

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

% **Date of decision: 9th August, 2018.**

+ **RSA 357/2016 & CM No.43935/2016 (for stay)**

KEHAR SINGH SAINI **Appellant**
Through: Mr. Virendra Singh, Adv.

Versus

AMAR SINGH **Respondent**
Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 impugns the judgment and decree [dated 8th March, 2016 in RCA No.08/13 of the Court of Additional Senior Civil Judge (North-West)] of dismissal of First Appeal under Section 96 of the CPC preferred by the appellant against the judgment and decree [dated 31st October, 2013 in Civil Suit No.115/04 (Unique ID No.02401C5142412004) of the Court of Civil Judge-01 (West)] of dismissal of the suit filed by the appellant/plaintiff for the relief of permanent injunction restraining the respondent/defendant from dispossessing the appellant/plaintiff from shop bearing plot no.72, forming part of Harlal Market, Nahar Park, Delhi – 110 085.

2. This appeal came up first before this Court on 28th November, 2016, when without recording any question of law lest substantial question of law arising for consideration, notice thereof was ordered to be issued and the counsel for the respondent/defendant appeared. Thereafter the appeal has

been adjourned from time to time but on none of the subsequent dates also any mention was made of the substantial question of law arising for consideration.

3. Today, Mr. Virendra Singh counsel for the appellant/plaintiff states that he has received a message from Mr. Rohit Manan, Advocate for the respondent/defendant stating that he is unwell and to make a request to this Court for an adjournment on his behalf.

4. However in the facts aforesaid, being of the view that till the appeal is found to raise any substantial question of law, the need to hear the counsel for the respondent/defendant would not arise, the counsel for the appellant/plaintiff has been heard and the Suit Court record and the First Appellate Court record requisitioned in this Court have been perused.

5. The suit, from which this appeal arises, being only for permanent injunction restraining forcible dispossession from the shop aforesaid, I have enquired from the counsel for the appellant/plaintiff whether the appellant/plaintiff is still in possession of the shop, inasmuch as since the dismissal of the first appeal on 8th March, 2016 there is no interim order in this appeal against dispossession of the appellant/plaintiff though an application in that regard is pending. In fact a perusal of the record of the First Appellate Court also does not disclose any interim order restraining the respondent/defendant from dispossessing the appellant/plaintiff from the shop during the pendency of the First Appeal. A further perusal of the Suit Court record shows that in the suit also, no interim stay was granted against dispossession of the appellant/plaintiff till 29th May, 2004 though the suit came up before the Suit Court first on 16th April, 2004. On 29th

May, 2004 also, on account of adjournment sought by the counsel for the respondent/defendant on that date, *status quo* regarding possession was directed to be maintained without returning any finding of the possession being that of the appellant/plaintiff. On the very next date i.e. 13rd July, 2004, the counsel for the respondent/defendant sought issuance of a commission to ascertain possession of the shop and which was opposed by the counsel for the appellant/plaintiff.

6. It is not understood as to why the appellant/plaintiff, if was in possession, opposed issuance of a commission to ascertain possession.

7. However the Suit Court, on 19th July, 2004, being of the *prima facie* opinion, on the basis of the settlement arrived at in Suit No.2933/1990 of this Court, that the appellant/plaintiff was in possession of the property and observing that the claim of the respondent/defendant of being in possession could be decided only at the time of trial, continued the order of *status quo* qua possession.

8. The appellant/plaintiff instituted the suit, from which this appeal arises, pleading (i) that the appellant/plaintiff had constructed Harlal Market, Nahar Pur, Delhi – 110 085 on part of land bearing *Khasra* no.215, Village Nahar Pur, Delhi which was the ancestral property of the appellant/plaintiff; (ii) that earlier, a dispute had arisen with one Sunil Kumar and his associates in respect of 31 shops of the same market including shop no.72 and the appellant/plaintiff had filed a suit being Suit No.2933/1990 of this Court for declaration and recovery of damages, injunction etc. and which suit was compromised on 22nd July, 1996; (iii) that as per the compromise, possession of 21 shops including shop no.72

was returned and given to the appellant/plaintiff and the possession of the remaining 10 shops i.e. shops no.67 to 70, 74 to 76, 104, 105 and 109 was given to Sunil Kumar; (iv) that the appellant/plaintiff, since 22nd July, 1996 had been enjoying peaceful possession of shop no.72 without any interruption from anyone;(v) that on 4th April, 2004, the appellant/plaintiff learnt that some workers were working in shop no.72 after entering the same by breaking open the shutter; (vi) the appellant/plaintiff immediately reached the spot; (vii) that the workers found working disclosed that they were workers of the respondent/defendant and left the shop no.72; (viii) the appellant/plaintiff tried to contact the respondent/defendant but could not; (ix) that the appellant/plaintiff learnt that the respondent/defendant, with an intent to grab the shop no.72 had fabricated documents; and, (x) that the appellant/plaintiff was the owner in possession of shop no.72 and apprehended dispossession by the respondent/defendant.

9. The respondent/defendant contested the suit by filing the written statement *inter alia* pleading, (i) that the appellant/plaintiff, on 9th October, 1989, sold shop no.72 to one Gurjeet Singh and executed an Agreement to Sell, General Power of Attorney (GPA), affidavit and receipt which were duly registered with the Registrar; (ii) that Gurjeet Singh sold half of the shop to the respondent/defendant on 15th October, 1996 and executed the documents with respect to the shop in favour of the respondent/defendant; (iii) that the respondent/defendant also deposited monies for electricity connection in the subject shop; (iv) that the other half of the shop was sold by Gurjeet Singh to one H.C. Batra; (v) that shop no.72 could not be subject matter of Suit No.2933/1990 inasmuch as shop no.72 had prior to the

institution of that suit been sold by the appellant/plaintiff to Gurjeet Singh; (vi) that the respondent/defendant was renovating the shop when the appellant/plaintiff attempted to interfere with the possession of the respondent/defendant and the respondent/defendant called the Police and the appellant/plaintiff was booked for the offence being committed by him; (vii) that as per the documents filed by the appellant/plaintiff of Suit No.2933/1990, shop no.72 was not subject matter thereof; (viii) the respondent/defendant was the owner of half of the shop purchased by him from Gurjeet Singh; and, (ix) that in fact it was the appellant/plaintiff who was creating problems for the respondent/defendant with respect to the shop no.72.

10. On the pleadings aforesaid of the parties, the following issues were framed in the suit on 14th September, 2004:-

- “1. Whether the plaintiff is entitled to relief of permanent injunction? OPP*
- 2. Relief.”*

11. The Suit Court, on the basis of the evidence led, dismissed the suit, finding/observing/holding, (i) that the appellant/plaintiff, by the subject suit was seeking to protect his possession of shop no.72; (ii) that the respondent/defendant had not admitted possession of the appellant/plaintiff; (iii) that the appellant/plaintiff had not proved any documentary evidence to prove his possession of shop no.72; (iv) had the appellant/plaintiff been in possession of the shop he could have filed photocopy of electricity bill or tax receipt to show possession thereof; (v) by virtue of oral evidence, possession of the appellant/plaintiff could not be proved; (vi) though the

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appellant/plaintiff claimed to be the owner but had not proved any title documents; (vii) on the contrary the respondent/defendant had proved Agreement to Sell, GPA, affidavit and receipt executed by the appellant/plaintiff in favour of Gurjeet Singh and Agreement to Sell, GPA, affidavit and receipt executed by Gurjeet Singh in favour of the respondent/defendant; (viii) though the appellant/plaintiff in his evidence denied having executed documents in favour of Gurjeet Singh but in cross-examination admitted that he had given shop to Gurjeet Singh in 1989; (ix) this admission of the appellant/plaintiff implied physical possession of Gurjeet Singh; (x) incidentally, the documents Ex.D-1 to D-4 proved by the respondent/defendant being Agreement to Sell, GPA, affidavit and receipt were also dated 9th October, 1989; (xi) that the appellant/plaintiff had not explained as to in what capacity he had inducted Gurjeet Singh into the shop in the year 1989; (xii) that the appellant/plaintiff, in cross-examination also admitted his signatures on receipt of Rs.25,000/- from Gurjeet Singh and which receipt showed the same to be towards consideration for the subject shop; (xiii) that the appellant/plaintiff, in cross-examination also admitted his signatures on GPA in favour of Gurjeet Singh; (xiv) from the said documents it was evident that the appellant/plaintiff had sold the subject shop to Gurjeet Singh; (xv) that though the respondent/defendant in his written statement had cast a cloud over title claimed by the appellant/plaintiff to shop no.72 but the appellant/plaintiff had not sought any declaration of his title to the said shop as ought to have been done in terms of **Anathula Sudhakar Vs P. Buchi Reddy** AIR 2008 SC 2033 and, (xvi) the appellant/plaintiff was thus unable to prove his possession of the shop.

12. A perusal of the judgment of the First Appellate Court shows that the contention of the appellant/plaintiff before the First Appellate Court was, (i) that the Suit Court had ignored the settlement in Suit No.2933/1990 whereunder the suit shop no.72 was returned by Sunil Kumar to the appellant/plaintiff; (ii) that the shop which was sold by Gurjeet Singh to the respondent/defendant vide documents proved by the respondent/defendant was not shop no.72, as the dimensions did not tally; and, (iii) the respondent/defendant might have purchased some shop other than shop no.72 from Gurjeet Singh.

13. Per contra, it was the contention of the counsel for the respondent/defendant that the appellant/plaintiff was not in possession of shop no.72 and not entitled to any relief.

14. The First Appellate Court, while dismissing the appeal of appellant/plaintiff, in addition to the reasoning given by the Suit Court, reasoned (i) that the appellant/plaintiff in cross-examination admitted knowing Gurjeet Singh and giving shop no.72 to Gurjeet Singh but denied execution of Agreement to Sell and GPA; (ii) however signatures on the receipt of Rs.27,000/- from Gurjeet Singh was admitted; (iii) that the appellant/plaintiff had not challenged the Agreement to Sell, GPA and affidavit proved to have been executed by him in favour of Gurjeet Singh; (iv) it was quite evident that Gurjeet Singh was not unknown to the appellant/plaintiff; (v) it was for the appellant/plaintiff to get the documents in favour of Gurjeet Singh declared null and void; (vi) that the appellant/plaintiff has failed to prove what transpired between him and Gurjeet Singh and/or which shop was given by the appellant/plaintiff to

Gurjeet Singh; and, (vii) the appellant/plaintiff had been unable to show any title over the shop.

15. The emphasis of the counsel for the appellant/plaintiff before this Court also is twofold. Firstly, it is contended that the appellant/plaintiff, during the pendency of the suit, filed an application for letting out of the suit shop and though the said application was dismissed but the same showed the possession to be of the appellant/plaintiff. The second contention is that from the compromise arrived at in Suit no.2933/1990, it is evident that the appellant/plaintiff was in possession of the shop.

16. A perusal of the application dated 10th January, 2005 filed by the appellant/plaintiff for permission to let out shop no.72 shows the appellant/plaintiff to have claimed therein that the shop was under his lock and key. The respondent/defendant, in reply to the said application stated that the appellant/plaintiff, in the guise of the application was wanting to take possession of the shop which was not with the appellant/plaintiff. The Suit Court, vide order dated 22nd August, 2005 dismissed the application reasoning that in the earlier order allowing application of appellant/plaintiff under Order XXXIX Rules 1&2 of the CPC there was no finding of possession being of the appellant/plaintiff and there was no fresh material before the Court on the basis of which it could be said that the appellant/plaintiff was in possession of the shop and thus the relief sought could not be granted.

17. Moreover, merely from the appellant/plaintiff filing application for letting out of the shop, it cannot be said to be proved that the

appellant/plaintiff was in possession of the property, specially when the application was dismissed with the order aforesaid.

18. The said argument thus does not raise any substantial question of law.

19. As far as the only other argument is concerned, the appellant/plaintiff, before the Suit Court, proved as Ex.PW1/2 a photocopy of a certified copy of the order dated 22nd July, 1996 in Suit No.2933/1990 titled ***Kehar Singh Vs. Sunil Kumar*** whereunder the appellant/plaintiff withdrew the suit against defendants no.2 to 4 therein and stated that the appellant/plaintiff had compromised the suit with the first defendant on terms contained in the application under Order XXIII Rule 3 of the CPC. Though the photocopy (not even certified copy) of the application under Order XXIII Rule 3 of the CPC along with the site plan purported to be attached thereto is also on record but no exhibit mark has been put on the said documents. The endorsement is not accompanied with the words Ex. PW1/2 “Colly.” so as to indicate that what was tendered and taken in evidence was not only the order dated 22nd July, 1996 but also the application under Order XXIII Rule 3 CPC; normally, when a single exhibit is put on several documents, the words “Colly.” are put next to the exhibit mark. Thus, strictly speaking, the compromise application has not been proved.

20. Moreover, there is nothing to show as to who were the other defendants in the aforesaid suit against whom the suit was withdrawn.

21. The counsel for the appellant/plaintiff states that Gurjeet Singh aforesaid was one of the defendants in the suit and further states that the appellant/plaintiff in his evidence deposed that Gurjeet Singh was a party.

22. Even if Gurjeet Singh was a party, the suit, insofar as against him, was withdrawn. No copy of the plaint in the Suit No.2933/1990 from which it could be determined as to for what reason Gurjeet Singh was impleaded has been placed on record or has been proved.

23. Even if the compromise application, though not proved, were to be read, the same is between the appellant/plaintiff and Sunil Kumar only and nothing therein would bind the appellant/plaintiff. There is also no mention in the compromise application of shop no.72. A reading of the compromise application only shows that the dispute with respect to 31 shops was being settled and of which ten shops (which did not include shop no.72) were to remain with Sunil Kumar and the other shops were returned by Sunil Kumar to the appellant/plaintiff. However, there is nothing to show that the 21 shops which were so returned included shop no.72. Though the compromise application indicates the shops with reference to colour coding thereof in the site plan annexed, but only a black & white photocopy of the site plan annexed is before this Court and which does not show any colours that are indicated in the compromise application.

24. Thus, even if the compromise application were to be read, the same does not prove that possession of shop no.72 was given thereunder by Sunil Kumar to the appellant/plaintiff.

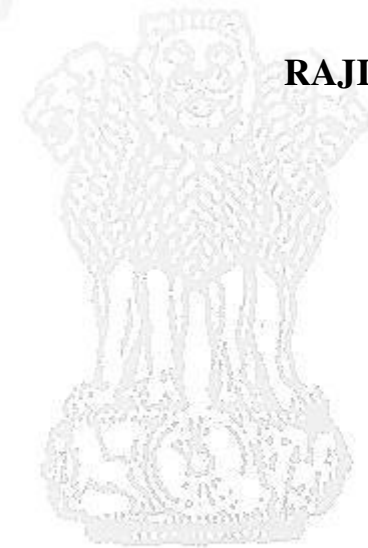
25. In the aforesaid state of affairs, neither any factual nor legal error is found in the judgment of the Suit Court and the First Appellate Court and no substantial question of law arises.

26. Dismissed.

27. The Suit Court record and the First Appellate Court record be returned forthwith.

AUGUST 09, 2018
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RAJIV SAHAI ENDLAW, J.



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