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

+ **Date of Decision: 10.09.2015**

% **RSA 158/2015**

YOGENDRA PRASAD

..... Appellant

Through: Mr. B.S. Rajesh Agrajit, Advocate.

versus

HEERAWATI DEVI

..... Respondent

Through: Mr. Mohar Singh & Mr. Siddharth,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. The present second appeal has been preferred under Section 100 CPC by the appellant/ defendant to assail the judgment and decree dated 30.01.2015 passed by the learned ADJ-03 (SW), Dwarka Courts, New Delhi in RCA No.48/2012. By the impugned judgment, the First Appellate Court has dismissed the appellant's first appeal preferred to assail the judgment and decree dated 02.06.2012 passed by the learned ACJ-cum-ARC, Dwarka Courts, New Delhi in Civil Suit No. 285/2009 titled *Heerawati Devi Vs. Yogender Prasad*. The Trial Court by the said judgment and decree, decreed the suit of the respondent/ plaintiff thereby directing the appellant/ defendant to handover the vacant and peaceful possession of the suit property to the plaintiff, and also awarded mesne profit from the date of filing of the suit till

delivery of possession @ Rs.2,000/- per month, subject to filing of Court Fees.

2. The case of the plaintiff was that she purchased a plot No.1 measuring 56 sq. yards falling in Khasra No.31/4 situated in the revenue estate of village Kakrula, Delhi in the abadi of the colony known as Bharat Vihar, New Delhi from one Nand Lal, S/o Sh. Ram Jas for a consideration of Rs.90,120/-. On urbanization, the said Plot No.1 was initially numbered as House No.B-49, B-Block, Bharat Vihar, Kakrula, New Delhi, and subsequently, it was re-numbered as B-118, Block-B, Bharat Vihar, Kakrula, New Delhi.

3. The plaintiff stated that on 31.10.1991, the vendor received the full and final consideration and executed several documents like GPA, Affidavit, Agreement to Sell, Will, Receipt, all duly notarised in favour of the plaintiff. The plaintiff further stated that she raised construction over the plot comprising of two rooms, one kitchen, one toilet and one bathroom from her own personal resources. She stated that she and her family are residing in the said property ever since. The plaintiff further stated that in the month of July 2005, the plaintiff and her husband allowed the defendant to occupy one room only as a licensee for some time, since the defendant is the nephew of the husband of the plaintiff. The plaintiff stated that the defendant was, at that time, passing through the financial crises and was not able to pay for a hired house. The defendant had then assured the plaintiff and her husband that he shall vacate the room after six months. However the defendant continued to stay in one room – marked 'B' in the site plan filed along with the suit, even after the expiry of the six months period.

4. The plaintiff further stated that the defendant filed a false and frivolous suit being Suit No.102/2009 against the plaintiff and her husband seeking permanent and mandatory injunction in the Court of the Civil Judge/ ARC, Dwarka Courts, New Delhi. In the said suit, the defendant in the present suit had averred that the plot in question was purchased from one Sh. Nand Lal, S/o Sh. Ramjas, R/o village Kakrula for a total sale consideration of Rs.18,525/- @ Rs.325/- per sq. yard in the name of the present plaintiff (who was impleaded as defendant No.2 in Suit No.102/2009). The defendant herein had claimed that the cost of the plot was equally borne by the defendant herein, Sh. Krishan Kumar – the husband of the plaintiff herein, and one Kishore Kumar.

5. The plaintiff stated that she had terminated the license of the defendant on 12.03.2009, and called upon him to deliver vacant possession of the room to her. However, the defendant did not do the needful. Consequently, the present suit was preferred. The plaintiff claimed the relief of possession/ mandatory injunction against the defendant, directing the defendant to handover possession of the suit property to the plaintiff. The plaintiff also claimed damages/ mesne profits @ Rs.2,000/- per month, i.e. Rs.8,000/-, apart from future mesne profits at the same rate till delivery of possession.

6. The defendant/ appellant filed his written statement. He admitted his relationship with the plaintiff and her husband. However, he denied that he lived in the suit property as a licensee. He stated that the suit property had been purchased from joint earnings, including that of the defendant. He claimed to have spent an equal amount towards the cost of the property.

However, he admitted that the suit property was purchased in the name of the plaintiff. He claimed that the plaintiff had assured that equal rights will vest in the defendant, in the suit property. He also stated that the construction on the property was done with joint funds of the plaintiff, the defendant and Sh. Kishore Kumar. The defendant stated that Sh. Kishore Kumar wanted to get his share from the suit premises. He was handed over Rs.20,000/- – being 1/3rd share of the cost of the suit property, on 15.06.1995. He claimed that, thereafter, he and the plaintiff became owners of the suit property half and half. He claimed that the plaintiff had executed a General Power of Attorney on 18.09.1992 in his favour declaring him to be the sole and absolute owner of an area admeasuring 18.5 sq. yards in Khasra No.31/4 situated in the revenue estate of village Kakrula, New Delhi. He further stated that the plaintiff executed the agreement to sell in respect of the area admeasuring 18.5 sq. yards for Rs.6,500/-. She also executed an affidavit to the same effect. He claimed that these documents were executed by the plaintiff to avoid any future dispute regarding ownership of the suit property. He stated that in her affidavit, the plaintiff had declared that she had delivered actual physical possession of the suit property to the defendant on the spot, and the defendant had become sole and absolute owner of 18.5 sq. yards. He also claimed that the plaintiff had executed the Receipt dated 20.06.1992.

7. On the basis of the pleadings of the parties, the Trial Court framed the following issues on 09.10.2009:

“1. Whether the plaintiff has no locus standi to file the present suit? OPD.

2. *Whether the plaintiff is entitled for the relief of recovery of possession? OPP.*

3. *Whether the plaintiff is entitled for the recovery of mesne profits? OPP.*

4. *Relief.”*

8. The plaintiff examined herself as PW-1. She led in evidence her affidavit by way of evidence towards examination-in-chief as Ex.PW-1/A and several other documents, including the General Power of Attorney, Agreement to Sell, Affidavit of Nand Lal, Will, Receipt executed by Nand Lal, Site Plan, documents to show raising of electricity bills by BSES Rajdhani Power Ltd. and Property Tax Receipts in her name. One Sh.Om Prakash was examined as PW-2, who is a neighbour of the plaintiff. The defendant also examined himself as DW-1; produced Sh.Ram Chander Mahato as DW-2, and Sh.Kishore Kumar as DW-3.

9. The Trial Court rejected the defence of the defendant/ appellant as there were several contradictions found in the testimonies of the defendant's witnesses. While DW-1, the defendant/ appellant stated during his cross-examination that Sh. Ram Chander Mahato (DW-2) had been part & parcel of the negotiations for purchase of the suit property, and he was witness to the payments made to the seller of the plot and also a witness in respect of the documents executed at the time of the transaction, DW-2 Sh. Ram Chander Mahato, during his cross-examination, stated that he did not witness any payment, which might have been made in respect of the deal to the Zamindar Nand Lal, and he was not aware when the property papers were executed by the Zaminder Nand Lal in favour of any of them, in

respect of the suit property. He voluntarily stated that he came to know, at a later stage, that Zamindar Nand Lal had executed the property papers in favour of Heerawati Devi.

10. The testimony of DW-3 Sh. Kishore Kumar was also rejected since the same also appeared to be contradictory. DW-3 during his cross-examination stated that he had been given Rs.20,000/- for foregoing his share in the suit property of the plaintiff. The Trial Court held that the Receipt (Ex.PW-1/A4) showed that the amount received by the vendor Sh. Nand Lal of Rs.19,120/- was received from the plaintiff/ Heerawati Devi. It did not record that any amount was received from DW-3 Kishore Kumar. The Trial Court also observed that the appellant/ defendant in his cross-examination had admitted to the execution of the documents, on which the plaintiff had based her title as Ex.PW-1/A1, PW-1/A2, PW-1/A3 & PW-1/A4.

11. The Trial Court invoked Section 4 of the Benami Transactions (Prohibition) Act, 1988 to held that no suit, claim or action to enforce any right in respect of any property held Benami against any person, in whose name the property is held or against any other person, shall lie by him or on behalf of a person claiming to be the real owner of such property, and no defence based on any right in respect of any property held Benami, whether against the person in whose name the property is held, or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property. Since the aforesaid documents Ex PW-1/A1, PW-1/A2, PW-1/A3 and PW-1/A4 were in favour

of the plaintiff, the defendant/appellant was barred from claiming that he was a benami co-owner/ interest holder in the suit property.

12. So far as reliance placed by the defendant on set of documents allegedly executed by the plaintiff in his favour – i.e. Ex.PW-1/D1 to Ex.PW-1/D5 is concerned, the Trial Court held that the plaintiff had, in her cross-examination, denied execution of the said documents. The Trial Court held that even though DW-2 and DW-3 testified that on 18.09.1992 the plaintiff had executed General Power of Attorney, Agreement to Sell, Will etc. in favour of the plaintiff, but they did not testify that Ex.PW-1/D1 to Ex.PW-1/D5 were the documents executed by the plaintiff. Consequently, the defence of the defendant/ appellant was rejected and the suit was decreed, as aforesaid.

13. The First Appellate Court by the impugned judgment and decree has concurred with the findings returned by the Trial Court. The First Appellate Court rejected the version of the appellant/ defendant that he had also contributed for purchase and construction of the suit property, by observing that if that were so, there was no plausible explanation as to why the suit property was not purchased in joint names, and why it was purchased in the name of the plaintiff alone. It was also not explained as to why it was not disclosed in the Receipt and Agreement to Sell, that a part of the sale consideration was paid by the defendant as well. The appellant had also not examined Sh.Nand Lal in support of his defence. The documents produced by the appellant/ defendant, i.e. Ex.PW-1/D1 to PW-1/D5 were also doubted by observing that these documents were not even notarised. The reasoning adopted by the Trial Court was also adopted by the First Appellate Court.

14. When this second appeal was preferred, it appears that this Court was led to believe that the suit filed by the respondent/ plaintiff was a suit for mandatory injunction, wherein no averment had been made by the plaintiff in her plaint to the effect that the appellant/ defendant was earlier her licensee in the suit property. On this basis, notice was issued by the Court in the present appeal. The order dated 27.04.2015 passed by this Court recorded:

“It has been contended by learned counsel for the appellant that the respondent had filed a suit for mandatory injunction claiming the appellant to be licensee while no such averment has been made in the plaint of the respondent/plaintiff to show that the appellant is a licensee in order to form a substantial question of law. It is only contended that the appellant is not satisfied by the findings of the First Appellate Court and that the trial court record be requisitioned. Notice be issued to the respondent, returnable on 5th August, 2015. Trial court record be requisitioned on the next date of hearing”.

15. Learned counsel for the appellant submits that the judgments and decrees passed by the Courts below are contrary to the evidence brought on record. Due emphasis has not been laid on Ex. PW-1/D1 to PW-1/D5.

16. On the other hand, the submission of learned counsel for the respondent is that the appellant is guilty of suppression and misstatement. It is firstly pointed out that the copy of the plaint filed by the appellant with the present appeal is not a correct copy inasmuch, as, in the title of the plaint/ suit and in the relief, the relief of possession has deliberately been omitted. It is further pointed out that the plaintiff had disclosed in paragraph 2 of the plaint that one room in the suit property had been given to the appellant/

defendant for occupation only as a licensee, and in paragraph 4 of the plaint, the plaintiff had stated that she had terminated the license of the defendant/ appellant on 12.03.2009. Again, in paragraph 6, the plaintiff had adverted to the termination of license even subsequently on 27.03.2009.

17. Having heard learned counsel and perused the judgment of the Trial Court, the First Appellate Court and the evidence led by the parties, I am of the view that there is absolutely no merit in this second appeal. The Trial Court as well as the First Appellate Court have exhaustively appreciated the evidence led by the parties while arriving at their consistent findings with regard to the entitlement of the plaintiff to the relief sought by her, and with regard to the falsity of the defence set up by the defendant. The appellant has not pointed out any perversity or misdirection in the approach of the Courts below, or non-consideration of evidence by the Courts below while arriving at their consistent findings. Pertinently, even though the plaintiff had denied execution of Ex.PW-1/D1 to Ex.PW-1/D5, the said documents were neither put to DW-2 or DW-3, nor the appellant/ defendant produced any expert evidence to prove the signatures attributed to the plaintiff on these documents. It is not explained by the appellant/ defendant as to why, in the documents executed by Sh. Nand Lal, only the name of the plaintiff was reflected as the agreement purchaser, and as to why the Receipt was executed by Sh. Nand Lal only in favour of the plaintiff and why the said documents were not prepared jointly in favour of the plaintiff, the defendant and Kishore Kumar DW-3- the so-called third agreement purchaser. Consequently, this Court is not persuaded to interfere with the concurrent findings of fact returned by the Courts below in favour of the plaintiff.

18. I also find that the appellant has sought to misled this Court in two ways. Firstly, the copy of the plaint filed on record does not disclose that the relief of possession was also sought by the respondent/ plaintiff. Neither in the heading of the suit, nor in the relief claimed, the said relief of possession is included. A perusal of the original record shows that the relief of possession was added, in hand, in the plaint at both the places. Even if it were to be assumed that the copy of the plaint served on the appellant/ defendant do not contain the said addition, a perusal of the judgment dated 02.06.2012 passed by the Trial Court would have alerted the appellant that the suit was not filed merely to seek a mandatory injunction, but to seek the relief of mandatory injunction/ possession.

19. Secondly, the plaintiff/ appellant misled this Court by submitting that the respondent/ plaintiff had not disclosed in the plaint that the appellant was a licensee, whereas, a perusal of the plaint shows that at several places the said fact had been disclosed, and it had been disclosed that the said license had been terminated.

20. In view of the aforesaid, the present appeal is dismissed with Costs quantified at Rs.10,000/-. The Costs be paid to the respondent within four weeks.

VIPIN SANGHI, J

SEPTEMBER 10, 2015

B.S. Rohella