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

% *Judgment Reserved on: July 06, 2015*
Judgment Delivered on: July 15, 2015

\+ **RFA(OS) 141/2014**

HARJINDER SINGH ANAND ..... Appellant
Represented by: Mr.Peeyoosh Kalra, Advocate with Mr.Samyak Jain and Mr.Sudhendra Tripathi, Advocates

versus

DALJEET SINGH ANAND ..... Respondent
Represented by: Mr.G.P.Thareja, Advocate with Mr.Surinder Jain, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. Harjinder Singh Anand : the appellant, and Daljeet Singh Anand : the respondent are brothers. The name of their father is Kulwant Singh Anand. In a suit filed by Daljeet Singh Anand, seeking partition of property bearing Municipal No.B-1/37, Ashok Vihar, Phase II, Delhi – 110052, a preliminary decree has been passed by the learned Single Judge vide impugned decree dated March 27, 2014, declaring the share of the two brothers to be 50% each.

2. Case pleaded by Daljeet Singh is simple. He and Harjinder Singh, by virtue of a conveyance deed dated May 15, 1996 are the recorded joint owners of the suit property, partition whereof was not being accepted by his brother. Relations between the two had soured. Being a two storeyed

building, he was residing on the first floor and his brother on the ground floor.

3. In the written statement filed by him, Harjinder Singh admitted that the two brothers were occupying the ground floor and the first floor as pleaded by his brother and that as per the registered conveyance deed the two were the recorded joint owners of the property, but claimed that the real owner was their father and that the conveyance deed was executed by Daljeet Singh by playing fraud upon their father. He pleaded that the sale consideration when the plot of land was purchased from one Sh.Harcharan Singh was from the funds of a partnership. He pleaded that the sale was by virtue of an agreement to sell and a power of attorney.

4. On the pleadings of the parties following issues were settled:-

> *"(i) Whether defendant proves that any documents, as claimed by him, were procured through fraud, by the plaintiff?*
>
> *(ii) Whether the plaintiff proves entitlement to any share in the property and, if so, to what extent?*
>
> *(iii) Whether plaintiff proves that he is entitled to a decree for partition, as claimed?"*

5. It is apparent that since title to the suit property as per the registered conveyance deed being in the name of the two brothers was admitted by Harjinder Singh, defence had to succeed to non-suit Daljeet Singh and thus issue No.1 was to be debated between the parties, onus whereof was on Harjinder Singh inasmuch as he had set up the plea of the conveyance deed recording he and Daljeet Singh to be the purchasers of the property being the result of a fraud played upon the father by Daljeet Singh.

6. Overlooking said fact, learned counsel for Daljeet Singh Anand filed an affidavit by way of evidence towards his examination-in-chief. Since during admission/denial of the documents filed by the two brothers prior to settlement of issues Harjinder Singh had admitted 14 documents filed by Daljeet Singh they were exhibited as Ex.P-1 to Ex.P-14, in his affidavit by way of evidence filed on January 23, 2009, Daljeet Singh referred to the said documents as Ex.P-1 to Ex.P-14. He proved 12 more documents and referred to them in his affidavit as Ex.PW-1/1 to Ex.PW-1/12. But, the said documents were not formally exhibited because said affidavit by way of evidence was ignored when it came to light that Harjinder Singh was required to lead evidence in the affirmative at the first instance. After Harjinder Singh examined himself and his father as DW-1 and DW-2, during the deposition which was by way of filing affidavit by way of evidence, no documents were proved, Daljeet Singh filed another affidavit by way of evidence towards examination-in-chief on May 01, 2012 in which apart from referring to the admitted documents as exhibits P-1 to P-14 he made a reference to the documents Ex.PW-1/12 to which he had referred to in his affidavit by way of evidence filed on January 23, 2009, he made reference to a few other documents which had not been filed earlier and were filed along with the affidavit. In this manner the exhibit marks referred to in the second affidavit by way of evidence was Ex.PW-1/1 to Ex.PW-1/16. Unfortunately when the second affidavit by way of evidence was formally tendered the learned Joint Registrar before whom cross-examination was recorded remained negligent and did not put the exhibit mark on the documents. At the stage of final hearing, though not recorded in any order sheet, but for the reason we would be hereinafter stating, it is

apparent that the exhibit marks put on the documents were as referred to in the written submissions by learned counsel for Daljeet Singh. It would be useful to put in a tabular form, the brief content of the document, its exhibit mark referred to in the affidavit by way of evidence dated January 29, 2009, the affidavit by way of evidence dated May 01, 2012 as also the written submissions filed on February 03, 2014. It would be read as under:-

Documents-	**Referred in the evidence by way of affidavit dated January 23, 2009 and also in written submissions dated February 03, 2014 as-**	**Referred in the evidence by way of affidavit dated May 01, 2012 as-**	**As per the mark on the document should be-**
Registered conveyance deed in favour of the appellant and respondent dated May 15, 1996	Exhibit P-1	Exhibit P-1	
Perpetual lease deed dated April 29, 1978	Exhibit P-2	Exhibit P-2	
Agreement for construction dated August 04, 1978 executed by Harcharan in favour of appellant and respondent.	Exhibit P-3	Exhibit P-3	
Registered receipt for sale consideration of ₹48,000/- dated September 04, 1978	Exhibit P-4	Exhibit P-4	

Registered Will dated September 04, 1978 executed by Harcharan in favour of the appellant and the respondent.	Exhibit P-5	Exhibit P-5	
Registered Power of attorney executed by Harcharan in favour of Kulwant Singh.	Exhibit P-6	Exhibit P-6	
Original water bill for July 28, 2006.	Exhibit P-7	Exhibit P-7	
Plan sanctioned by MCD in favour of the appellant and respondent dated October 21, 1997.	Exhibit P-8	Exhibit P-8	
Application for mutation of property in favour of the appellant and respondent dated June June 18, 1996.	Exhibit P-9	Exhibit P-9	
Indemnity bond dated June 17, 1996 for mutation of the suit property.	Exhibit P-10	Exhibit P-10	
Affidavit by the appellant dated June 17, 1996 for mutation of the suit property.	Exhibit P-11	Exhibit P-11	
Letter dated October	Exhibit P-12	Exhibit P-12	

21, 1997 by MCD sanctioning construction in the suit property.			
Property tax return filed by the appellant for the year 2004-05, 2005-06 dated March 17, 2006.	Exhibit P-13	Exhibit P-13	
Property tax payment receipt in favour of the appellant for the year 2004-05, 2005-06 dated March 17, 2006.	Exhibit P-14	Exhibit P-14	
Income tax assessment order dated September 30, 1982 for the year 1979-80.	Exhibit PW-1/1	Exhibit PW-1/3	Exhibit PW-1/1
Water bill of Delhi Jal Board (DJB) in the name of the respondent for the period June 08, 2002 to August 09, 2002.	Exhibit PW-1/2	Exhibit PW-1/4	Exhibit PW-1/2
Water bill of DJB in the name of the respondent for the period May 20, 2006 to July, 13, 2006.	Exhibit PW-1/3	Exhibit PW-1/5	Exhibit PW-1/3
Electricity bill for April 2003 in favour	Exhibit PW-1/4	Exhibit PW-1/6	Exhibit PW-1/4

of the respondent.			
Electricity bill for August 29, 2006 in favour of the respondent.	Exhibit PW-1/5	Exhibit PW-1/7	Exhibit PW-1/5
Electricity bill for February, 2004 in favour of the appellant.	Exhibit PW-1/6	Exhibit PW-1/8	Exhibit PW-1/6
Property tax bill dated January 24, 1981 in favour of Harcharan Singh.	Exhibit PW-1/7	Exhibit PW-1/9	Exhibit PW-1/7
Property tax payment receipt dated November 14, 1990 in favour of Harcharan Singh.	Exhibit PW-1/8	Not referred	Exhibit PW-1/8
Property tax payment receipt dated October 25, 1994 in favour of Harcharan Singh.	Exhibit PW-1/9	Exhibit PW-1/10	Exhibit PW-1/9
Property tax payment receipt dated March 08, 2006 in favour of respondent.	Exhibit PW-1/10	Exhibit PW-1/11	Exhibit PW-1/10
Letter dated March 15, 1983 written by Harcharan Singh in favour of the	Exhibit PW-1/11	Exhibit PW-1/1	Exhibit PW-1/11

appellant and respondent.			
Plaint of the suit filed by the plaintiff/respondent.	Exhibit PW-1/12 (not mentioned in the written submissions.)	Not referred	
House tax receipt for the year 2004-05.	Not referred	**<u>Exhibit PW-1/12</u>**	Not marked as exhibit
House tax receipt for a sum of ₹ 4,399/- dated March 07, 2006 for the year 2005- 2006.	Not referred	**<u>Exhibit PW-1/13</u>**	Not marked as exhibit
Certified copy of the Order refusing to grant interim injunction against the respondent dated December 17, 2009 in case no. 583/2009.	Not referred	Exhibit PW-1/14	Not marked as exhibit
Examination of Kulwant Singh 2009 in case no. 583/2009.	Not referred	Exhibit PW-1/15 (not on record)	
Certified copy of Cross examination of Kulwant Singh 2009 in case no. 583/2009.	Not referred	Exhibit PW-1/15A (not on record)	
Certified copy of application dated March 03, 1993 to the DDA for making property freehold.	Not referred	**<u>Exhibit PW-1/16</u>**	Not marked as exhibit

7. From Ex.P-3, Ex.P-4, Ex.P-5 and Ex.P-6 it becomes crystal clear that the owner of the property Harcharan Singh had sold a plot of land bearing

Municipal No.B-1/37, Ashok Vihar, Phase II by executing documents under which, to evade payment of unearned increase in the price of the land to the Delhi Development Authority and to evade payment of stamp duty on a sale-deed, the parties resorted to a stratagem of contrivance, which was very popular in Delhi. Enter into an agreement to sell. Hand over possession of the property agreed to be sold. Receive full sale consideration as so recorded in the agreement to sell. Possession was therefore secured in the hands of the purchaser who could set up a defence under Section 53-A of the Transfer of Property Act which enables a party in possession having paid full sale consideration to retain possession of an immovable property. Further, an irrevocable power of attorney was obtained by the purchasers either in their own name or in the name of a close trustworthy relative empowering him to deal with the subject property.

8. So rampant was the misuse of law that, the Ministry of Urban Development took a policy decision to regularize all such kinds of sales and simultaneously conveying a free hold tenure. A conversion charge was notified. If the original perpetual lessee came forward to pay the said conveyance charge, on receipt thereof the perpetual lessor would convey a free hold tenure in the name of the perpetual lessee. If the property had been transferred under an agreement to sell, will and a power of attorney, upon the beneficiary applying for conversion of the lease hold tenure to free hold tenure and paying 33.33% additional conversion charges, the property would be conveyed into a free hold tenure directly in the name of the purchaser. Ex.P-1 and Ex.P-2 are evidence that the benefit of the conversion policy was availed of by Harjinder Singh and Daljeet Singh in whose favour Harcharan Singh had executed the agreement to sell. Their father Kulwant Singh

Anand in whose favour the power of attorney Ex.P-6 was executed by Harcharan Singh had to sign the necessary documents. The superior lessor i.e. the Delhi Development Authority executed the conveyance deed Ex.P-1.

9. Highlighting in the written statement filed by him, Harjinder Singh merely pleaded that Daljeet Singh played a fraud on their father when Ex.P-1 was registered, what were the acts done by Daljeet Singh which as per him constituted fraud was not pleaded. In his deposition filed by means of an affidavit by way of evidence he simply said that the aged father was taken to the sub-Registrar's office with the information that his presence was required for conversion, he deposed no more. Now, this would not be an act of fraud for the reason indeed, presence of the father was required for the purposes of conversion inasmuch as the power of attorney Ex.P-6 had been executed by Harcharan Singh in favour of Kulwant Singh. No document was proved by him to show that the sale consideration paid to Harcharan Singh in sum of ₹48,000/- (Rupees Forty Eight Thousand only) was either by the father or from the account of any partnership firm. Similarly Kulwant Singh, except for stating that he was told to come along and visit the office of the sub-Registrar for purposes of conversion, said no further and proved no document evincing that either he or any partnership firm paid the sale consideration to Harcharan Singh. Subjected to cross-examination, Kulwant Singh evaded reply to specific questions putting fact to him by generally responding that he did not remember.

10. As regards Daljeet Singh Anand, he deposed facts consistent with pleadings in his plaint and apart from the 14 admitted documents exhibited further documents, and relevant would it be to note that apart from the documents which he had filed before issues were settled between the parties

he made a reference to Ex.PW-1/12, Ex.PW-1/13. Ex.PW-1/14, Ex.PW-15, Ex.PW-1/15A and Ex.PW-1/16. None of these documents have been exhibited and we find that the documents referred to as Ex.PW-1/15 and Ex.PW-1/15A are not even a part of the judicial record.

11. With reference to the proved documents the learned Single Judge has found that not only are the two brothers the recorded owners of the suit property as per Ex.P-1 as also evidenced by Ex.P-8 the two were the ones in whose joint names sanction was granted by the Municipal Corporation of Delhi to erect a building as also evidenced from Ex.P-9 were the ones who applied for the mutation of the property in their names in the records of the Municipal Corporation of Delhi and they were the ones who had submitted the indemnity bond Ex.P-10. With reference to the property tax returns Ex.P-13 and Ex.P-14 as also the water bills, electricity bills and income tax assessment orders Ex.P-1 to Ex.P-10, the learned Single Judge has concluded that far from the defence discharging the onus, the positive evidence led by Daljeet Singh warranting a finding to be returned that the two brothers were the joint owners of the suit property, each having 50% share therein, resulting in the impugned preliminary decree being passed.

12. Contentions advanced by learned counsel for the appellant in appeal were:-

(i) The learned Single Judge erred in reading in evidence Ex.PW-1/12, Ex.PW-1/13 and Ex.PW-1/16 because these documents were not filed by Daljeet Singh before issues were settled. He surreptitiously inserted the documents in the judicial record by annexing the same when he filed the affidavit by way of evidence on May 01, 2012.

(ii) That Daljeet Singh Anand led no evidence to prove the source wherefrom ₹48,000/- (Rupees Forty Eight Thousand only) was paid to Harcharan Singh the seller.

13. Learned counsel urged that under the circumstances the impugned decree has to be set aside.

14. We deal with the second contention urged.

15. In his deposition, filed in the affidavit by way of evidence, Daljeet Singh Anand has deposed that he paid ₹24,000/- (Rupees Twenty Four Thousand only) utilizing the funds in his saving accounts No.12587 with Bank of India, Kamla Nagar, Delhi – 110007; requiring his banker to issue a pay order/demand draft in the name of the seller Harcharan Singh and debiting his account. It may be true that Daljeet Singh Anand has not examined any witness of the bank nor has he proved his bank statement of account, but we find corroboration to his oral testimony on said aspect of the matter in Ex.PW-1/1 which is the income tax assessment order dated September 13, 1982 for the assessment year 1979-1980. The same duly records that the assessee has shown to the satisfaction of the assessing officer that his sharge towards the sale consideration i.e. ₹24,000/- (Rupees Twenty Four Thousand only) was from out of funds lying to his credit in saving account No.12587 with Bank of India, Kamla Nagar, Delhi – 110007. Further, being the registered owner of the suit property evidenced by Ex.P-1, the presumption of law would be that Daljeet Singh was the joint owner of the property. The onus was on Harjinder Singh to displace the said presumption. His word of mouth and that of the father of the parties has not shifted the onus from him to his brother.

16. The second contention advanced in support of the appeal is thus rejected.

17. Pertaining to the first contention advanced, as we have noted hereinabove, documents referred to as Ex.PW-1/12 to Ex.PW-1/16 in the affidavit by way of evidence filed on May 01, 2012 by Daljeet Singh, were not filed by him before issues were settled between the parties and he never took any permission from the Court to file the same. We find, as noted above, that documents referred to as Ex.PW-1/15 and Ex.PW-1/15A are actually not a part of the judicial record. Document referred to as Ex.PW-1/14 has not been assigned any exhibit mark. Documents referred to as Ex.PW-1/12, Ex.PW-1/13 and Ex.PW-1/16, are the three documents referred to and relied upon by the learned Single Judge, but we find that no exhibit mark has been put on the said three documents.

18. What has happened before the learned Single Judge is obvious. The learned Joint Registrar before whom evidence was recorded did not bother to put any exhibit marks on the documents other than the ones which were admitted/denied during admission/denial. When written submissions were filed learned counsel for Daljeet Singh confused the matter further by referring to the exhibit marks on the documents with reference to the affidavit by way of evidence filed on January 23, 2009 and for the three documents relied upon by the learned Single Judge as Ex.PW-1/12, Ex.PW-1/13 and Ex.PW-1/16, with reference to the affidavit by way of evidence filed on May 01, 2012. Before the learned Single Judge a compilation was filed and the learned Single Judge made a reference to the proved documents with reference thereto.

19. Be that as it may, Ex.PW-1/12 and Ex.PW-1/13 are house tax receipts for the year 2004-05 and the year 2005-06. The receipts are in the joint names of Harjinder Singh and Daljeet Singh. They may be ignored. The house tax receipts for the earlier years, water and electricity bills for the earlier years proved as Ex.PW-1/2 to Ex.PW-1/10 would show that the two brothers were paying house tax jointly. Ignoring Ex.PW-1/16 which is an application filed to Delhi Development Authority for conversion of the property, we note that Ex.P-1 is the registered conveyance deed executed by Delhi Development Authority in the name of the two brothers.

20. For record, we note that the father Kulwant Singh had filed a suit against his son Daljeet Singh in which he pleaded that he was the real owner of the property. The suit was dismissed on merits. The number of the suit being 583/2009 was filed before the learned Civil Judge. Appeal filed against the judgment and decree dismissing the suit has also been dismissed.

21. There is no merit in the appeal which is dismissed with costs against the appellant and in favour of the respondent.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

JULY 15, 2015
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