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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RSA No. 201/2003

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24th August, 2016

NEW FRIENDS COOP. HOUSE BUILDING SOCIETY LTD. Appellant

Through: Mr. S.C.Singhal, Advocate.

versus

SH. HET RAM

..... Respondent

Through: Mr. Virender Kumar Singh, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908 (CPC) against the concurrent Judgments of the courts below; of the Trial Court dated 27.2.1996 and the First Appellate court dated 25.6.2003; by which the suit filed by the appellant/plaintiff for possession of the suit land against the defendant has been dismissed.

2. The case of the appellant/plaintiff is that by virtue of the Sale Deed dated 26.11.1959, the defendant sold 1/4th share of his land situated in Khasra no. 376/219, Village Khijrabad, Delhi to the plaintiff. Appellant/plaintiff pleads that it received possession of the land sold by the defendant to the plaintiff, but the defendant has thereafter encroached on part of the land sold by the defendant to the plaintiff and forming part of Khasra no. 376/219 which is

shown in red colour in the site plan filed alongwith the plaint and marked as XYZW. Appellant/plaintiff claims that since the defendant after selling of the suit land to the appellant/plaintiff encroached upon part of the land sold, hence the appellant/plaintiff is entitled to possession of this suit land.

3. Respondent/defendant contested the suit by pleading that it was not disputed that he sold 1/4th share of his land comprising Khasra no. 376/219 to the plaintiff by the Sale Deed dated 26.11.1959, however, what was sold to the appellant/plaintiff was agricultural land and not the suit land which is part of the abadi/habitation of the village and on which land the defendant has constructed his property. Suit was hence prayed to be dismissed.

4. After pleadings were complete the trial court on 16.5.1978 framed the following issues:-

- “1. Whether the plaint has been signed and verified by the duly authorised person? (OPP)
2. Whether the plttf has become the full and absolute owner of the 1/4th share of the property in dispute as alleged in the plaint?
3. Whether the suit is correctly valued for the purpose of court fees and jurisdiction? (OPP)
4. Whether the suit is within time? (OPP)
5. Whether this court has no jurisdiction to try the present suit as alleged in the paragraph No.9 of written statement? (OPD)
6. Whether the disputed site does not form a part of the khasra No: 376/219 as alleged in paragraph No:5 of the WS. If so to what effect?
7. Whether the plaintiff is entitled to the relief prayed for in the plaint? (OPP)
8. Relief.”

5. The crucial issues to be decided were issue nos. 2, 6 and 7 and which have been decided by the trial court together. The relevant discussion of the trial court with regard to issue nos. 2, 6 and 7 is as under:-

“ISSUE No. 2, 6, & 7

These three issues are clubbed hereby for the shake of convenience involving common discussion. The onus of proving issue No: 6 was upon the deft whereas the onus of proving the issue No: 2&7 was upon the plaintiff. The case of the plttf is that the deft had sold his 1/4th share in the disputed property to them vide the sale deed Ex.Pw1/1 in respect of the khasra No: 376/219. The deft has admitted the sale of the land but his case is that it was only the agricultural land which was sold to the plaintiff on which presently there is a Hospital, road and other houses built up. According to the deft the present property/land in dispute on which his house has been constructed falls within the Abadideh of the Village and had never been sold to the plaintiff at any point of time. The deft has in his evidence admitted that there had been a partition in their family and that he had become the owner of the ¼ the portion/shares in the property.

I have gone through the various documents placed on record by the parties. The plttf has placed on record the copy of the sale deed which is Ex.PW1/1 and is pertaining to khasra No: 376/229 of Village Khizarabad. The perusal of the statement of Pw1 namely Sh. Bal Mukand Wig shows that the possession of the vacant land is stated to have been delivered at the site but he has in his cross examination stated that the deft did not point out his 1/4th share separately. He has admitted that there was no demarcation of boundary wall nor any land around the land over 1/4th share of the deft and there was no demarcation on the suit land. This court had Appointed a local commissioner to record the statement of Sh. Het Ram Witness to the sale deed but the said commission had not been executed on account of the conduct of the plaintiff. Hence an adverse inference is liable to be drawn against the plttf to that effect. The perusal of the statement of Naffees Ahmad Halqa Patwar shows that the land bearing khasra No: 376/219 had been mutated in the name of the plttf of which the deft had 1/4th share. The Secy. of the plttf society Pw5 has in his cross examination admitted that he had got the land in dispute demarcated on which the deft had later on made the construction of his house. The deft has in support of his case has examined the witness from the house tax department and has also produced the various electricity bills and water bills on record to show that the suit property is being assessed to the house tax since the year 1961 which is still in the name of the deft Het Ram. The various witness of the deft namely Dw3, DW5 and Dw6 have corroborated what has been stated by the defendant Dw4 in his testimony. According to the oral testimony of all these witnesses the deft is having his house over the disputed plot land since the last 30/35 years. Pw5 has in his cross examination denied that the deft is in possession of the land since 20/30 years but no evidence had been adduced by

the pltff to show that the said construction had been made by the deft only after the taking possession of the land whereas the various witnesses of the deft and the documents present on record namely the various electricity and water bills and the house tax receipts show that the deft had been in continuous possession of the suit plot over which he has built up his house since the year 1961. The deft has also placed on record the copy of the khasra girdawari to show that it was the agricultural land which was sold to the pltff which land was bearing 376/219. According to Dw4 the land on which the house is situated is a part of the Abadi Deh of the Village Khizrabad. Ld. counsel for the pltff has relied upon the authority in the case of Beant Singh Vs. Natha Singh reported in 1966 HP Page 48 in support of his case and has stated that the khasra girdawari is a public documents and it is not able to produce the patwari to prove the same.

It is settled proposition of law that the khasra girdawari is not a proff of ownership as such and can only be used for the corroborative purposes. The khsara girdawari placed on record by the deft finds a corroboration from the oral testimonies of various witnesses i.e. DW3, DW5 and DW6 who are the residents of the same village since last many years and there is no reason to disbelieve them. It is an admitted the case of the plff that no demarcation had been done of the suit land. The pltff has also not proved his sale deed in accordance with law and has failed to examine the material witnesses namely Sh. Het Ram despite the repeated opportunities and hence an adverse inference is liable to be drawn against them in respect of the same.

In view of the above I hereby hold that the suit land falls within the Abadi Deh of the Village and the disputed site does not form a part of the khasra No. 376/219 which had been sold to the plaintiff by the defendant. The plaintiff had become the absolute owner of the 1/4th share of the property sold to the deft which was agricultural land forming a part of the Khasra No.376/219 but since the pltff has failed to show that the suit land falls within the said khasra numbers i.e K.No.376/219 hence I hereby hold that they are not entitled to the relief asked for in the plaint. These issues are decided accordingly.” (underlining added)

6. A reading of the aforesaid discussion of the judgment of the trial court shows that the trial court has observed that there exists a construction on the suit property which is assessed to house tax since 1962-63 (wrongly written as 1961). The house tax bills were filed and proved as Ex.DW1/1 to Ex.DW1/5. Electricity and water bills with respect to the suit property were also filed and proved as Ex.DW4/H to Ex.DW4/L and Ex.DW4/M to Ex.DW4/O respectively. The trial court has by its judgment essentially held that onus to prove that

defendant was situated on land comprising Khasra no. 376/219 was on the plaintiff but the plaintiff failed to discharge the onus and defendant has proved that suit land falls within the abadi/habitation of the village and was not the agricultural land which was sold to the plaintiff under the Sale Deed dated 26.11.1959 comprised in Khasra no. 376/219. It is also held by the trial court that appellant/plaintiff failed to lead evidence of demarcation that the suit land fell in Khasra no. 376/219 sold to the plaintiff. The trial court accordingly has concluded that plaintiff has failed to show that the land with the defendant is forming part of Khasra no. 376/219 which was sold to the plaintiff and hence the plaintiff is not entitled to any relief.

7. The first appellate court has given similar reasoning and held that issue ultimately is of demarcation and whether the respondent/defendant was situated on Khasra no. 376/219, but the appellant/plaintiff had to stand on his own legs to prove that the suit land forming part of Khasra no. 376/219, which the appellant/plaintiff failed to do so because no demarcation report has been filed by the appellant/plaintiff to show that the suit land forms part of Khasra no. 376/219 sold under the Sale Deed 26.11.1959 to the appellant/plaintiff. The relevant observations of the first appellate court in this regard are contained in paras 5 to 8 of the judgment and which read as under:-

“Issue No.6: Whether the disputed site does not form part of Kh. No.376 of 219 as alleged in para 5 of W.S. If so, to what effect? OPD

Shri S.C. Singhal, Ld. counsel for the appellant has submitted that the defendant has failed to lead any evidence in support of issue No.6. The

defendant while appearing as DW4 has not proved the Khasra numbers of the suit land and the land in his possession. It has further been argued that the Defendant has not cross-examined PW2 and PW3 as regards the Khasra Number of the suit land. PW2 had proved the site plan and PW3 had proved the sale deed. So these witnesses have established the identity of the suit land. The Secretary of the society, Sh. M.L.Jaggi appearing as PW5 had further proved the possession of the plaintiff society and also subsequent encroachment by the defendant. Plaintiff/appellant had thus, proved its case to the hilt. The Ld. trial court while dealing with Issue No.6 had twisted the findings thereon and wrongly recorded that plaintiff/appellant had failed to show that the suit land fell within Khasra No.376/219. The sale of land bearing Khasra No.376/219 in favour of the Plaintiff has been established by proving the sale deed Exh.PW3/1, mutation Exh. PW3/A and the statement of PW3 and PW5. It was thus, proved that the appeal be allowed and suit be decreed.

6. Shri Verma, Ld. Counsel for the respondent, while replying to the arguments, submitted that the Plaintiff/appellant who had approached the court and initiated the proceedings had to stand on his own legs and prove that the suit land was a part of Khasra No.376/219, which had been sold to the Plaintiff/Appellant. The Plaintiff/appellant has not placed on record any demarcation report to establish that the suit land is part of Khasra No.376/219. PW5 during his cross-examination was specifically put this question and has submitted that he had got the disputed land demarcated but did not recollect whether the same was got demarcated by any revenue officer and since no demarcation report has been filed, issue No.6 has been rightly decided in favour of the respondent/defendant. Referring to the statement of Halka Patwari, who had appeared as PW3/A, it has been submitted by Shri Verma that the 1/4th share of the defendant sold by way of the sale deed dated 26.11.1959 was in undivided khewat. This witness in his cross-examination has further deposed that the land is in possession of "owner", meaning thereby, Plaintiff Society is in possession be passed in his favour. The learned trial court in its wisdom placed the onus to prove this issue on the Defendant. It is Plaintiff's case that the Defendant/Respondent has encroached upon the land sold to it, thus entitling him to seek possession thereof. So the Plaintiff/Appellant was required to establish that Defendant/respondent after sale of the land in dispute had raised construction and encroached upon the same. The importance of onus on a party to prove a particular issue is of relevance for the purpose of leading evidence only. Once the evidence has been led by both the parties, the placement of onus loses its relevance. Further, it is settled principle of law that the plaintiff has to prove his own case and stand on his own legs. In the present case, the Plaintiff/appellant has miserably failed to lead any evidence and prove that suit land, on which the defendant has raised construction was a part of khasra No. 376/219, which had been sold to it vide sale deed dated 26.11.1959. Admittedly, no demarcation report has been placed on record by the plaintiff/appellant to establish that the suit land is a part of khasra No. 376/219.

This fact become all the more important, when the defendant/respondent at the first stage possible i.e at the stage of Written Statement itself had pleaded that the construction raised by him is on land which is part of Abadi Deh and not contained in Khasra no.376/219. The evidence of PW.2 and PW3 do not help the case of plaintiff/appellant, as they only proved the sale of Khasra No. 376/219 to the Plaintiff/appellant. The fact that land allegedly encroached upon by the Defendant is a part of Khasra No. 376/219 has not been established by the appellant. Plaintiff's own witness PW3/A, Shri Nafiz Ahmad, Halka Patwari, has deposed that on Khasra No. 376/219, possession is that of 'owners'. It is plaintiff's own case that owner of Khasra No. 376/219 is the Plaintiff/appellant. Thus, as per Halka Patwari, the possession of Khasra No.376/219 is with appellants. For the reasons recorded above, I am of the considered opinion that the finding by the Ld. trial court on issue No.6 are perfectly valid and just. I endorse the finding that the appellant has failed to prove that respondent/defendant has encroached upon and raised construction on land contained in Khasra No.376/219.

8. As regards, the findings on issue No.2, consequent to my findings recorded on issue No.6, the same shall also go in favour of the respondent/defendant. The property in dispute has not been established by the plaintiff/appellant to be a part of Khasra No.376/219. Since only share in Khasra No.376/219 had been sold by the defendant to the Plaintiff, no other land can be held to be under the ownership of the Plaintiff/appellant. There is no issue framed by the Ld. trial court or claimed by the Plaintiff/appellant as regards declaration of its ownership with respect to Khasra No.376/219. Thus, no finding can be recorded with respect to ownership of plaintiff/appellant qua Khasra No. 376/219.”
(underlining added)

8. A reading of the judgments of the courts below show that whereas it is not disputed that the appellant/plaintiff purchased the 1/4th share of respondent/defendant comprising in Khasra no. 376/219, appellant/plaintiff failed to lead any evidence to show that the suit land on which the respondent/defendant is situated falls in Khasra no. 376/219 which was sold by the respondent/defendant to the plaintiff under the Sale Deed dated 26.11.1959. In my opinion, both the courts below have also in this regard rightly observed that what was crucial in the present case was preparation and filing of demarcation report by the appellant/plaintiff to show that the suit land forms

part of Khasra no. 376/219, and which was not done by the appellant/plaintiff. I would also further like to note that it has come in the evidence of Mr. Sagtu DW5, who has stated that respondent/defendant never sold his house which is on the western side with the house of one Sh. Shamroop on the other side. On the eastern side of the house of the plaintiff there is a road and on the northern and southern side of the house there are galis/lanes. Essentially, therefore, on three sides of the house of the respondent/defendant either there are galis or a road and on the fourth side, which is the western side, there is a house of one Sh. Shamroop. Thus, it is seen that there is a constructed house which is in possession of the respondent/defendant and which is a specific portion forming part of abadi/habitation of the village, and which therefore clearly would not be an agricultural land which was sold to the appellant/plaintiff under the Sale Deed dated 26.11.1959.

9. A civil case is decided as per the preponderance of probabilities on the basis of evidence which is led in the case. Appellant/plaintiff had to stand on his own legs and had to lead sufficient evidence to show that the suit land was situated in Khasra no. 376/219 which was sold by the respondent/defendant to the plaintiff under the Sale Deed dated 26.11.1959, but plaintiff has failed to do so by not filing any demarcation report that the respondent/defendant is situated in the Khasra/land sold to the appellant/plaintiff. Also it is seen that once what is sold to the appellant/plaintiff is an agricultural land, and the

defendant is living in a property which is part of abadi/habitation of the village, and that too appropriately bounded by road/galis and house of a person, and therefore such land could not be agricultural land which could have been sold to the appellant/plaintiff.

10. This second appeal under Section 100 CPC can only be entertained if substantial questions of law arise i.e where the courts below have arrived at grossly illegal and perverse conclusions on the basis of appreciation of evidence which is led in the case. Appreciation of evidence and arriving at conclusions thereupon is in the realm of the jurisdiction of the courts below and in the facts of the present case the courts below have rightly concluded that the appellant/plaintiff has failed to prove its case that the respondent/defendant is situated on the land which was sold to the appellant/plaintiff under the Sale Deed dated 26.11.1959.

11. In view of the above, no substantial question of law arises for this second appeal to be entertained by setting aside the concurrent judgments of the courts below. This Regular Second Appeal is hence dismissed, leaving the parties to bear their own costs.

AUGUST 24, 2016
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VALMIKI J. MEHTA, J