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HIGH COURT OF DELHI AT NEW DELHI

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R.S.A. No.39/2012 & C.M. No.4391/2012

Decided on : 29th June, 2015

NDMC

..... Appellant

Through: Mr. Arvind Sah, Advocate.

Versus

BRIJ MOHAN SHARMA & ORS.

..... Respondent

Through: Mr. Ajay Kumar Porwal, Advocate for
R-1 with R-1 in person.
Mr. Navin Kumar Jaggi, Advocate for
R-2 to 6.

WITH

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R.S.A. No.3/2013

DEEP KARAN LAL

..... Appellant

Through: Mr. Dhanesh Relan, Advocate.

Versus

BRIJ MOHAN SHARMA & ANR.

..... Respondent

Through: Mr. Ajay Kumar Porwal, Advocate for
R-1 with R-1 in person.
Mr. Navin Kumar Jaggi, Advocate for
R-3.

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J.

1. These are two regular second appeals arising out of the common judgment and decree dated 15.12.2011 passed by Mr. Ajay Goel, the

learned Senior Civil Judge-cum-RC (Central), Delhi in R.C.A. No.213/2005.

2. Briefly stated the facts leading to filing of the present appeals are that Brij Mohan Sharma (parties are referred by their status in the trial court), respondent No.1 in both the aforesaid appeals, filed a suit bearing No.123/1997 for declaration against NDMC, Om Prakash Sharma (his brother) and Deep Karan, making them as defendant Nos.1, 2 & 3 respectively. The declaration sought by Brij Mohan Sharma was that a decree be passed declaring him to be the joint licensee of shop No.29 Prithvi Raj Market, New Delhi. The said shop was originally allotted to one Hans Raj Sharma by NDMC (defendant No.1) on licence basis. Hans Raj Sharma, father of Brij Mohan Sharma (plaintiff) and Om Prakash Sharma (defendant No.1), remained licensee till his death on 22.4.1961 and after his death, all legal heirs became entitled to be substituted as legal heirs of the deceased/licensee but the licence was substituted in favour of his widow, Pushpawati. All the remaining legal heirs had no objection to her substitution. She remained licensee of the suit property till her death on 2.5.1970. After her death, all her legal heirs, namely, Brij Mohan Sharma, Om Prakash Sharma, Nand Kishore Sharma, Madan

Mohan Sharma, Krishna Devi, Saroj Bala and Neelam Devi became entitled to a joint licensee in respect of the shop in question. It was alleged that Om Prakash Sharma, brother of Brij Mohan Sharma, manipulated with NDMC and fraudulently without his knowledge, and got the shop transferred in his own name as a licensee and occupied the shop. It was alleged that false affidavits of legal heirs of Pushpawati including that of Brij Mohan Sharma were filed for this purpose. It is further alleged that no 'No objection' was invited by the NDMC from the other legal heirs and thus, a declaration was sought.

3. So far as Deep Karan (defendant No.3) is concerned, it was alleged that a further conspiracy was hatched between him and Om Prakash Sharma (defendant No.2) by virtue of which the shop No.29, which was originally allotted to Hans Raj Sharma, father of Brij Mohan Sharma, was exchanged by Om Prakash Sharma with shop No.22 owned by Deep Karan. It was stated that this fact of exchange of shops was learnt by Brij Mohan Sharma (plaintiff) only on 30.4.1989 and, therefore, he sent a notice to NDMC dated 25.9.1989 to issue a joint licence in favour of all the legal heirs but of not avail and accordingly, he chose to file the aforesaid suit seeking declaration.

4. So far as NDMC is concerned, it controverted all the allegations except that Hans Raj Sharma was the original licensee. It was also admitted by NDMC that after the death of Pushpawati, the shop was ultimately regularized in the name of Om Prakash Sharma, who had submitted an affidavit to NDMC that all the other legal heirs including Brij Mohan Sharma do not have any objection for transfer of the licence in the name of Om Prakash Sharma, being the eldest in the family. NDMC got a resolution passed and accordingly transferred licence in favour of Om Prakash Sharma. It also admitted that the aforesaid resolution was passed by the committee vide resolution No.6 on 5.3.1974. Brij Mohan Sharma (the plaintiff) has stated that he learnt about this only in the year 1989 despite the fact that he claimed that he was running the said shop along with his brother, Om Prakash Sharma.

5. Om Prakash Sharma also contested the suit and filed reply on the same lines on which NDMC had filed its reply. He also stated that he had legally exchanged shop No.29, of which his father, Hans Raj Sharma, was the original licensee, after having got his licence regularized with Deep Karan, who was the owner and licensee of shop No.22. Accordingly, he prayed for dismissal of the suit.

6. On the pleadings of the parties, the following five issues were framed :-

- “1. Whether plaintiff is entitled to declaration as he is joint licensee of shop No.29, Prithvi Raj Market, New Delhi? OPP*
- 2. Whether suit is barred by limitation? OPD-1*
- 3. Whether suit is bad for non-joinder and misjoinder of necessary parties? OPD-1*
- 4. Whether suit is not maintainable u/S 49 of Punjab Municipal Act, 1911? OPD*
- 5. Relief.”*

7. The parties examined their respective evidence. Brij Mohan Sharma (the plaintiff) examined himself as PW-1 and NDMC examined one S.K. Saini. On the basis of the evidence, all the issues were decided against Brij Mohan Sharma (the plaintiff). The trial court also observed that a suit for declaration has to be filed within the period of three years from the date when the right to sue has accrued for the first time and in the instant case, the right to sue accrued on 13.6.1973 when ‘No Objection Certificate’ was given by all the legal heirs, yet the suit was filed after expiry of almost 15 years and therefore, the suit was hopelessly barred by time and was dismissed on 4.10.2005. The documents which

were the basis of regularizing the licence and the resolution on the basis of which the licence of Om Prakash Sharma was regularized were duly proved.

8. Feeling aggrieved by the aforesaid dismissal of the suit, Brij Mohan Sharma preferred an appeal against the judgment and decree of dismissal bearing RCA No.213/2005 titled *Brij Mohan Sharma vs. NDMC & Others*. By the time the appeal was filed, Om Prakash Sharma had died and his legal heirs, who were five in number, were impleaded as respondent No.2A to 2E. The appellate court overturned the judgment of the trial court by observing that some hanky panky in mutating the suit shop in the name of Om Prakash Sharma was made out as he had not even bothered to step into the witness box to prove his case. It was observed by the first appellate court that all the rules and regulations were thrown to winds which were to be observed with regard to mutation of the property in the name of Om Prakash Sharma and therefore, the first appellate court allowed the appeal on 15.12.2011 and set aside the judgment and the decree passed by the trial court and directed that Brij Mohan Sharma is the joint co-licensee in respect of shop No.29, Prithvi Raj Market, New Delhi and consequently exchange of shop No.22 with

shop No.29 between Om Prakash Sharma (since deceased) and Deep Karan was also declared null and void.

9. Feeling aggrieved, NDMC and Deep Karan Jai have preferred two separate appeals. While as appeal No.39/2012 is filed by NDMC, appeal No.3/2013, has been filed by Deep Karan Jai. The only question which arises for consideration is as to whether the judgment and decree passed by the first appellate court suffers from any perversity which necessarily will include a question of examination of facts in the light of evidence adduced and it would be a substantial question of law. Further in order to establish a thing, is it necessary that one of the party, who has setup a case in that regard, must necessarily enter into the witness box? A peripheral question to this would be as to whether the court can grant a relief which is not even claimed by the plaintiff, Brij Mohan Sharma?

10. I have heard the learned counsel for the parties and have also gone through the judgment of the trial court as well as the first appellate court. The first appellate court has primarily set aside the judgment and the decree of dismissal on the ground that Om Prakash Sharma (defendant No.2) has not entered into the witness box in order to prove his case. I do not feel that Om Prakash was required to enter into the witness box at all.

This is on account of the fact that Om Prakash Sharma's case has been established on the basis of the stand taken by NDMC in the pleadings as well as through the testimony of the witness, who has been examined by the NDMC that he is a legal genuine licensee of the shop in question. Two vital documents have been proved by the NDMC in this regard. The first document is 'No objection' having been given by all the legal heirs including Brij Mohan Sharma on 13.9.1973 giving therein no objection to the transfer of the licence in respect of shop No.29 in favour of their eldest brother, namely, Om Prakash Sharma. This document is not admitted by Brij Mohan Sharma. He has denied that he has ever signed any such document. The witness does not seem to be testifying the truth. If at all he had not signed the said document, he at best could have obtained an expert's opinion as to whether his signatures which are appearing on the copy of the plaint or *vakalatnama* or on any other admitted documents were tallying with the signatures appearing on the questioned document. It is very unlikely that this document of 'no objection' has not been signed by Brij Mohan Sharma. This is on account of the fact that not only Brij Mohan Sharma has signed the said document but it is signed by other remaining legal heirs also. None of the other

legal heirs have been impleaded as a party to the suit nor have they been made to appear as a witness to say they did not sign the said document. If that would have been so then perhaps one could have easily and safely said or presumed said that this 'No objection certificate' is a procured document. On the contrary, so far as Brij Mohan Sharma's signatures are concerned, I have compared his signatures appearing on this 'No objection' with his signatures appearing on the plaint and *vakalatnama*. I find, a comparison from the naked eye, gives an irresistible impression that the signatures appearing on the 'No objection certificate' are that of Brij Mohan Sharma. The reasons for drawing this inference is the formation of the words, the force with which the signatures have been put. It shows some amount of similarity which makes the court to draw this inference. The second document which has been proved by NDMC was the resolution passed by it regularizing the licence in favour of Om Prakash Sharma after he had completed the requisite formalities including filing of 'No objection' by the six legal heirs in favour of Om Prakash Sharma, being the eldest.

11. These two documents, therefore, clearly establish the case of Om Prakash Sharma (defendant No.2) that he was a valid licensee in respect

of the suit shop in question and his name was correctly substituted in place of his mother on account of 'no objection' having been given by all the remaining legal heirs. That being the position, the finding recorded by the first appellate court in this regard that something hanky panky has transpired or something is amiss with the NDMC, is only based on conjecture and surmises without their being any evidence on record. I, therefore, feel that the judgment of the first appellate court suffers from perversity inasmuch as it has failed to appreciate evidence in its correct perspective and it has ignored evidence which has been produced by NDMC in proof of a fact by preponderance of probability which indirectly goes to prove the case of Om Prakash Sharma (defendant No.2). If that be so, then obviously the consequences must follow. The first appellate court cannot declare exchange of shop by Om Prakash Sharma with Deep Karan in place of shop No.29, taking shop No.22, to be null and void.

12. There is another aspect of the matter that though Brij Mohan Sharma (the plaintiff) states that cause of action accrued to him on 30.4.1989, when he, for the first time, learnt that the licence in respect of the shop in question has been mutated in the name of Om Prakash

Sharma (defendant No.2) but the fact of the matter remains that the document itself which gives 'no objection' for transfer of licence in favour of Om Prakash Sharma is signed and bearing a date of 13.6.1973, therefore, Brij Mohan Sharma (the plaintiff) was aware of the fact that his signatures are obtained showing that he has given 'no objection' for transfer of licence in favour of Om Prakash Sharma, is attributable to him in 1973. That being the position, the suit for declaration has to be filed within a period of three years which has been long overdue and it was incorrect on the part of the first appellate court to hold that the suit of the appellant is within limitation.

13. There is yet one more aspect also to the written statement of the defendants that according to Order I Rule 10 CPC, all the parties whose presence is required for the just and effective adjudication of the lis between the parties is necessary as well as proper party to the suit and must be impleaded so. In the instant case, Brij Mohan Sharma is claiming himself to be the licensee in respect of the shop in question basing his claim that he is a co-licensee along with Om Prakash Sharma, yet, he does not make the other five/six legal heirs of original allottee as parties for being impleaded. He knew for certain that if they would have

been impleaded as parties and appeared as witnesses, they would have testified against him.

14. For the reasons mentioned above, I am of the considered opinion that the judgment passed by the first appellate court is suffering from perversity and accordingly deserves to be set aside. Ordered accordingly. Both the regular second appeals are allowed and the suit of the plaintiff, Brij Mohan Sharma, for declaration is dismissed.

V.K. SHALI, J.

JUNE 29, 2015
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