

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

+ **RSA No.108/2011**

% **15th September, 2016**

L.M. WALTER (SINCE DECEASED) THROUGH LRS. Appellants

Through: Mr. Muneesh Malhotra, Advocate
with Mr. Rituraj Shahi, Advocate.

versus

SH. ONKAR GIRI (NOW DECEASED) THROUGH LRS & ORS.

..... Respondents

Through: Ms. Kajal Chandra, Advocate with
Ms. Perna Chopra, 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 filed under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the Judgment of the First Appellate Court dated 5.6.2010 by which the first appellate court has reversed the Judgment of the Trial Court dated 17.11.2004 decreeing the suit for possession filed by the plaintiff, and who is now represented by the appellants and who are his legal heirs. In view of the setting aside of the judgment of the trial court by the first appellate court, the suit for possession filed by the plaintiff/appellants stood dismissed. The suit for possession was filed with respect to suit property

admeasuring 165 sq yds comprising of two rooms, bathroom, latrine with boundary wall bearing original no.1442C/1A/2 (new no.1/3648, Bhagwanpur Khara, Loni Road, Shahdara, Delhi).

2. The case of the plaintiff/appellants was that the plaintiff purchased rights in the suit property under the documents being an Agreement dated 9.4.1975 (Ex.PW2/1) and receipt of the same date Ex.PW1/A. Rights in the property were purchased by the plaintiff from one Mohd. Asghar. Mohd. Asghar had purchased the property from one Sh. Gajraj Singh who had remained in occupation of the suit property for about ten years and had constructed two rooms and installed a hand pump in the suit property. Consideration paid for purchase of the rights in the suit property by the plaintiff to Mohd. Asghar was a sum of Rs.6,000/-. Plaintiff/appellants further pleaded that the defendant no.1/Sh. Clames Walter/respondent no. 2 was his nephew and he requested the plaintiff for staying in the suit property on account of advanced pregnancy of his wife whereupon the plaintiff took pity and out of human sympathy allowed his nephew/defendant no.1/respondent no.2 herein to live in the suit property. Defendant no.1/respondent no.2 however illegally 'sold' the suit premises to the defendant no.2/Sh. C.L. Sharma/respondent no.3 herein and which respondent thereafter further transferred the suit property to defendant no.3 (Sh. Ram Nath Sharma/respondent no.4 herein) and defendant no.4 (Sh.

Onkar Giri/respondent no.1 herein). Whereas the defendant no.3/Sh. Ram Nath Sharma was inducted in 135 sq yds of the property, the defendant no.4/Sh. Onkar Giri and who is represented in this second appeal by his legal heirs respondent nos.1(i) to (iv) was inducted in 30 sq. yards. The suit was originally filed for mandatory injunction but it was amended during the pendency to convert it from a suit for mandatory injunction to a suit for possession.

3. The case of the defendant no.1/respondent no.2/Sh. Clames Walter was that he had been in lawful occupation and possession of the suit property since the year 1963 without interference from anybody and that neither Sh. Gajraj Singh nor Mohd. Asghar had any interest in the suit property and therefore the plaintiff also had no right, title and interest in the suit property. It is stated that plaintiff being the paternal uncle of defendant no.1/respondent no.2 visited the premises since the year 1965 and became greedy by wanting to take possession by forcible means and consequently has plotted against the defendant no.1/respondent no.2 by fabricated documents for filing of the present suit for possession. The other defendants no.2 to 4 pleaded the same defence. The main contest in the present second appeal is by respondents no.1(i) to (iv) and who are the legal heirs of Sh. Onkar Giri/defendant no. 4 and who was the sole appellant who filed the first appeal resulting in the impugned judgment in his favour.

4. After pleadings were complete, the trial court on 3.1.1984 framed the following issues:-

- “1. Whether the plaintiff is the owner of the superstructure as alleged in the plaint? OPP
2. If the issue No.1 is answered in the affirmative, whether the plaintiff inducted defendant No.1 as licensee? OPP
3. Whether the suit is not properly valued for the purpose of Court fee and jurisdiction? If so, what is the proper value? OPP
4. Whether defendant No.3 has been wrongly joined as a party? OPD
5. Relief.”

5. The main issue was issue no.1 with respect to rights of the plaintiff in suit property and this issue was decided in favour of the plaintiff/appellants by the trial court. The relevant discussion in this regard is contained in paras 10, 12, 14, 15, 16, 18 and 20 to 25 of the judgment of the trial court and these paras read as under:-

“10. In support of the case, plaintiff has examined himself as PW.1 reiterating the averments of the plaint and asserting therein that property in dispute was purchased by him vide Agreement dated 09.04.1975 Mark “A” executed in the presence of witnesses namely Chandan Giri, M. Bengimen and Abdul Shakur. The receipt of Rs.6,000/- was executed which has been proved as Mark “B” also bearing the signatures of above mentioned witnesses. The signatures of the witnesses have been identified and Receipt is proved as Ex.PW1/A. The suit premises is situated at a distance of one mile from the residence of the plaintiff. The copy of FIR has been placed on record as Mark “C” and it is further stated that plaintiff continued to pay house tax after Mohd. Asghar. The Survey Report has been proved as Ex.PW1/B. and house tax receipts are Ex.PW.1/C to G it is further stated that after the institution of the suit, defendant No.2 Shri C.L. Sharma sold the property to defendants No.3 and 4. The value of the suit property is stated to be Rs.6,000/- at the time of institution of the suit. The witness has been cross examined at length on behalf of the defendants wherein he deposed that property was purchased from Mohd. Asghar who had purchased the same from Gajraj Singh. The exact measurement of the property could not be specified by the witness. It is categorically denied that Gajraj Singh or Mohd. Asghar had no right in the suit

property. It is also denied that defendant No.1 has been in possession of the property since 1963 and had also constructed the structure thereupon. The plaintiff denied that after the death of his brother, he wants to grab the suit property by creating false agreement. Presently, Mr. Tandon resides in the suit property as same has been sold to him. Perhaps, 135 sq. yds. is in possession of Mr. Tandon and remaining, in possession of Chandan Giri. It is denied that false complaint has been filed by the plaintiff. The plaintiff denied the suggestion that suit property has not been sold to defendants No.3 and 4 after the institution of the suit. The plaintiff has no knowledge that value of the suit property was about Rs.20,000/- in November, 1981.

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12. PW2 M. Benjamin deposed that property document dated 09.04.1975 was executed in his presence before the Office of Sub Registrar which is Ex.PW2/1 bearing his signatures. He has also identified the signatures of other witnesses on the document and deposed that same bear the thumb impression of Mohd. Asghar at Point "F". He confirmed that Rs.6,000/- were paid by the plaintiff. He also identified his signatures on Ex.PW1/A which is receipt of Rs.6,000/-. The possession of the property was also handed over on 09.04.1975 itself. During cross examination, he deposed that document was written in his presence, but same was not read by him. According to him, he does not know Mohd. Asghar and therefore, has no knowledge whether he was present at the time of execution of the document. He denied that he has given the false testimony.

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14. On the other hand, defendant No.4 Onkar Giri has examined himself as DW1 and deposed that he is residing in house No.1/3648 having 30 sq. yds. of land on which there is one room and a kitchen constructed. According to him, plaintiff had no connection with the property and defendant No.1 used to reside in the suit property in the capacity of the owner. The property consists of 135 sq. yds. of land out of which 30 sq. yds. is in occupation of DW1 and remaining 105 sq. yds. is in possession of Shri J.N. Tandon. DW1 states that he does not accept the plaintiff as the owner and according to him, the value of the property was about Rs.1,50,000/- at the time of institution of the suit.

15. During cross examination DW1 deposed that land was purchased in his name by his maternal grand father, but he could not tell about the execution of any document to this effect. He has no knowledge whether defendant No.2 had any title deed in his favour or that the defendant No. 1 was inducted only as a licensee in the premises. He has no knowledge that land was purchased in his name during the pendency of the suit.

16. DW2 Mukesh Kumar is the son of J.N. Tandon. He deposed that he is residing at the address 1/3648, Ram Nagar Extension, Loni Road, Shahdara since 1981. The total land is 135 sq. yds. out of which 105 sq. yds. is in possession of his father. The plaintiff has never been in possession of the suit property and at the time of institution of the suit, the property valued between

Rs. 1 lac to Rs.1.25 lacs. During cross examination, he denied that suit property consists of 165 sq. yds. of land. It is, however, admitted that the portion in possession of his father and in the possession of defendant No.4 formed the part of the same house and there is boundary wall around the same. The land is purchased by his father in 1981 from Ram Nath Sharma through written documents which were not brought by him. Father of DW2 is alive. The defendant No.3 Ram Nath Sharma had title deeds of the property which he sold to the father of DW2 and documents were also handed over. The land was purchased by Ram Nath Sharma (defendant No.3) from C.L. Sharma who also had title deeds of the suit property. The title deeds of C.L. Sharma are also in possession of father of DW.2. The defendant No.2 C.L. Sharma had purchased the property from defendant No.1. It is denied that plaintiff was the owner of the property. DW.2 could not tell at what amount the property was purchased by his father or by defendant No.4.

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18. The witness has also been cross examined during which he deposed that since defendant No.1 stated that the house belongs to him, the witness has deposed so. However, he has never seen any documents in relation to the property. Thereafter, the evidence of the defendant was closed.

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ISSUE No. 1

20. The plaintiff has filed the present suit on the basis of his claim with respect to the suit property that same was purchased by him from Mohd. Asghar vide Agreement dated 09.04.1975. The consideration amount was Rs.6,000/-. The Agreement Ex.PW2/1 and Receipt Ex.PW.1/A have been proved on the record. Also, the house tax receipts have been proved to show that property was assessed firstly in the name of Mohd. Asghar and thereafter, in the name of the plaintiff. The property in question was allegedly given to defendant No.1 on licence basis out of humanitarian approach, but the defendant No.1 fraudulently sold the property to defendant No.2. Having come to know about this fraudulent transaction, plaintiff confronted the defendant No.1 and lodged criminal FIR and also filed the present suit. During the pendency of the suit, defendants No.3 and 4 were also impleaded as property was allegedly sold by defendant No.2 in favour of defendants No.3 and 4.

21. On the other hand, defendants have refuted the averments of the plaintiff and categorically denied his claim with respect to the suit property. The defendants asserted that defendant No.1 has been in lawful occupation of the property since 1963 and had every right to deal with the same. It is admitted that property was sold by defendant No.1 to defendant No.2 and thereafter, by defendant No.2 to defendants No. 3 and 4. It has also come on the record that during the pendency of the suit, defendant No.3 further sold the property to Mr. Tandon on 7th December, 1981 and presently, the property to the extent of 105 sq. yds. is in possession of Mr. Tandon. The plaintiff also moved an application U/O 1 R.10 CPC to implead said Mr. Tandon as a party to the

pleadings, but the application was dismissed with the observations that any person claiming under the defendants is bound by the decree of if ultimately passed in favour of the plaintiff.

22. After giving due consideration to the rival contentions of both the sides and the evidence of the parties, I am of the opinion that plaintiff has been able to establish his case whereas defendants have miserably failed to prove their assertions on the record. So far as the ownership of suit property is concerned, plaintiff has been able to prove his right, title and interest towards the same by virtue of Agreement and Receipt. The witnesses to the Agreement and Receipt have also testified in favour of the plaintiff and it is also established that possession was handed over to the plaintiff. The testimony of PW.1, PW.2 and PW.3 clearly establishes that documents were executed and possession was handed over to the plaintiff. Although the plaintiff was cross examined at length, but PW.2 has not been cross examined on substantial points. There is no controversy from the side of the defendants to question the testimony of PW.2 to the effect that possession was handed over in favour fo the plaintiff. By virtue of Section 53A of the Transfer of Property Act, the plaintiff acquires interest in the property although the transfer has not been completed. The house tax receipts although by itself do not confer any right, title or interest in favour of the plaintiff, yet same can be looked into by way of supportive evidence to the averments of the plaintiff. The documents produced by the plaintiff are very old and in fact, the documents between Gajraj Singh and Mohd. Asghar pertained to the year 1973 and therefore, the presumption U/S 90 of Evidence Act has to be drawn about its genuineness. To my mind, the document has come from the proper custody in view of the house tax receipt allegedly paid by Mohd. Asghar in the year 1975.

23. It is well settled legal position that no one can transfer a better title than he himself has. The defendant No.1 has alleged to be in possession of the property since 1963, but there is nothing on the record to prove the same. It is also not specified as to in what right the defendant No.1 has occupied the suit property. The other defendants have also failed to bring anything on the record in support of the contentions of defendant No.1. **The defendants No.1 to 3 have not entered into witness box despite the fact that plaintiff has laid his claim against them. The defendant No.1 has not come forward to establish his title with respect to the suit property or to controvert the averments of the plaintiff.** The witnesses examined by the defendants are not trustworthy and no credibility can be attached to their testimony. In fact, DW.2 and DW.3 are not much concerned about the present dispute of the parties. According to the statement of DW.2, the documents of title with respect to the suit property have been in the possession of his father as he purchased the property. If the documents of title pertaining to C.L. Sharma and R.N. Sharma who are defendants No.2 and 3, have not been produced or proved on the record, the adverse inference has to be drawn against the defendants as best possible evidence has been withheld from the court. Otherwise also, the defendants have failed to prove the origin of the title of the suit property in

favour of defendant No.1. In view of this, I hold that defendant No.1 had no right, title or interest with respect to the suit property and therefore, he could not transfer any right, title or interest therein in favour of any other defendants. The defendants have also taken the stand that alleged agreement in favour of the plaintiff is forged and fabricated. However, at no point of time the signatures of the witnesses were challenged or any effort was made to send the admitted signatures of the witnesses for comparison to the Handwriting/Signature Expert. The pleadings of the defendants only remained bald averment without there being any supportive material.

24. It is also very important to mention that defendant No. 4 asserted that property has been purchased by his maternal grand father in his name. The maternal grand father of defendant No.4 happens to be Chandan Giri who is one of the witnesses to the Agreement and Receipt executed in favour of the plaintiff. It is evident from the record that said Chandan Giri had been attending the present litigation on behalf of defendant No.4 and had also signed the pleadings. At no point of time, the said Chandan Giri entered into the witness box to deny or question his signatures on the documents executed in favour of the plaintiff. In fact, Chandan Giri had taken no stand before this court about his signatures on the documents of the plaintiff and therefore, adverse inference has to be drawn in these circumstances.

25. After giving careful consideration to the facts and circumstances and the evidence, I conclude that plaintiff is the rightful holder of the suit property and has every right to claim the same from the defendants who have no right, title or interest in the suit property. The issue is decided in favour of the plaintiff.”
(emphasis is mine)

6. A reading of the aforesaid paras of the judgment of the trial court shows that the trial court has by a detailed and persuasive reasoning held that the plaintiff/appellants had better title to the suit property by virtue of the Agreement executed by Mohd. Asghar in favour of the plaintiff dated 9.4.1975 and which was duly proved as Ex.PW2/1. The receipt of the same date in favour of the plaintiff by Mohd. Asghar was proved as Ex.PW1/A. The property tax receipts in the name of Mohd. Asghar and thereafter the plaintiff with respect to the suit property were proved as Ex.PW1/C to Ex.PW1/G. The

survey report of the MCD showing the property to be owned and in the name of the plaintiff was proved as Ex.PW1/B. In contrast the defendants only led oral evidence and which oral evidence did not support the stand of the defendant no.1 of either being in possession of the suit property since 1963 or being the owner because of any title documents. Hence, the trial court has rightly held the plaintiff/appellants to be having better title right and thus entitled to possession of the suit property from the defendants.

I may note that originally when the suit was filed there were two defendants namely Sh. Clames Walter and Sh. C.L. Sharma, however, during pendency of the suit defendant nos.3 and 4 were impleaded as defendant nos.3 and 4 as they were inducted in the suit property during the pendency of the suit by the defendant no.2/Sh. C.L. Sharma claiming that the suit property was sold to them. As noted above after decreeing of the suit in favour of the plaintiff by the judgment of the trial court, it was only Sh. Onkar Giri/defendant no.4 who filed the first appeal, and no appeal was filed by defendant nos.2 and 3. Defendant no.1/Sh. Clames Walter though originally appeared in the suit but he died during the pendency of the suit and his legal heirs did not appear and contest the suit.

7. The first appellate court by its impugned judgment has set aside the judgment of the trial court by basically arriving at the following conclusions:

(i) In the name of Mohd. Asghar there is only one property tax receipt of the year 1974-1975 but there were no property tax receipt of earlier years either in the name of Mohd. Asghar or the prior owner Sh. Gajraj Singh.

(ii) Property tax receipts from the year 1974-1975 onwards proved and exhibited as Ex. PW1/C to PW1/G would not show any title to the property because property tax receipts are easily prepared because the Corporation is basically interested in taking its property tax and is not interested with respect to who is the owner of the property.

(iii) The property tax document of the Corporation being the survey report Ex. PW1/B falsifies the case of the plaintiff inasmuch as this document shows ownership of the plaintiff as on 1.4.1974 and which cannot be because as per the case of the plaintiff himself the property was purchased by the documents dated 9.4.1975.

(iv) The documents being the agreement and receipt Ex. PW2/1 and Ex. PW1/A respectively not being registered documents would not create rights in an immovable property in favour of the plaintiff.

(v) There is lack of credibility of the deposition of plaintiff/PW1 as there are various inconsistencies in the deposition of the plaintiff who deposed as PW1 with respect to the date of entering into possession of different

defendants and also that there were further inconsistencies with respect to the facts as to how the suit property come into possession of three different persons ie defendant nos. 3 and 4 and now with one Sh. J.N. Tandon. In this regard the observations of the first appellate court are as under:

“17. He further submits that in view of the law laid down in these judgments, Ex. PW1/A and Ex. PW2/1 which required compulsory registration, do not confer any title upon respondent no.1.

18. It is deposed by PW1 in his deposition that at that time Sh. Chandan Giri, Master M. Bengamen and Sh. Abdul were also present. It is further stated that document i.e. Mark A is Agreement to Sell and the said document later on proved by PW2 as Ex. PW2/1, was executed in his presence. This document is perused where in Hindi there is signature of one Sh. Chandan Giri. During the course of arguments, it is stated that Sh. Chandan Giri was maternal grandfather of the appellant. It is further deposed by PW1 that Mohd. Asraf handed over possession to PW1 on the same date. He identified the signatures and thumb impression on Ex. PW1/A. This receipt also bears signature of Sh. Chandan Giri. During cross examination, a suggestion was given by defendants no.1, 2 and 4 that this agreement Ex. PW2/1 does not relate to the property in dispute and the said suggestion was denied. It was further suggested to this witness that property no. 1442 is not the property bearing no. 36/48 and the said suggestion was also denied. During cross examination, it is further suggested that Sh. Gajraj Singh and Mohd. Asraf had no right in the suit property and the said suggestion was denied. During cross examination, it is deposed by PW1 that Sh. Mohd. Asraf had purchased the property from Sh. Gajraj Singh but he did not know from whom Sh. Gajraj Singh had purchased the suit property. He has further stated that he had taken relevant papers showing title from Sh. Mohd. Asraf. He has further stated that Sh. Mohd. Asraf told him that he was the owner of the suit property. During cross examination, further suggestion was given that defendant no. 1 was in possession of suit land since 1963 and it was he who had constructed the structure upon it and the said suggestion was denied. This witness further stated that as respondent no.2 i.e. defendant no.1 was not in possession of the land in 1963 therefore, there was no question of interference. Further suggestions were given to this witness that suit property was never in his possession and he never used the suit property and the said suggestions were denied. This witness further stated that at present one Mr. Tandon, whose initials he did not know reside in the suit property since the date respondent no.2 sold the property to Mr. Tandon. A further suggestion was given to him that since the date of filing of the suit, Mr. Tandon was in possession of the suit land and the said suggestion was denied. This witness was further unable to state that since when Mr. Tandon was in possession of the suit land. This

witness admitted that perhaps 135 sq. yds. was in possession of Mr. Tandon and the remaining 30 yds. was in possession of Sh. Chandan Giri. He was also unable to tell the month or year when Mr. Chandan Giri came into possession of the land. He has further stated that the land of the North side was given to Sh. Chandan Giri but unable to tell since when Sh. Chandan Giri was residing there. He has further stated that he did not know anything regarding the property constructed by Sh. Chandan Giri. He has further stated that in the South side of the land, Mr. Teja Giri resides but unable to tell since when Mr. Teja Giri is residing or land is in his possession. He has further stated that the property has been constructed from all the remaining three sides and the single side is open i.e. from West. He has further stated that he did not remember the exact date, month or year when he found Sh. C.L. Sharma in occupation of the suit premises for the first time but it was in 1980. He has further stated that Sh. C.L. Sharma remained in the suit property for about two months. PW1 has further stated that the condition of the suit property in 1981 was the same in which he had purchased it. He has further stated that when he purchased, it was pakka construction made of cement, sand and motar. A suggestion was given that appellant did not take any land i.e. about 30 sq. yds. from his suit land and the said suggestion was denied.

19. As per filing stamp, the suit was filed on 13.3.1980. In the original plaint, the facts as presented by PW1 are entirely different which he has divulged/disclosed during cross examination. In the amended plaint there is no whisper of any Mr. Tandon. During cross examination, this witness admitted that 135 sq. yds. is in possession of Mr. Tandon and remaining 30 yds. is in possession of Sh. Chandan Giri. Sh. Chandan Giri was also a witness for the documents Ex. PW2/1 and Ex. PW1/A and Sh. Chandan Giri was in possession of 30 sq. yds. on the date of filing of the suit. But this fact has not been disclosed by the plaintiff i.e. respondent no.1 in his plaint. In the deposition during cross examination, respondent no. 1 has deposed entirely different case which he has not disclosed either in the plaint or in the amended plaint. On 17.9.1988, the plaintiff had moved an application under Order 1 Rule 10 of CPC. This application was dismissed by the Id. trial court by order dated 31.5.1989. However, he has further disclosed that one Sh. Teja Giri also resides on the South side of the property but he failed to disclose since when he resides there and the land is in his possession. He has further deposed that the suit property was single side open i.e. West and it is constructed from all the three remaining sides. Thus, a question arises how the suit property had come into possession of three different persons. It is deposed by PW1 that 135 sq. yds. is in possession of Mr. Tandon while remaining 30 sq. yds. is in possession of Mr. Chandan Giri and at the South side, Sh. Teja Giri resides. If suit property opens from West side as at the South side Mr. Teja Giri resides and property is open only at one side and the remaining three sides are constructed then definitely Sh. Teja Giri has to enter into his portion of property from West side only. But under which circumstances the occupant of the property of West side allowed Mr. Teja Giri to enter into his premises, has not been disclosed by PW1. Even if testimony of PW1 is relied upon then as

per him 135 sq. yds. is in possession of Mr. Tandon and remaining 30 sq. yds. is in possession of Mr. Chandan Giri then how Mr. Chandan Giri enters in his property which is in his possession is also appears to be very difficult. The testimony of PW1 does not inspire confidence. It is also the case of PW1 during examination that suit premises is situated at about distance of one mile from the place of his residence, which was a rented place. Moreover, this witness further stated that he went on deputation with MCD in the year 1958 and got retired in the year 1969 while the suit has been filed in the year 1983. During entire testimony, this witness does not disclose when all such persons, as mentioned by him, came into possession of the different parts of the suit property.

20. Amended plaint is again perused. Sh. C.L. Sharma is respondent no.3. When respondent no.3 was not in possession of the suit property then what relief has been sought against respondent no.3 by the plaintiff. It is the case of respondent no.1 that respondent no.2 approached respondent no.1 sometime about a year ago and made representations and he gave the property on licence but during cross examination PW1 himself admitted that 135 sq. yds. of the property is in possession of Mr. Tandon and the remaining 30 sq. yds. is in possession of Mr. Chandan Giri. But no attempt was made to implead Mr. Chandan Giri as a party in the suit. **Thus, the entire testimony of PW1 does not inspire confidence and these facts disclosed first time in cross examination by PW1.** Moreover, during chief examination, it is stated by PW1 that in January February, 1980, respondent no.2 came to him and on account of humanitarian considerations, he allowed him to live in the premises whereas in the original plaint which bears date 23.9.1980 in para3, it is pleaded that a year ago, respondent no.2 approached respondent no.1 and he allowed him on humanitarian ground to live in the suit property. Again the evidence given before the court is entirely different from the pleadings. The plaint was signed and verified on 23.9.1980 then definitely when he filed the suit, all the facts must be afresh whereas in the testimony before the court it is stated by PW1 that in January February, 1980 i.e. 7/8 months back he allowed respondent no.2 to live in the suit property. **Again evidence of PW1 does not inspire confidence.** In the cross examination, this witness stated that he is not aware whether the condition of respondent no.2 was miserable or not. Again he made different version during cross examination, as pleaded by him earlier in his plaint. This witness further stated in cross examination that at present Mr. Tandon resides in the suit property since the day respondent no.2 sold the property to him. Again this fact has not been disclosed earlier in any of the plaints. PW1 further deposed that he had taken relevant papers showing title from Sh. Mohd. Asraf but no such document has been proved. Moreover, the facts disclosed during evidence by PW1, first time before this court and are not part of the pleadings. In the pleadings, respondent no.1 i.e. plaintiff has not disclosed the facts which have been brought in the knowledge of the court during evidence of PW1. PW3 stated that the plaintiff allowed respondent no.2 to remain in the suit property in March April, 1980. He has further stated that respondent no.2 lived there for 34 months. Again this is a new story brought

by PW3 i.e. the witness brought by the plaintiff i.e. respondent no.1 himself. This witness further stated that he is son of plaintiff i.e. respondent no.1 and the property in dispute is situated at a distance of about 2 k.m. from his house. This witness further stated that he did not see any sale deed in favour of Sh. Mohd. Asraf. Thus, again a question arises if there was no sale deed in favour of Sh. Mohd. Asraf then how Sh. Mohd. Asraf was competent to sell the suit property to any one either to the plaintiff or any of the defendants. It is a matter of record that no sale deed as valid in law has been brought on the record. This witness further stated that now the premises is being occupied by one Mr. Tandon along with his family who has purchased the property from Sh. Ram Nath. This witness has further stated that he did not know since when Mr. Tandon was living there.

21. DW1 i.e. the appellant also appeared as witness and he deposed that he is residing at the suit property since the time he gained consciousness. During cross examination, he stated that he was born on 04.5.1965. He has further stated that he purchased 30 sq. yds. of land from Sh. C.S. Sharma. He has further stated that the property was purchased in his name by his maternal grandfather when he was studying. This witness has further stated that he had seen respondent no.2 in 1970 in the premises in dispute. It is further stated that respondent no.2 never told him as to how he has become the owner of the property. This witness has further stated that he never seen respondent no.1 in the property in suit. A suggestion was given that respondent no.1 was in possession of the suit property and was owner of the same. This suggestion was denied. However, it was not suggested to this witness in which year the respondent no.1 was in possession of the suit property. No suggestion has been given to challenge the ownership of DW1 i.e. appellant qua the suit property. A peculiar suggestion was given to this witness that 30 sq. yds of land was purchased in his name during the pendency of this suit to which he stated that he was not aware. Now a question arises how DW1 was impleaded as party in the suit at the time of institution of the suit in the year 1980. During cross examination, it is the case of the plaintiff that DW1 had purchased the property during pendency of suit then what was the occasion to implead DW1 as a party to the suit, at the time of institution of the suit. The testimony of the appellant was recorded on 02.12.1998 whereas he was already made party at the time of institution of the suit. Thus, again entirely different case has been put by respondent no.1 during cross examination of DW1. In these circumstances, I am of the view that plaintiff i.e. respondent no.1 has failed to prove that he was even in possession of the suit property. I am further of the view that no document has been proved by respondent no.1 to prove his ownership of the suit property. Ex. PW2/1 and Ex. PW1/A are the documents which do not confer the title in favour of respondent no.1. At the most, these documents are receipt of payment and agreement to sell but in cross examination, it has been proved that respondent no.1 has never entered into the possession of the suit property.

22. During the course of further arguments, counsel for the appellant brought the attention of the court towards Ex. PW2/B. This document is issued by MCD and the same is survey inspection report. This report is dated 01.4.1974 and the property is stated to be in the name of respondent no. 1. It has been stated that the property was lying vacant. A question arises if the survey inspection was carried out in the year 1974 then under which document respondent no.1 entered into the property prior to the year 1974 or in the year 1974. It is the case of respondent no.1 that agreement to sell Ex. PW2/1 was executed in the year 1975 and receipt was also issued in the year 1975. Moreover, in para1 of the plaint also, it is the case of respondent no.1 that agreement to sell was executed on 09.4.1975. Ex. PW1/C is house tax receipt issued in the name of Sh. Mohd. Asgar. This house tax receipt was also issued for the year 1974-75 but the date of execution of this receipt is not mentioned. Similarly, Ex. PW1/D is of the year 1976-77 issued in the name of respondent no.1. Ex. PW1/E issued in the name of Sh. Mohd. Asgar through Sh. L.W. Walter i.e. respondent no.1. Similarly other house tax receipts are of subsequent years. Now a question arises if Sh. Mohd. Asgar was paying house tax to MCD then why respondent no.1 has not filed the receipts prior to the year 1974-75. It appears that respondent no.1 for the purpose of filing of this suit has fabricated these documents. It is a matter of practice that when any person goes to deposit house tax to MCD then officials of MCD do not ask for the title or document. House tax can be deposited by any stranger. If Sh. Mohd. Asgar was paying the house tax then definitely the house tax receipts must be available with him for the earlier years also but those house tax receipts have not been brought on the record which implies that the said house tax receipts were not available either with the plaintiff or with Sh. Mohd. Asgar. It is the case of PW1 i.e. the plaintiff during cross examination that he obtained all the documents at the time of purchase of the property. It is also stated in evidence by PW1 that he was in MCD then definitely the plaintiff was aware about such practice of MCD and with this knowledge, there is possibility of obtaining the receipts to file in this case, cannot be ruled out. Learned trial court relied upon Section 53A of the Transfer of Property Act but this provision is not applicable to the facts and circumstances of the present case. To my mind, Section 53A might be applicable but that applicable only qua Sh. Mohd. Asgar in this case but not for the plaintiff or anybody else. Learned trial court also relied upon Section 90 of Indian Evidence Act regarding genuineness of the documents like house tax receipts etc. but it is already observed hereinabove that nobody is going to dispute about the execution of these documents but the question arises inasmuch as whether these documents confer any title in favour of respondent no.1. It is already observed hereinabove that respondent no.1 is not able to state when he came in possession of the suit property and he does not have any title for the suit property. Moreover, Sh. Mukesh Kumar son of Sh. Jai Narain Tandon appeared as DW2. He has deposed that he is living at the property since 1981 and the total land is 135 sq. yds. and 105 sq. yds. is in possession of his father and 30 sq. yds. is in possession of Sh. Onkar Giri i.e. the appellant. He has

further deposed that since 1970/71, he has been coming to this area as 7/8 houses away in this lane, his maternal aunt was residing. He has categorically deposed that the plaintiff was never in the property nor was ever in possession of the land nor the super structure thereof. He has further stated that he had never seen the plaintiff. This witness was cross examined by the plaintiff. During cross examination, it is admitted by this witness that the portion in possession of his father and that in possession of the appellant, form the part of the same house. During cross examination, he has stated that his father purchased the land in the year 1981. During cross examination, he has further stated that he purchased the property from Shri Ram Nath Sharma through written documents. He has further stated that Shri Ram Nath Sharma had title deed of the property which he sold to his father and which documents were handed over to his father and those title deeds are in possession of his father. Sh. Ram Nath Sharma had purchased the land from Shri C.L. Sharma and Shri C.L. Sharma had also title deed of this property. He has further deposed that title deeds of Sh. C.L. Sharma were also in possession of his father. He has further deposed that Sh. C.L. Sharma had purchased the property from respondent no.2. This witness categorically stated about the facts how he has purchased the property and from whom the property was purchased. No request was made by the plaintiff during cross examination to call the title deeds of Sh. Tandon to see whether Sh. Ram Nath Sharma was the owner of the property or not. In these circumstances, adverse inference drawn by the trial court, is not correct as inasmuch as it was the plaintiff who had to make request to the trial court to call for the record regarding the title of the property. Moreover, it is already observed by learned trial court that Sh. Chandan Giri was also appearing in this case but the plaintiff did not take any step to call Sh. Chandan Giri in the witness box to state about the entire affairs about the transaction taken place in the year 1974-75. Moreover, it is pointed out by counsel for the appellant that in para 12 of the amended plaint the plaintiff has relied upon the site plan of the property but no site plan of the property has been brought on the record by the plaintiff. No site plan is available on the record. It also goes against respondent no.1 inasmuch as that non-filing of the site plan also indicates that the plaintiff was having a malafide intention at the very inception of the institution of the suit. In para 8A of the amended plaint which was verified on 27.7.1989, it is the case of the plaintiff that defendant no.2 when came to know about the institution of the suit, he had inducted defendant no.3 and 4 into the suit property whereas DW2 appeared in the witness box and stated that since 1981, he is residing in the property in suit. Thus, here respondent no.1 admits the truthfulness of the statement of DW2 regarding the presence of the defendant since the year 1981 then what stopped the plaintiff to state about the presence of DW2 or his father in the amended plaint filed in the year 1989. All these observations as observed hereinabove show that the plaintiff is not the owner of the super structure as alleged in the plaint. During the course of arguments, counsel for the appellant also relied upon para 14 of AIR 2009 SUPREME COURT 2966 titled as T.K.

Mohammed Abubucker (D) Thr. L.Rs. & Ors. v. P.S.M. Ahmad Abdul Khader & Ors decided on 22.4.2009.

“14. The Letters Patent Bench overlooked the fact that a plaintiff in a suit for declaration of title and possession, can succeed only by making out his title and entitlement to possession and not on any alleged weakness in the title or possession of the defendants. It also overlooked the fact that the plaintiff did not step into the witness box and that none of his vendors and none of the neighbours/villagers, were examined. There was therefore no evidence about previous possession. In fact, plaintiff had deliberately withheld evidence as to the date from which the defendants were in possession.”

23. Moreover, as per Section 17 of the Registration Act, documents regarding immovable property required compulsory registration and Section 54 of the Transfer of Property Act states that transfer of property can be made only by a registered instrument. Ex. PW1/A and Ex. PW2/1 are not registered documents. Therefore, these documents cannot be looked into evidence at all.”

(emphasis is mine)

8. This regular second appeal was admitted for hearing on 17.12.2012 by a learned Single Judge of this Court when the following substantial question of law was framed:

“Whether on the basis of evidence on record, learned Appellate Judge was justified in reversing the conclusion arrived at by the learned Trial Judge?”

9. With regard to the above substantial question of law framed, I exercise my power under the proviso of sub-Section 5 of Section 100 CPC and I would like to observe that the substantial question of law framed in fact would be that whether the first appellate court has not committed gross illegality and perversity in setting aside the judgment of the trial court by giving absolutely irrelevant and baseless findings instead of the persuasive, categorical and pithy reasoning of the trial court?

10. Since the documents being the Agreement dated 9.4.1975, Ex.PW2/1 and the receipt Ex. PW1/A were in Urdu language, the first appellate court appointed a Local Commissioner for translation of the said documents into Hindi language. I have taken from the counsel for the respondent no.1(i) to (iv) the english translations of the agreement to sell and the receipt. Counsel for the appellants also agrees that the english translations so given are correct english translations of the Agreement dated 9.4.1975 and the receipt of the same date. The english translations of Agreement to Sell dated 9.4.1975, Ex. PW2/1 and the receipt of the same date, Ex. PW1/A read as under:

“Agreement of Total Sell

That, I, M. Asgar son of Md. Shafti, am a resident of House No. 1442 C/1A/2, Bhagwanpur Khera, Loni Road, Shahdara.

That, a piece of land measuring area 165 Murabba yards situated at Bhagwanpur, Khera Loni Road, Area: Shahdara, in which , two rooms, one Bathroom, one Baitulkhala are constructed and one Hand pump is installed and boundary has been made and there is door. In the East direction – vacant plot, in West: Street, in North: House Teda giri and in South: House of Chandan Giri are situated. Shri Gajraj Singh had been in possession on this land for the period of 10 years and he had constructed two rooms. I, vide agreement dated 2.4.73, have purchased and taken the possession of this land and all the rooms therein. Now, I have sold two rooms, one Bathroom, one Baitulkhala and boundary with possession of the land against the sale consideration of Rs. 6000/-, half of which comes to Rs. Three thousand only in favour of L.W. Walter son of John Walter, resident of No. 715, Kabool Nagar, G.T. Road, Shahdara, Delhi and have received total sale consideration of Rs. six thousand against all the rooms, bathroom, Baitulkhala (toilet) and boundary wall and gate through receipt on this day in cash from the purchaser and have handed over vacant possession of all the rooms to him. In future, I and my legal heirs shall have no claim or concern of any kind in connection with the above-mentioned all the land and possession of the above-mentioned land and I assure the purchaser that the above-mentioned total land and premises are free from all kinds of dues and encumbrances, transfer, sale, mortgage etc. In case, any claimant claims against the purchaser and causes any kind of loss to the purchaser in connection with the purchased property, I shall be responsible to

return the total sale consideration with costs from my personal funds and property. House tax against the house is paid, number of which is 1442/C/1A/2. I shall get made mutation in favour of purchaser, otherwise, the purchaser has the right to get made mutation in his name through document, I shall have no objection of any kind. In case, the above-mentioned land is acquired by the Government at any event, the purchaser shall be entitled for the premises allotted in lieu of that acquired property. I shall have no concern or relation with that, therefore, this agreement to sell in respect of the above-mentioned property has been reduced into writing, so that, it may be used as and when required. Executed on 9th April 1975.

Witnesses:

1. Shakoor Miyan son of Abdul Rafeeq resident of Bhagwanpur Khera, Loni Road, Shahdara, Delhi.
Thumb impression
2. Mohan Benjamin son of Shri M. Benjamin, C-22, New Gandhi Nagar, Ghaziabad
(Signatures in English 9.4.78)
3. **Chandan Giri** son of Kanagiri resident of Bhagwanpur Khera, Loni Road, Shahdara, Delhi 1442/1A.

Executant:

M. Asgar, Agreement is true and correct.
(Signatures in Hindi, Thumb Impression)
4.4.75

Report of Receipt

That, I, M. Asgar son of Mod. Shafi, am an resident of House No. 1442C/1A/2, Bhagwanpur Khera, Loni Road, Shahdara. That, I have received the total sale consideration of Rs. six thousand, half of which comes to Rs. three thousand in respect of two rooms, one Bathroom, one Baitulkhala and boundary and gate in favour of L.W. Walter son of John Walter, resident of No. 715, Kabool Nagar, G.T. Road, Shahdara, Delhi, purchaser in cash. Therefore, this receipt regarding recovery of Rs. six thousand in total has been reduced into writing. Executed on 9th April 1975.

Executant:

M. Asgar, Agreement is true and correct.
(Signatures in Hindi, Thumb Impression)
Rs six thousand received in Cash,
M. Asgar Khan 4.4.75

Written in Hindi on revenue Stamp:

Witnesses:

1. Shakoor Miyan son of Abdul Rafeeq resident of Bhagwanpur Khera, Loni Road, Shahdara, Delhi.
Thumb impression

2. Mohan Benjamin son of Shri M. Benjamin, C-22, New Gandhi Nagar, Ghaziabad
(Signatures in English 9.4.78)
3. Chandan Giri son of Kanagiri resident of Bhagwanpur Khera, Loni Road, Shahdara, Delhi 1442/1A.

Executant:

M. Asgar, Agreement is true and correct.

(Signatures in Hindi, Thumb Impression)

4.4.75”

(emphasis is mine)

11. In my opinion, the judgment of the first appellate court suffers from perversity and gross illegality for the following reasons:

(i) A reading of the agreement Ex. PW2/1 leaves no manner of doubt that Mohd. Ashgar has transferred rights in the suit property to the plaintiff. The property is described in the agreement to sell Ex. PW2/1 has a built up area comprising of two rooms, one bathroom, one Baitulkhala and installed hand pump and a boundary with a door. Possession of the suit property was delivered to the plaintiff under this Agreement dated 9.4.1975. Consideration as mentioned in the agreement to sell as Rs. 6,000/- and which is reiterated in the receipt Ex. PW1/A. The suit property has been shown as property bearing no. 1442C/1A/2, Bhagwanpur Khera, Loni Road, Shahdara, Delhi. To complete the narration in this regard, I would like to note that the property tax receipts which are filed and exhibited as Ex.PW1/C to Ex.PW1/G, in at least two of these receipts, both the old number of the property being no.1442C/1A/2 is shown along with the new number being no.1/3648. I am stating this in order to

remove any doubt as regards the identity of the suit property because at one such stage there were arguments before the courts below with respect the identity of the suit property and in this regard there cannot be better documents than the documents issued by the local Corporation showing both the old municipal number and the new municipal number of the suit property.

(ii) Therefore on the one hand there were documents being the agreement to sell along with the receipt and the property tax documents showing ownership of the Mohd. Ashgar and thereafter of the plaintiff from 1974-1975 and on the other hand there was only oral evidence led on behalf of the defendants and which oral evidence cannot dislodge the strong evidentiary documents proved on behalf of the plaintiff to show ownership rights of the suit property.

(iii) Further, the first appellate court has erred in coming to the conclusion that the agreement to sell Ex. PW2/1 does not confer rights in the suit property inasmuch as this agreement is in the nature of part performance under Section 53A of the Transfer of Property Act, 1882 and accordingly the plaintiff had rights in the suit property although the agreement to sell was not registered. I may note that the agreement to sell Ex. PW2/1 in this case is of the year 1975 and the compulsory registration of an agreement to sell for benefit of doctrine of part performance under Section 53A of the Transfer of Property Act

come into existence only later from 24.9.2001 when by Act 48 of 2001 Section 53A of the Transfer of Property Act and the other related provisions of other statutes including Indian Stamp Act, 1899 etc were amended. The said unregistered Agreement to Sell dated 9.4.1975 therefore would give the necessary rights under Section 53A of Transfer of Property Act to the plaintiff in the suit property, though classically it may not be complete ownership rights as per a registered sale deed executed under Section 54 of the Transfer of Property Act.

(iv) The first appellate court has also fallen into a complete error in referring to the document Ex.PW1/B being the Corporation survey report by stating that such document is of the year 1974 and thus allegedly showing plaintiff's ownership from 1974 although plaintiff purchased the suit property vide documents dated 9.4.1975, and thereby, plaintiffs case is falsified. A minute examination of this document Ex.PW1/B however shows that the date in this document of 1.4.1974 is a date written only with respect to the amount of property tax being Rs.320/- being w.e.f 1.4.1974 and not that the document is dated 1.4.1974. In fact, the date of document is written as 11/10 at the bottom of this document Ex.PW1/B without the year being specified. The first appellate court has thus quite clearly and most perversely misdirected itself by stating that the document Ex.PW1/B is dated 1.4.1974 and thus destroying the case of the

plaintiff because the plaintiff cannot be an owner in 1974 when the plaintiff had purchased rights in the property by the documents dated 9.4.1975. In fact, I must note in this regard that this document showing the name of the plaintiff as the owner of the suit property in my opinion would in fact completely support the case of the plaintiff as the owner of the property. Most probably this document is of 11.10.1975 showing dues payable at Rs.320/- w.e.f 1.4.1974 for the suit property. A survey report is with respect to what is the construction which exists on a property because it is the area of the plot and construction made thereupon which determines the property tax which is payable.

(v) In my opinion, also the first appellate court has placed unnecessary and undue emphasis on contradictions and inconsistencies in deposition of PW1 with respect to dates of possession of defendant nos.1 to 4 or which part of property is with which defendant or with one Sh. J.N. Tandon, because, oral testimony in this regard will not wipe away the contents of the documents being the agreement to sell, Ex.PW2/1, receipt Ex.PW1/A and the property tax receipts with survey report being Ex.PW1/C to Ex.PW1/G and Ex.PW1/B respectively, and all of which clearly show that the suit property is owned by the plaintiff. Even if the inconsistencies are there as per the deposition of plaintiff/PW1, and taking them as true, yet how can such inconsistencies be at all relevant qua ownership of an immovable property and which as per the

documentary evidence is in the ownership of the plaintiff. It again in this regard needs to be highlighted and reiterated that no credible evidence in the form of documentary evidence whatsoever was led on behalf of the defendants/respondents with respect to ownership either of the defendant no.1/Sh. Clames Walter or of the other defendants before 1980 when the disputes had arisen. Disputes arose on account of the illegal occupation of the defendant no.2 being the alleged purchaser from defendant no.1, and thereafter of defendant nos.3 and 4 on account of illegal selling of the suit property by the defendant no. 2 to these defendant nos.3 and 4.

(vi) I may only add that *nemo dat quod non habet* i.e no one can give what he has not got, and once defendant no.1 has no right, title and interest in the suit property which vested in the plaintiff by virtue of the aforesaid documentary evidence discussed, no title can at all flow from defendant no.1 to defendant nos.2 to 4, much less to a *pendente lite* subsequent purchaser one Sh. J.N. Tandon with respect to 135 sq yds of the property. Also I may note that any transfer *pendente lite* by the defendant no.1 to any of the defendants including Sh. J.N. Tandon would be hit by the doctrine of *lis pendens* contained in Section 52 of the Transfer of Property Act and once the plaintiff is successful in the suit, then, there does not arise any valid claim of the defendant nos.2 to 4

from the defendant no.1, and which defendant no.1 was not the owner of the suit property.

(vii) The first appellate court has committed a complete perversity in holding that corporation/property tax documents Ex.PW1/B and Ex.PW1/C to Ex.PW1/G will not help the plaintiff firstly because there is only one property tax document of Mohd. Asghar and secondly that property tax receipts only show interest of a Corporation to collect tax, because, property tax documents show assertion and acting upon of ownership documents by Mohd. Asghar and then the plaintiff as contrasted by defendant no.1 who failed to do so in spite of claiming ownership.

12(i) Counsel for respondent nos.1(i) to (iv) has argued that the document Ex.PW2/1 is not properly proved, however, it is noted that this agreement has been duly proved by the person who witnessed this document and who has appeared as PW3 namely Sh. Fradrick W. Walter and who is son of the plaintiff.

(ii) Also I would like to reject the argument urged on behalf of the respondent nos.1(i) to (iv) that the agreement Ex.PW2/1 is not a valid document because it is not signed by the plaintiff and that it is only signed by the seller inasmuch as there is no law that an agreement to sell is not valid if it is not signed by the proposed buyer. The Supreme Court in the case of *Alka Bose Vs.*

Parmatma Devi and Others, (2009) 2 SCC 582 has held that an agreement to sell would not be invalid even if it is not signed by the buyer/proposed buyer and that it is enough for an agreement to sell to be signed only by the seller/proposed seller. I would also like to note that the trial court has in fact noted that Sh. Chandan Giri regularly appeared in the trial court and contested the proceedings on behalf of the defendant no.4/Sh. Onkar Giri as noted in the same para 24 of judgment of trial court. In the facts of the present case the agreement Ex.PW2/1 has been proved to be signed and executed by the seller/Mohd. Asghar and thus Ex.PW2/1 is a legally valid document.

13. One other aspect in this regard is importantly to be noted and which is that the Agreement to Sell and the Receipt dated 9.4.1975 are witnessed by one Sh. Chandan Giri and who is the maternal uncle of defendant no.4/Sh. Onkar Giri. In case the documents being the Agreement to Sell and Receipt dated 9.4.1975 were to be doubted and proved to be illegal then it was very easy for the defendant no.4/Sh. Onkar Giri to have summoned his maternal uncle but this was not so done. Trial Court has drawn a similar conclusion in para 24 of its judgment reproduced above. Also once the documents being agreement to sell and receipt are proved, in my opinion, there was no requirement on behalf of the plaintiff to call other attesting witnesses to these documents as argued on behalf of respondents no. 1(i) to (iv).

14. At one stage it was sought to be argued on behalf of the respondent nos.1(i) to (iv) that defendant nos.3 and 4 were only subsequently impleaded as defendants in the suit and this will impact the success in the suit, however, I fail to understand as to how decreeing of the suit can in any manner be unsuccessful once the plaintiff had proved his ownership and the original ownership of Sh. Gajraj Singh and then of Mohd. Asghar, and, defendant no. 1 and the other defendants miserably failed to prove ownership of defendant no.1.

15. Learned counsel for the respondent nos.1(i) to (iv) also took this Court through the testimony of DW1 to argue that DW1 Sh. Onkar Giri had deposed of his long possession in the suit property and that the plaintiff had no right, title and interest or was ever in possession of the suit property, however, in my opinion, nothing can turn on such oral deposition of DW-4 inasmuch as once the issue is of ownership of the valuable immovable property then surely oral testimonies cannot dislodge written documentary evidence being of the agreement to sell/Ex.PW2/1, receipt/Ex.PW1/A, property tax receipts/Ex.PW1/C to Ex.PW1/G and the survey report Ex.PW1/B which clearly proved ownership of the plaintiff of the suit property. This argument urged on behalf of respondent nos.1(i) to (iv) also lacks substance and is accordingly rejected.

16. In view of the aforesaid discussion, substantial question of law as framed above is answered in favour of the appellants and against the respondents and thus the Judgment of the First Appellate Court dated 5.6.2010 is set aside and the Judgment of the Trial Court dated 17.11.2004 is restored in terms of the reliefs granted by operative para 29 of the Judgment of the Trial Court dated 17.11.2004. This Regular Second Appeal is accordingly allowed. Parties are left to bear their own costs.

SEPTEMBER 15, 2016
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VALMIKI J. MEHTA, J