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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RSA No. 320/2016 and RSA No. 321/2016

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25th October, 2016

+ RSA No. 320/2016

NAND RAM & ORS.

..... Appellants

Through: Mr. Sunil Mittal, Sr. Advocate with
Mr. Maldeep Sidhu and Mr. Dhruv
Grover, Advocates.

versus

SURAJ BHAN

..... Respondent

Through:

+ RSA No. 321/2016

NAND RAM & ORS.

..... Appellants

Through: Mr. Sunil Mittal, Sr. Advocate with
Mr. Maldeep Sidhu and Mr. Dhruv
Grover, Advocates.

versus

KANWAL SINGH & ANR

..... Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

YES

VALMIKI J. MEHTA, J (ORAL)

1. These Regular Second Appeals under Section 100 of the Code of Civil Procedure, 1908 (CPC) are filed by the appellants/defendants in the suit impugning the Judgment of the First Appellate Court dated 25.4.2016 by which the first appellate court has allowed the first appeal by setting aside the Judgment of the Trial Court dated 29.1.2014 as regards issue no. 1, and since issue no. 1 was decided in favour of the respondents/plaintiffs with issue nos. 2 to 4 having already been decided in favour of the respondents/plaintiffs by the trial court, the suit was hence decreed by the first appellate court as a whole in favour of the respondents/plaintiffs by restraining the appellants/defendants from using the disputed gali/private street and removing the iron grill/jaal and staircase made by the appellants/defendants in the subject gali.

2. I note that in the Regular Second Appeal No. 320/2016 instead of adding both the plaintiffs Sh. Kanwal Singh and Sh. Suraj Bhan as respondents only Sh. Suraj Bhan has been added as a respondent and the oral request of the counsel for the appellants/defendants is allowed and Sh. Kanwal Singh will also be treated as respondent/plaintiff in this second appeal. Let the amended memo of parties be filed within a week from today.

3. The subject suit was filed by the respondents/plaintiffs along with their mother Smt. Nahar Kaur/plaintiff no.1, who has since expired, and

therefore, there remained only two plaintiffs in the suit, and who are the respondents in this second appeal. In the subject suit for injunction the respondents/plaintiffs claimed injunction against the appellants/defendants from in any manner using or constructing upon the disputed land/gali shown with the letters EFGH in the site plan annexed to the plaint. Respondents/plaintiffs also sought the relief that an iron jaal/mesh/grill which was put up by the appellants/defendants in the gali on 13.1.2003 be directed to be removed. The trial court granted only this latter prayer, because the trial court held issue no. 1 against the respondents/plaintiffs thereby holding that the gali in question was commonly owned by the appellants/defendants and the respondents/plaintiffs, and therefore no construction could be made in the nature of a staircase or iron grill/mesh in the subject gali by the appellants/defendants. Two appeals were therefore filed against the Judgment of the Trial Court dated 29.1.2014. One appeal was filed by the respondents/plaintiffs against the finding on issue no. 1 holding that the disputed gali was commonly owned and not exclusively owned by the respondents/plaintiffs, and thus in the first appeal the respondents/plaintiffs sought setting aside of the finding on issue no. 1 and for holding that only the respondents/plaintiffs had the exclusive ownership right to the disputed land/gali. Appellants/defendants also filed an appeal against the Judgment of the Trial Court dated 29.1.2014 as the trial court had found issue

nos. 2 to 4 against the appellants/defendants and had directed the appellants/defendants to remove the iron jaal/mesh/grill and staircase which was fixed by the appellants/defendants in the gali, and which direction was given because it was held that the gali was common and no one had a right to make any construction on the same which would affect the right of the other co-owners/plaintiffs to use the gali unhindered. Both the appeals have been disposed of by the First Appellate Court vide the impugned Judgment dated 25.4.2016 by accepting the appeal of the respondents/plaintiffs and dismissing the appeal of the appellants/defendants, hence this Regular Second Appeal under Section 100 CPC by the appellants/defendants.

4. The sole issue is as to whether the respondents/plaintiffs are the exclusive owners of the disputed land/gali, and for which purpose respondents/plaintiffs had placed reliance upon two family settlement entered into between the three brothers who are three sons of late Smt. Nahar Kaur/late plaintiff no. 1, the mother. The suit gali was part of the land in Khasra no. 241/1 min measuring 10 biswas, Village Sultanpur, Tehsil Mehrauli, New Delhi and was originally in the ownership of the mother Smt. Nahar Kaur/plaintiff no.1. On account of division of the land between the three sons, by the mother Smt. Nahar Kaur who was the owner of the same, all the three sons of the Smt. Nahar Kaur/ plaintiff no. 1 came into physical possession of their respective

shares of land. One son of the Smt. Nahar Kaur/ plaintiff no. 1/mother was Sh. Kanwal Singh/plaintiff no. 1, the second son was Sh. Suraj Bhan/plaintiff no. 2 (and who are the respondents in this second appeal) and the third son was Sh. Nand Ram/appellant no. 1/defendant no. 1. A Family Settlement dated 2.2.1980/Ex. PW1/2 was entered into between the three sons of Late Smt. Nahar Kaur, namely, the respondents and appellant no.1. In this Family Settlement dated 2.2.1980, it was agreed between the three brothers being the three sons of Smt. Nahar Kaur, that if the plaintiffs purchase land to give a passage to the plot which fell to the share of the appellant no. 1/defendant no. 1, then on getting such passage the appellant no. 1/defendant no. 1 will have no right remaining in the disputed gali/land. The case of the respondents/plaintiffs was that they purchased the land/passage for giving access to the plot which fell to the share of the appellant no. 1/defendant no. 1, and accordingly, the second Family Settlement dated 9.4.1992/Ex. PW1/7 was entered into between the three brothers being the three sons of Smt. Nahar Kaur, whereby the appellant no. 1/defendant no. 1 gave up the rights to the disputed land/gali. A document being a receipt Ex.PW/1/6 was executed by the appellant no. 1/defendant no. 1 on receiving payment from respondent no.1/plaintiff no. 2/Sh. Suraj Bhan, and which is the payment with respect to the consideration by which the passage was purchased for appellant no. 1/defendant no. 1 for approaching to the

plot/portion of land which fell to his share. Accordingly, respondents/plaintiffs claim exclusive right and ownership to the disputed land/gali whereby the reliefs of injunction were claimed in the subject suit against the appellants/defendants from using the gali or making any construction in the gali.

5. Out of the three appellants, and who were the three defendants in the suit, only the appellant no. 3/Sh. Surinder Kumar contested the suit by filing his written statement. Appellant no. 1 and appellant no. 2, and who were/are the defendants no.'s 1 and 2 in the suit, did not contest the suit as they did not file any written statement. As already stated above, appellant no. 1 is the brother of the two plaintiffs/respondents, and he is the father of appellant no. 3/defendant 3/Sh. Surinder Kumar. As per the written statement of appellant no. 3/defendant no. 3 the suit was prayed to be dismissed firstly on the ground that the price which was paid for purchase of the passage for giving ingress and egress to the portion of the plot which fell to the share of the appellant no.1/defendant no. 1 was not paid by the respondents/plaintiffs but the same was paid by the appellant no. 1/defendant no. 1 and it was accordingly contended that the Family Settlement Ex.PW1/2 dated 2.2.1980 was not complied with because under this Family Settlement dated 2.2.1980, the appellant no. 1/defendant no. 1 was to give up the rights in the disputed gali only if the respondents/plaintiffs would have paid the price to the appellant no.

1/defendant no. 1 for purchasing the passage to the plot which fell to the share of appellant no. 1. The second main defence was that the second Family Settlement dated 9.4.1992/Ex.PW1/7 required stamping and registration and since it was not adequately stamped and registered, hence the same could not be legally looked into for the respondents/plaintiffs to claim settlement qua the disputed land/gali. These are also the only two aspects which have been argued before this Court on behalf of the appellants/defendants.

6. So far as the fact that the two family settlements executed, and were proved, is not in issue before this Court with the first Family Settlement dated 2.2.1980 being proved as Ex.PW1/2 and the second Family Settlement dated 9.4.1992 being proved as Ex.PW1/7. For the record it is stated that though the appellant no.3/defendant no.3 who filed the written statement had denied the execution of the Family Settlement dated 9.4.1992 by his father who was the defendant no.1, but, the courts below have held this against the appellants/defendants in view of the fact that the signatures of the defendant no.1 on the Family Settlement dated 9.4.1992 were proved through a handwriting expert's report. In any case, in the opinion of this Court the appellants cannot play games with the court because appellant no.1/defendant no.1 who was a party to the Family Settlement dated 9.4.1992, did not file his

written statement and did not deny his signatures on the family settlement dated 9.4.1992.

7. The first aspect to be considered is as to whether the Family Settlement dated 9.4.1992 is not binding because as a pre-condition for the enforcement of this Family Settlement dated 9.4.1992 it had to be shown that the consideration which was paid for purchase of the passage for access to the portion of the plot allotted to the appellant no.1/defendant no.1, this consideration for purchase of this passage was paid by the respondents/plaintiffs. According to the appellant no.1/defendant no.1 the respondents/plaintiffs did not pay this consideration and therefore the term of the first Family Settlement dated 2.2.1980 is not complied with, and hence the subsequent Settlement dated 9.4.1992 signed by the appellant no.1/defendant no.1 would have no force. In this regard, the trial court has held in favour of the appellant/defendants that once the passage has been purchased by means of the documents in the name of the appellant no.1/defendant no.1, Section 92 of the Indian Evidence Act bars the respondents/plaintiffs from stating otherwise that the consideration was not paid by the appellant no.1/defendant no.1 for purchasing the passage. Effectively, what the trial court holds is that once the document by which passage was purchased by the appellant no.1/defendant no.1 states that consideration/price was paid by the appellant no.1/defendant no.1 to

the third party seller, then, respondents/plaintiffs are estopped under Section 92 of the Indian Evidence Act from varying the terms of the document which shows payment of consideration by the appellant no.1/defendant no.1 to the third party seller.

8. In my opinion, the trial court in this regard has seriously erred by holding that the respondents/plaintiffs cannot question or vary the terms of the document of purchase of the passage in the name of the appellant no.1/defendant no.1, inasmuch as, Section 92 of the Indian Evidence Act only stops the parties to a document from varying or contradicting the terms of the document, but third parties being the respondents/plaintiffs who were not parties to the document evidencing purchase of the passage could always have led evidence as to the existence of a contemporaneous agreement varying the terms of the document by which the passage was purchased. This is permissible and so provided in Section 99 of the Indian Evidence Act which reads as under:-

“99. Who may give evidence of agreement varying term of document.—Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.”

9. Respondents/plaintiffs have proved on record the receipt Ex.PW1/6 which shows payment of consideration by the respondent no.1/plaintiff no.1/

Sh. Suraj Bhan to the appellant no.1/defendant no.1 for purchase of the passage for ingress and egress to the plot which fell to the share of the appellant no.1/defendant no.1 and therefore once the document being the Family Settlement dated 9.4.1992 is read with the receipt Ex.PW1/6, and also along with the earlier Family Settlement dated 2.2.1980, it is clear that the respondents/plaintiffs have proved payment of consideration and acting upon the first Family Settlement dated 2.2.1980, and consequently it cannot be held that the second Family Settlement dated 9.4.1992 is void on account of lack of consideration or that the term of the Family Settlement dated 2.2.1980 was not complied with by the respondents/plaintiffs. In view of the document Ex.PW1/6, it is therefore held that the second Family Settlement Ex.PW1/7 dated 9.4.1992 is valid as consideration was paid by the respondents/plaintiffs to the appellant no.1/defendant no.1, and as was required by the first Family Settlement dated 2.2.1980.

10. The matter can also be looked into by another angle and which will be related to the second issue which is urged on behalf of the appellants/defendants that the Family Settlement dated 9.4.1992 cannot be looked into as the same by its language created rights in the disputed land/gali and therefore required stamping and registration. The second Family Settlement dated 9.4.1992 if is not required to be stamped and registered, then,

the issue of alleged non-payment of consideration to the appellant no.1/defendant no.1 by the respondents/plaintiffs pursuant to the first Family Settlement dated 2.2.1980 would pale into insignificance because the second Family Settlement dated 9.4.1992 specifically refers to the appellant no.1/defendant no.1 giving up his rights in the disputed land/gali on account of a passage having been given by the respondents/plaintiffs to the appellant no.1/defendant no.1 for ingress and egress/access to his portion of the plot.

11. In my opinion, the second Family Settlement dated 9.4.1992 is not required to be stamped and registered because it is not to be taken as an independent document in itself, inasmuch as, actually this document titled as a Family Settlement dated 9.4.1992 is only a follow up document and hence a part and parcel of the earlier Family Settlement dated 2.2.1980. A follow up document cannot be said to be creating rights because that is only acting upon the earlier/first Family Settlement dated 2.2.1980 as per which appellant no.1/defendant no.1 would have given up rights to the disputed land/gali on the appellant no.1/defendant no.1 being given a passage by the respondents/plaintiffs purchasing the same or providing the consideration for the passage which would have the access to the portion of the plot of the mother/Smt. Nahar Kaur which was allotted to the appellant no.1/defendant no.1. Therefore, the document being the document dated 9.4.1992 is not an

independent document in itself, and being only a follow up document to the actual Family Settlement dated 2.2.1980, this second document dated 9.4.1992 hence did not create rights for the first time and thus did not require stamping and registration.

12. Another reason for the document dated 9.4.1992/Ex.PW1/7 not requiring stamping and registration is because all the three documents being the first Family Settlement dated 2.2.1980, the receipt Ex.PW1/6 showing payment of consideration to the appellant no.1/defendant no.1 for purchase of the passage to the plot allotted to him, and the document dated 9.4.1992/Ex.PW1/7 have to be read together and any statement made of creating rights in the document dated 9.4.1992 is only a misnomer or mis-description because whatever rights were created were already created as per what was recorded in the earlier Family Settlement dated 2.2.1980/Ex.PW1/2.

13. A document requires stamping and registration only if the said document for the first time creates or extinguishes rights, but the document dated 9.4.1992 when is read with the earlier Family Settlement dated 2.2.1980 shows that this follow up document is in fact, only a consequence and part and parcel of the transaction recorded in the joint Family Settlement dated 2.2.1980.

Thus no rights are created or extinguished for the first time by this document dated 9.4.1992 did not require stamping and registration.

14. The next reason for holding as valid the Family Settlement dated 9.4.1992 inspite of non-stamping and non-registration of the same is that even assuming that the Family Settlement dated 9.4.1992 has to be taken as an independent document, yet, the language in that the document has to be interpreted in a practical manner for not creating rights or extinguishing rights for the first time but language thereof being taken only as a recordal of rights created prior to the execution of this document, and for which purpose I rely upon the ratio of the judgment of the Supreme Court in the case of ***Roshan Singh Vs. Zile Singh, AIR 1988 SC 881*** wherein the Supreme Court inspite of a language which would seem to suggest creation of rights for the first time, yet, in order to uphold the family settlements which bring about family peace, interpreted the settlement as only a recordal of rights which were already earlier agreed upon prior to the signing/execution of the family settlement.

15. Accordingly, for all the above reasons it is held that the Family Settlement dated 9.4.1992 is only a recordal of the terms which were already earlier agreed upon and therefore did not require any stamping and registration. I note that this Court in second appeal in view of Order XLI Rule 24 can give

additional reasoning to sustain the judgments of the courts below and so held by the Supreme Court in its recent judgment in the case of *Lisamma Antony and Another Vs. Karthiyayani and Another* (2015) 11 SCC 782.

16. It is seen that the present litigation initiated by the appellants/defendants is a clear case of the abuse of the process of law. I have already stated above that appellant nos. 1 and 2 inspite of being defendants did not file written statements and contest the suit. Only the appellant no. 3, and who is the son of appellant no. 1/defendant no. 1 contested the suit by filing the written statement and his rights exist only through the appellant no.1/defendant no. 1. This factum of appellant no. 1/defendant no.1 not contesting the suit was a convenient exercise of collusion and dishonesty because if appellant no. 1/defendant no. 1 would have contested the suit by filing written statement he would have been forced to admit his consent, validity and bindingness of the two Family Settlements dated 2.2.1980 and 9.4.1992. While appellant no. 1/defendant no. 1 did not file the written statement or lead any evidence, yet appellant no. 1/defendant no. 1 has chosen to file this second appeal. In fact, even in the first appeal before the first appellate court the present appellant no. 1/defendant no. 1 was an appellant, as informed to this Court by the learned senior counsel for the appellants. Therefore, appellants/defendants are playing games of ducks and drakes and hide and seek with not only the

respondents/plaintiffs but their dishonest actions have led to the respondents/plaintiffs having to spend valuable time and money to contest the present litigation which has reached up to the stage of second appeal. Trial court had granted costs which totalled to only an amount of Rs. 813.75/-. First appellate court while allowing the first appeal of the respondents/plaintiffs and dismissing the first appeal of the appellants/defendants did not award any costs. Therefore, in my opinion, the present is a fit case where this second appeal is dismissed with costs of Rs.50,000/- throughout to the respondents/plaintiffs and for determining and paying such costs the appellants/defendants will get adjustment for the sum of Rs.814/- as granted by the trial court. Costs be paid within four weeks from today. No substantial question of law arises. Both the appeals, i.e. RSA Nos. 320/2016 and 321/2016, are accordingly dismissed in terms of the observations made hereinabove.

OCTOBER 25, 2016

AK/Ne

VALMIKI J. MEHTA, J