 C.P.C. against the judgment and decree dated 20.04.2015 passed by the learned ADJ, East, Karkardooma Courts, Delhi in Regular Civil Appeal No. 58/2012.
23. The respondent/plaintiff filed a suit against the appellants/defendants for declaration, possession, permanent injunction and damages before the Court of Commercial Civil Judge/A.R.C., East District, Karkardooma Courts, Delhi for the suit property admeasuring 100 square yards, bearing Khasra No. 40/5, situated at Gali Ni.3, Main 25 Fts. Road, Indraprastha Colony, Part-I, Amrit Vihar, Burari, Delhi.
24. Consequently the learned CCJ/ARC(E), Karkardooma Courts, Delhi after completing the pleadings of the parties dismissed the aforesaid suit of the respondent/plaintiff holding failure to prove its onus casted on the appellants/defendants.
25. What was pleaded by the respondent/plaintiff before the learned Commercial Civil Judge was that the respondent/plaintiff had purchased the suit property, i.e. suit property admeasuring 100 square yards, bearing Khasra No. 40/5, situated at Gali Ni.3, Main 25 Fts. Road, Indraprastha Colony, Part-I, Amrit Vihar, Burari, Delhi, from one Baccha Ram son of Shri Jagan Nath vide G.P.A. executed on 29.02.1992 and thereafter had carried out construction on the said plot. Further on the request of the appellant/defendant No.1 the said

constructed house, i.e. a room, kitchen, latrine and shop part of property bearing Khasra No. 40/5 situated at Gali Ni.3, Main 25 Fts. Road, Indraprastha Colony, Part-I, Amrit Vihar, Burari, Delhi, was given to the appellants/defendants No. 2 and 3 by creating a license in favour of the appellants/defendants No. 2 and 3 for a short period on the basis of family relation between the parties.

26. Subsequently, despite repeated requests and a legal notice dated 19.10.2004 for vacating the said property of the respondent/plaintiff the appellants/defendants failed to vacate the said suit property. This averment of the respondent/plaintiff was contested by the appellants/defendants in their written statement alleging therein that the suit property was purchased from one Baccha Ram by the respondent/plaintiff and the appellant/defendant No.1 by spending money equally in equal shares vide receipt dated 29.05.1992 and the respondent/plaintiff carried out construction on his 50% share of the plot and the appellant/defendant No.1 carried out construction on his remaining 50% share but does not give details of the construction, i.e. date, month year, and the said Baccha Ram had also executed a Will in favour of the appellant/defendant No.1 on 29.05.1992 and the suit is without cause of action and barred by time and even not maintainable under Section 110 of The Indian Evidence Act.

27. However, the near relationship with the respondent/plaintiff has not been disputed by the appellants/defendants and the appellant/defendant No.1 also does not claim that the his construction on his 50% share was prior to that of the respondent/plaintiff on the suit property.

28. What is emerging on the record is that the appellants/defendants has not pleaded their ownership by way of adverse possession. The plea of the appellants/defendants is that the property in question was jointly purchased by the respondent/plaintiff and the appellant/defendant No.1 after spending money in equal shares from one Baccha Ram on 29.05.1992.

Whereas the plea of the respondent/plaintiff is that the suit property was purchased individually by him from one Baccha Ram on 29.02.1992 and he had constructed a house thereon and a license was created in favour of the appellants/defendants No.2 and 3 because of their near family relationship.

29. Here both the parties failed to prove title documents as per law in their favour. However, the facts on record shows that the respondent/plaintiff was in prior possession of the suit property and his prior possession over the suit property has not been challenged in the written statements by the appellants/defendants.

30. Moreover, the appellants/defendants have also admitted their close relationship with the respondent/plaintiff and the plea of the appellant/defendant No.1 that he had carried out construction on his 50% share of the suit property loses its significance for want of supporting documents.

31. The appellants/defendants through the instant regular second appeal are challenging a suit for declaration, possession, permanent injunction and damages who neither have better title of the suit property than the respondent/plaintiff nor they are in prior possession of the suit property bearing Khasra No. 40/5 situated at Gali Ni.3,

Main 25 Fts. Road, Indraprastha Colony, Part-I, Amrit Vihar, Burari, Delhi.

32. Here the appellants/defendants cannot be permitted to succeed in their design in presence of the well known maxim referred from *Broom's Legal Maxims (10th edition)* that no one can take a profit out of his own wrong. Reliance is placed on the judgment of the Apex Court in the case ***Kusheshwar Prasad Singh vs. State of Bihar and Others; (2007) 11 SCC 447*** and the relevant paragraph is reproduced as under:-

*"16. It is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, "a wrong doer ought not to be permitted to make a profit out of his own wrong"*

33. Consequently, the suit for recovery of possession of the present petition on the basis of prior possession is maintainable against all except the true owner. Reliance is placed on the judgment of the Apex court in case ***Somnath Burman vs. Dr. S.P. Raju and Anr.; AIR 1970 SC 846.***

34. In view of the above discussion, the judgment and decree dated 20.04.2015 of the first appellate Court does not suffers from any perversity and there is no merit in the present regular second appeal. No substantial question of law arises therefore, dismissed.

35. Let one copy of this Judgment be sent to the concerned Court(s).

36. Trial Court Record be also sent back to the concerned Court(s) forthwith.
37. All the pending applications (if any) are disposed of accordingly. No order as to Costs.

**I.S.MEHTA, J.**

**MAY 08, 2017**

