

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **RSA 96/2011**

Reserved on: 25.01.2016

Date of decision: 03.02.2016

RAM KUMAR & ORS Appellants
Through: Ms. Amrit Kaur Oberoi with
Ms.Pooja Yadav, Advs.

versus

PARSANDI DEVI & ORS Respondents
Through: Mr. Basant Kumar Gupta,
Advocate with Respondent
No.1A in person
Mr. Ankur Singhal, Advocate
for Respondent No.2.

CORAM:

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR , J.

1. The appellants are the LR's of late Ganpat Nath, defendant No.2 in the plaint who have challenged the judgment and decree dated 24th March, 2011 passed by the Additional District Judge, Central-08, Delhi in RCA No.12/10/80 (new number) whereby the appeal preferred by the respondent No.1 (since deceased, through her LR's) and respondent No.2, Inderjit, has been allowed, declaring that they are the joint owners of suit property bearing No.431, Chirag Delhi, New Delhi and the respondent No.3 (Municipal Corporation of Delhi) was directed to record the name of respondent Nos.1 & 2 as owners of the suit property after deleting the name of Ganpat Jogi @ Ganpat Nath (defendant No.2 in the plaint) represented by the appellants as

his LRs to be deleted from the record of the MCD within three months of the passing of the judgment.

2. Respondent No.1 Smt.Parsandi Devi (since deceased through her LRs) and respondent No.2 Sh.Inderjit had filed a suit for declaration and mandatory injunction against respondent No.3 (Municipal Corporation of Delhi) and Ganpat Nath (defendant No.2 in the original suit), claiming themselves to be the owners of House No.431, Chirag Delhi, New Delhi against the Municipal Corporation of Delhi to mutate the property in their names after deleting the name of Ganpat Nath from the records. Ganpat Nath was shown as Ganpat Jogi son of Jhutter in the plaint.

3. The suit proceeded ex-parte but the same was dismissed.

4. The respondents (plaintiffs) preferred an appeal against the aforesaid dismissal of suit wherein notice was served upon the MCD but the notice to Ganpat Jogi @ Ganpat Nath was returned with the endorsement by the process server that the same was refused to be accepted as his real name was Ganpat Nath and his father's name was Gulab Nath and not Sh.Jhutter.

5. The Appellate Court, on receipt of the aforesaid report of the postal authorities, directed for service to be effected by beat of drums but because of non-appearance of Ganpat Jogi @ Ganpat Nath, the suit proceeded ex-parte as against him. The claim of respondent Nos.1 & 2 (original plaintiffs) was allowed and the appeal succeeded.

6. Ganpat Nath (defendant No.2), on learning about the judgment in appeal referred to above, filed an application under Order IX Rule

13 of the CPC, for setting aside the ex-parte decree, but the same stood dismissed vide order dated 14.10.1987. Almost contemporaneously, another application under Order 41 Rule 21 CPC was also preferred which too met the same fate by order dated 16.10.1996.

7. The LR's of Ganpat thereafter, preferred an appeal before the High Court against the order dated 16.10.1996 disallowing the prayer made under Order XLI Rule 21 CPC referred to above. The aforesaid order was set aside on 31.01.2008, and the matter was remanded to the learned first appellate Court with a direction to rehear the appeal on merits as valuable rights of the LR's of Ganpat had been affected. The parties were directed to appear before the first appellate Court on 24.03.2008. The relevant portion of the order passed by the High Court is as hereunder:-

“18. Valuable rights of Ganpat Nath have got affected by the impugned decision passed by the learned Appellate Court. If for no other reason, impugned order has to be set aside and appeal is required to be re-heard on merits, for the reason, that valuable rights of Ganpat Nath would be lost in absence of any meaningful representation by him.

19. For the reasons stated herein above I hold that Ganpat Jogi S/o Jhuttar claiming himself to be Ganpat Nath S/o Gulab Nath had sufficient cause for not appearing when the appeal was listed for hearing and hence would be entitled to have the appeal re-heard and disposed of on merits.

20. The appeal is allowed. Order dated 16.10.1996 is set aside. Application filed by the appellant under Order 41 Rule 21 CPC is allowed.”

8. Before the first appellate Court, the appellants preferred an application under Section 151 CPC along with a written statement praying that the written statement be taken on record. The aforesaid application was rejected on 03.10.2009 on the ground that since the objection/reply to the appeal had already been filed, no fresh written statement was required to be placed on record on behalf of Ganpat Nath son of Sh.Gulab Nath.

9. The first appellate Court, listed the developments which took place in the case and returned the finding that respondent Nos.1 & 2 have inherited the suit property after the death of their mother, Smt.Dharam Kaur in the year 1977, who was the undisputed owner of the suit property and was in possession of the same till her death. The respondents had thus inherited the suit property in accordance with Hindu Succession Act.

10. The first appellate Court disagreed with the Trial Court judgment that the respondents had failed to place on record any document of ownership of the suit property in their favour. The appellate Court, on the contrary, relied upon the documents namely the bills of payment of house tax of Smt.Dharam Kaur (Ex.PW-1/1 and Ex.PW-1/2), assessment notice issued to her by the MCD (Ex.PW-1/3), the certified copy of Will of Smt.Dharam Kaur (Ex.PW-1/5, though the document could not be proved in accordance with law as no attesting witness was examined to prove the said Will), the Adoption Deed by virtue of which respondent No.2 came to be adopted (Ex.PW-1/10) as well as the demand by the Municipal

Corporation of Delhi in its written statement about the ownership of the suit property of Smt.Dharam Kaur.

11. Be it noted that the Trial Court had dismissed the suit for want of documentary evidence as the respondent No.1 & 2 (plaintiffs) had not filed any documentary evidence to show as to how the suit property came to be recorded in their names or in the name of Smt.Dharam Kaur or her predecessor-in-interest Sh.Mehar Nath. The Trial Court was of the view that the Will dated 31.05.1957 which is said to have been executed by Smt.Dharam Kaur could not be proved as only certified copy was offered and the attesting witnesses to the said Will were not produced.

12. The challenge to the judgment passed in RCA No.12/10/80 is basically on the ground that the appellate Court was, for a just decision in the case required to frame an issue as to whether Ganpat Nath was adopted by Gulab Nath as pleaded by him. He had also filed a certified copy of the Adoption Deed (Ex.AW-2/1) for adjudicating the controversy involved in the suit by giving a meaningful representation to the appellants.

13. Learned counsel appearing for the appellant submitted that the High Court, in FAO No.361/1996 clearly directed that for the reason that valuable rights of Ganpat can be affected by the impugned decision passed by the appellate Court in the first instance, the appeal was required to be reheard on merits as the valuable rights of Ganpat Nath, otherwise would be lost in the absence of any meaningful representation by him. It was, therefore, urged that the first appellate

Court did not actually advert to the mandate given by the High Court in FAO No.361/1996 for giving a meaningful representation. In the absence of the written statement filed by Ganpat Nath, it was highly improper for the appellate Court to have relied upon the submissions and evidence of the respondent Nos.1 & 2 as unrebutted and unchallenged.

14. The further contention of the appellants is that in the facts of the case it was only incumbent upon the first Appellate Court to have remanded the case to the Trial Court under Order XLI Rule 23A or the first Appellate Court ought to have framed issues and thereafter referred them for trial to the Trial Court under Order XLI Rule 25. Thus it was urged that the impugned judgment and decree passed by the first Appellate Court is in violation of the remand order dated 31.01.2008 passed in FAO No.361/1996 and the judgment, therefore, suffers from illegality leading to perversity as the provisions of Order XLI Rule 23 and 23A as well as Order XLI Rule 25 have not been invoked without any justifiable cause. The first Appellate Court did not at all advert to Exh.AW-2/1, AW-2/2 and AW-2/3 which were all relevant for the purposes of determining the issue in question.

15. Learned counsel for the appellants relied upon a decision of the Supreme Court delivered in Abdul Raheem vs. Karnataka Electricity Board & Ors, AIR 2008 SC 956 wherein it was held that non consideration of relevant facts gives rise to a question of law. Reversal of a finding of fact arrived at by the first Appellate Court, ignoring the vital documents may also lead to a substantial question of law.

16. The Trial Court had framed the following issues on 15.12.1977:-

1. Whether the plaintiffs are the owners of the house in dispute? OPP
2. Whether the plaintiffs are entitled to relief of declaration and injunction as sought in the present case? OPP
3. Whether the present suit is barred under Section 477 and 478 of the Delhi Municipal Corporation Act? OPD
4. Whether the suit is barred under Section 169 and 170 of the DMC Act? OPD

17. A perusal of the deposition of PW-1 reveals that Smt.Dharam Kaur @ Dhanno was the owner of the suit property and the aforesaid fact was admitted by MCD (defendant No.1) in the written statement. The appellants, even though objected to and filed their written statement to the appeal but did not at all state as to how Late Ganpat Nath could acquire right, title or interest in the suit property. There is no reference in the written statement of the Municipal Corporation of Delhi (defendant No.1) as to how the name of Ganpat Nath @ Ganpat Jogi was mutated in the records of the MCD as owner of the suit property.

18. On the contrary, the documents viz. bills of payment of house tax by Smt.Dharam Kaur (Ex.PW-1/1 and PW-1/2) and the assessment notice issued to her by MCD (Ex.PW-1/3) clearly indicate that Smt.Dharam Kaur, the predecessor-in-interest of the original plaintiff

was the undisputed owner of suit property during her lifetime. The Will (Ex.PW-1/5), bequeathing the property to respondent No.2, though could not be proved in actual sense of the term but the same was not denied specifically. The Adoption Will reflecting the adoption of respondent No.2 has been proved (Ex.PW-1/10). The aforesaid Adoption Deed also has not been objected to or denied.

19. Thus from the pre-ponderance of evidence, oral and documentary it stands established that the plaintiffs/respondents (Smt.Parsandi Devi and Sh.Inder Jeet) inherited the suit property after the death of Smt.Dharam Kaur in the year 1977. The aforesaid finding of the Appellate Court has been further lent credence by the absence of any valid response from the MCD about how the suit property was mutated in the name of the predecessor-in-interest of the appellants, in the records of the MCD. The remand order dated 31.01.2008 clearly indicates that the first Appellate Court was required to rehear the appeal on merits. The first Appellate Court was not, therefore, unjustified in rejecting the prayer of the appellants for bringing on record the written statement as objection/reply to the appeal was already on record.

20. Order XLI Rule 23 & 23A are invokable by the Appellate Court where the appeal arises either from a decree passed on preliminary point or on merits but only when the Appellate Court thinks fit and deems it expedient to invoke such provision for the ends of justice.

21. Order XLI Rule 24, however, clearly spells out that that where the evidence on record is sufficient to enable the Appellate Court to

pronounce the judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree, the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

22. There was no requirement of framing of issue regarding the ownership/title of the suit property of Ganpat Nath, the predecessor-in-interest of the appellants. The first issue framed by the Trial Court “Whether the plaintiffs are owners of the house in dispute”, was sufficient to decide the lis between the parties.

23. This Court finds no fault with the reasoning given by the first Appellate Court. The findings of the first Appellate Court, therefore, have not led to any perversity in the judgment either in facts or in law. No substantial question of law arises in the aforesaid appeal.

24. The second appeal is, therefore, dismissed but without costs.

C.M.App.No.11458/2011

1. In view of the second appeal having been dismissed, this application has become infructuous.

2. This application is disposed of accordingly.

ASHUTOSH KUMAR, J

FEBRUARY 03, 2016

k