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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RSA No. 223/2016

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16th August, 2016

SH. BHUSHAN KUMAR KHANNA

..... Appellant

Through: Ms. Rekha Aggarwal and Mr. Anand
Vershan Maitrya, Advocates.

versus

SMT. ASHA DEVI

..... Respondent

Through:

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 by the plaintiff under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugning the concurrent Judgments of the courts below; of the First Appellate Court dated 9.10.2015 and the Trial Court dated 16.8.2014; by which judgments the courts below have dismissed the suit for possession and injunction filed by the appellant/plaintiff with respect to the suit property bearing no.B-95, Gandhi Vihar, Delhi-110009 situated on plot of land admeasuring 25 sq. yds. Appellant/plaintiff also challenges the Order dated 4.4.2016 dismissing the his review petition filed against the Judgment dated 9.10.2015.

2. The case set up by the appellant/plaintiff was that the original allottee of the suit property was one Sh. Inder Singh. Sh. Inder Singh had executed a Will dated 5.12.1992 in favour of his widow Smt. Sona Devi and who sold the property further by means of usual documentation to one Sh. Kanwarjeet Khanna. Sh. Kanwarjeet Khanna thereafter transferred rights in the suit property to Sh. Balvinder Singh vide documents dated 3.6.1997 and from Sh. Balvinder Singh the present appellant purchased rights by means of documents dated 21.7.1997. The case of the appellant/plaintiff is that when he purchased the suit property he only received symbolic possession because the respondent/defendant requested 2-3 months time to vacate the suit property on the ground that her minor son was only about 2 years old and was ill and hence respondent/defendant was not in a position to immediately shift. This request of the respondent/defendant is said to have been accepted by the appellant/plaintiff but since the respondent/defendant failed to vacate the suit premises, therefore, the subject suit came to be filed on 13.4.2005.

3. The defence of the respondent/defendant is that she is the daughter-in-law of the original allottee Sh. Inder Singh and his widow Smt. Sona Devi. It is pleaded that the entire chain of documents relied upon by the appellant/plaintiff are forged and fabricated because such documents never saw the light of the day from the year 1997 till the suit was filed on 13.4.2005. It is

argued that actually the respondent's/defendant's mother-in-law alongwith her son Sh. Om Prakash, who is the estranged husband of the respondent/defendant, have contrived so as to oust the respondent/defendant from the suit property which was in fact given to her in lieu of maintenance. It is also pleaded by the respondent/defendant that she had filed a suit for permanent injunction against her in-laws and in this suit vide Order dated 15.5.2001 passed under Order XXXIX Rules 1 and 2 CPC the in-laws were restrained from selling or transferring the suit property, and hence there could not be transfer of title in favour of the appellant/plaintiff or some of the predecessors-in-interest of the appellant. Finally, the respondent/defendant pleaded that in fact in execution proceedings bearing Ex. No.9/9/08 arising out of proceedings under Section 125 of the Code Of Criminal Procedure, 1973 (Cr.P.C) her in-laws had settled the matter with her and executed a Settlement Deed dated 30.11.2009 whereby the in-laws have given up rights in the suit property to the respondent/defendant in lieu of right of maintenance of the respondent/defendant.

4. A second appeal can be entertained under Section 100 CPC only if there arise substantial question(s) of law. This Court sitting in second appeal is neither the trial court nor the first appellate court, and which courts are the final courts with respect to appreciating evidence and facts. Unless the conclusions reached by the courts below are completely perverse and completely illegal, no

substantial questions of law will arise for entertaining this second appeal under Section 100 CPC. Let us therefore examine that whether any substantial question of law arises for this second appeal to be entertained.

5. At this stage, before adverting to the arguments urged on behalf of the appellant/plaintiff, the following important conclusions of the trial court, as also the responses given to the queries raised by this Court, are set out as under:-

(i) The documents of the year 1997, by which the appellant/plaintiff claims to have purchased the suit property did not see the light of the day including by filing of the same before any public authority, from 1997 till 13.4.2005 when the subject suit was filed. Therefore, it is not easy to believe existence of such documents on which appellant/plaintiff (and his predecessors) had claimed ownership rights but did not seek implementation of the same in spite of having paid complete consideration.

(ii) The reason given by the appellant/plaintiff for not implementing the documents on the ground that respondent/defendant had a small son of 2 years and was not well, and therefore, the respondent/defendant was allowed to continue to stay in the suit property is again a stand which on the face of it is such that it cannot be accepted by this Court for the reason that why would the appellant/plaintiff a complete stranger to the respondent/defendant allow the

respondent/defendant to stay in the suit property after having paid the entire consideration, and that too without taking in writing from the respondent/defendant that she is allowed to stay for a particular time on account of the tender age of her son.

(iii) The consideration of Rs.83,000/- which is said to have been paid by the appellant/plaintiff for purchase of the property is said to be in cash, and therefore, there is no proof of payment of consideration itself and much less by unimpeachable contemporary evidence existing at the time of transfer of the suit property to the appellant in 1997.

(iv) Also it is further seen that the appellant/plaintiff is the last purchaser, being the last link in the chain of documentation, but at no point of time even the earlier so called purchasers of the suit property were put in physical possession by Smt. Sona Devi or that such prior purchasers had ever sought to seek possession from the respondent/defendant by means of filing judicial proceedings.

(v) The respondent/defendant relies upon a Settlement Deed dated 30.11.2009 executed by her in-laws in her favour in execution proceedings arising in 125 Cr.P.C proceedings whereby the suit property was given to her for her claim of maintenance and with respect to which the first appellate court has observed as under in the impugned order:-

“(17) **Fifthly**, it has also come on record that the respondent Asha Jain filed a petition under Section 125 Cr. P.C against her husband Sh. Om Prakash for maintenance which had been granted in favour of the respondent/defendant and in the execution proceedings vide Ex.No. 09/9/08 all the in-laws of the defendant settled the matter with the respondent/defendant and they executed settlement deed dated 30.11.2009 which is also on record according to which the in-laws of the defendant have given the suit property i.e. B-95, Gandhi Vihar, Delhi-9 to the defendant. The relevant para no.4 of the said settlement is as under:-

“.....That the second party (in-laws of the defendant) in order to satisfy the claim of the first party (defendant) for past, present and future maintenance and permanent alimony for herself as well as her children, shall leave their all rights title and claims in the aforesaid property bearing no.B-95, Gandhi Vihar, Near Mukharji Nagar, Delhi (suit property).....”

(18) Further, in Para 5 of the settlement deed it is stated that:

“....the second party (in-laws of the defendant) shall leave their right , title and interest in the aforesaid property (suit property) in favour of the first party (defendant) in favour of the first party (defendant) only after quashing of the aforesaid case FIR from the Hon'ble High Court.

(19) It is submitted that on the basis of this settlement deed the counsel for the respondent had also filed an application under Order 6 Rule 17 CPC to amend the written statement which has been allowed vide order dated 26.5.2012 by the trial court and same had been amended. Smt. Sona Devi, was also a party to the above settlement deed and hence the question of her having executed any documents in favour of Sh. Kavarjeet Khanna or other person and could not have arisen.”

Merely because appellant/plaintiff has chosen to file an application under Section 340 Cr.P.C against the respondent/defendant would not change the fact that the proceedings under Section 125 Cr.P.C as of date stand concluded in favour of the respondent/defendant, with the fact that till date neither Smt. Sona Devi nor Sh. Om Prakash have applied for setting aside of those proceedings whereby the Settlement Deed dated 30.11.2009 was relied upon by the respondent/defendant to claim rights in the suit property in lieu of her right of maintenance.

6. Learned counsel for the appellant/plaintiff very passionately argued that as a matter of justice appellant/plaintiff be allowed to lead additional evidence of Smt. Sona Devi and her son i.e the estranged husband of respondent/defendant so that appellant/plaintiff can prove the affidavits of Smt. Sona Devi and Sh. Om Prakash filed in the first appellate court on the aspects that the Will was executed by Sh. Inder Singh in favour of Smt. Sona Devi and also that they had not executed the Settlement Deed dated 30.11.2009, but I find that the first appellate court has on this aspect given exhaustive reasoning for dismissing the application under Order XLI Rule 27 CPC by observing that appellant/plaintiff has had ample opportunities to lead evidence with respect to his case, and having failed to do so, repeated opportunities cannot be given so as to prolong the case. In this regard the following observations have been rightly made by the first appellate court:-

“4. In so far as the application under **Order 41 Rule 27 CPC** is concerned, the short ground raised is that the earlier counsel had failed to seek examination of the attesting witnesses to the Will. It is pleaded that the present counsel was engaged by the appellant when the case was fixed for final arguments before the Ld. Trial Court. The respondent filed her written statement on 5.7.2005 and later on filed an application under Order 6 Rule 17 CPC at the stage of final arguments which was allowed by the Ld. Trial Court. The appellant filed an application against the order dated 26.5.2012 before High Court and the High Court vide order dated 25.7.2012 disposed of the appeal of the appellant with the following directions :

“..... after filing of amended written statement, the petitioner herein would be allowed to file amended rejoinder thereto and further that the evidence, if any, sought to be led with regard to additional pleas of aforesaid Suit No. 210/1996, if sought to be proved by the defendant, it only be permitted by way of filing the certified copies thereto with liberty to if so sought, by the

petitioner to rebut the same and thereafter, the trial court shall proceed further for final arguments.....”

5. Now, it is submitted that despite the above directions, the respondent neither filed any document in this regard nor produced any witness in the witness box. It is also submitted that in order to delay the matter, the respondent had filed few applications which had been dismissed by the Ld. Trial Court in view of order / direction passed by Hon'ble High Court of Delhi. It is further submitted that the earlier counsel for the appellant could not lead evidence of the attesting witnesses of the Will for the reason best known to him and also because the appellant could not find out whereabouts of attesting of the Will as the appellant purchased the property as back as in the year 1997. It is submitted that the earlier counsel for the appellant had moved an application to call the concerned clerk from the office of Sub Registrar with the relevant record but the said application was dismissed by the Ld. Trial Court in view of order / direction of the court. It is pointed out that the respondent at the time of cross examination dated 10.11.2009 herself stated that her husband and mother in law Smt. Sona Devi are residing with her while in her own documents i.e. settlement deed dated 30.11.2009 filed before the Ld. Trial Court in the month of September 2011 she mentioned that she was residing at Beri Mohalla, Ward No. 11, Mata Darwaja, Rohtak. It is also submitted that the appellant could not lead the evidence of Sona Devi in whose favour the Will in question was executed under bonafide belief that the case is not a case of probate. In support of his contentions, the Ld. Counsel for the appellant has also placed his reliance upon the judgment in the case of ***“M/s Clean International Pvt. Ltd. Vs. Ashok Surana”*** reported as ***AIR 2003 Cl. 263*** wherein the Hon'ble Apex Court has observed that ***“..... additional evidence sought to be adduced at appellate stage can be allowed by the court in exercise of its discretion”***

6. In so far the respondent Smt. Asha Devi is concerned, it is argued by her counsel that the application under Order XLI Rule 27 (B) read with Section 151 CPC is not maintainable as and is liable to be dismissed as the property in question was allotted by the DDA for rehabilitation after removal of the JHUGGI of the father in law of the respondent Late. Sh. Inder Singh as a licensee. It is further argued that it could not be sold at all as even the late father in law of the respondent even did not have any transferable right in the suit property. It is further argued that after the death of the father in law of the respondent Late. Sh. Inder Singh who died intestate all the legal heirs of Late. Sh. Inder Singh, i.e., Smt. Sona Devi (wife), Om Prakash and Randheer Singh (Sons) and the respondent herself inherited the property in question but the appellant did not make all the legal heirs of Late. Sh. Inder Singh party to the suit from which the present appeal has arisen. It is submitted that in these circumstances the present application merits dismissal for mis-joinder and non-joinder of necessary parties.

(7) Ld. Counsel for the respondent has argued that in the year 2007 when the matter was fixed for Final Arguments the Respondent / Defendant moved an application before the Ld. Trial court under Order VI Rule 17 for amendment of her written statement which the Ld. Trial court was pleased to allow vide its order dated 26.05.2012 and the Respondent/Defendant filed her amended Written statement. It is further argued that the applicant / appellant aggrieved by the said order dated 26.05.2012 approached the Hon'ble High court by filing a **C. M. (Main) bearing No. 828/2012** titled as "**Bhushan Kumar Khanna Vs. Asha Devi**". It is pointed out that the Hon'ble High Court was pleased to dispose of the said C. M. (Main) bearing No. 828/2012 with direction to the Trial Court that "**.....After filing of the amended written statement, the petitioner herein would be allowed to file the amended rejoinder thereto and further that the evidence, if any, sought to be led with regard to additional plea of aforesaid suit No. 210/1996, if sought to be proved by the defendant, it only be permitted by way of filing of certified copies thereto with liberty to if so sought by the petitioner to rebut the same and thereafter the Trial court shall proceed further for final arguments.....**". Thereafter, the applicant / appellant moved an application before the Ld. Trial court for summoning the official witness from the office of the Sub-Registrar but the Ld. Trial court was pleased to dismiss the said application of the applicant / appellant in view of the above directions of the Hon'ble High Court of Delhi. It is submitted that the Ld. Trial court in compliance of the directions of the Hon'ble High Court of Delhi had given opportunity to both the parties to lead additional evidence by way of filing certified copy of any documents but the applicant/appellant chose not to lead any additional evidence as per the direction of the Hon'ble court. It is argued that the applicant / appellant himself has not availed the opportunity to lead additional evidence cannot be allowed any further opportunity to lead additional evidence at the stage of appeal. It is further argued that the applicant / appellant cannot be rewarded by giving the opportunity to lead additional evidence as per his own whims and fancies and hence the present application of the applicant / appellant merits dismissal with exemplary cost. Ld. Counsel for respondent further pointed out that the Respondent /Defendant examined the official witness from the DDA which had allotted the suit property in the name of the deceased father in law of the Respondent/Defendant Sh. Inder Singh vide demolition Slip No. 4555. **The dealing assistant Sh. S. N. Sharma, OSV branch, DDA Vikas Sadan, Delhi, appeared before the Ld. Trial court on 12.10.2010 and was examined as DW-4, who stated in his examination in Chief that "the above mentioned plot is still in the name of Sh. Inder Singh as per record. I have also brought the letter of vacant possession of Jhuggi after which the plot No.B-95, was allotted".**

7. In my opinion, even if I ignore the aforesaid observations of the first appellate court I would not like to give any fresh opportunity under Order XLI Rule 27 CPC to lead evidence inasmuch as bad relations between the mother-in-law Smt. Sona Devi and the husband Sh. Om Prakash with the respondent/defendant is otherwise established on record, and therefore, surely such persons would want to depose in favour of the appellant/plaintiff and against the respondent/defendant who is estranged daughter-in-law/wife, and therefore, serious weight cannot be given to the statements/affidavits of Smt. Sona Devi and Sh. Om Prakash especially in view of the aforesaid conclusions of the title documents in favour of the appellant and his predecessors-in-interest of the suit property not seeing the light of the day for around eight years, no proof existing of payment of consideration at contemporary point of time in the year 1997 and finally no reason for purchasers who paid valuable consideration to allow a complete stranger to reside in the suit property and that too without any agreement or undertaking in writing by the respondent/defendant/stranger to vacate the suit property after a particular point of time.

8. In view of the above, I find that there does not arise any substantial question of law for this second appeal to be entertained under Section 100 CPC. Dismissed.

AUGUST 16, 2016
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VALMIKI J. MEHTA, J