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

+ RFA 950/2016 & CMs 45259-61/2016

HARBHAJAN SINGH Appellant
Through : Mr. Manuj Aggarwal, Advocate

versus

KULDEEP SINGH & ORS Respondents
Through : None.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI

ORDER
06.12.2016

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1. The appellant seeks setting aside of the judgment and decree dated 7.9.2016 passed by the trial court in a suit for declaration and permanent injunction instituted by him against his siblings, respondents No.1, 2, 3 (since deceased), respondent No.4 and his father, respondent No.5 (since deceased) (defendants No.1 to 5 in the trial court).
2. Before considering the submissions made by learned counsel for the appellant, it is necessary to take note of the factual narrative. The appellant/plaintiff had instituted the aforesaid suit praying *inter alia* for declaring the sale deed dated 22.5.2006 executed by the respondent/defendant No.5 (father of the parties) in favour of the respondent/defendant No.1 as *null and void* and further, for declaring that he is the joint owner of the said premises; and asking for a decree of permanent injunction for restraining the respondents/defendants from creating any third party interest in the suit premises.

3. The appellant/plaintiff has stated in the suit that he and the defendants are class-1 heirs of late Smt. Prasin Kaur, mother of the appellant/plaintiff and the respondents/defendants No.1 to 4 and wife of the respondent/defendant No.5 (since deceased) who owned a property measuring 110 sq. yards situated at village Tihar, Fateh Nagar, New Delhi; that the mother had acquired the said property, by virtue of sale documents executed in her favour by the erstwhile owner, Shri Budh Singh on 14.2.1974. While skipping over the nature of the sale documents executed by the erstwhile owner in favour of Smt. Prasin Kaur, the appellant/plaintiff simply stated that during her lifetime, the mother was asserting all her rights as an owner of the suit premises and after the same was purchased, “the entire family shifted to the said property and thereafter the plaintiff had been in continuous, open, peaceful and exclusive possession of the same.”

4. On a pointed query raised to learned counsel for the appellant/plaintiff as to what were the nature of the documents of title that were executed by the erstwhile owner in favour of Smt. Prasin Kaur, he reluctantly submits that though it has not been specifically stated anywhere in the plaint, a GPA was executed in favour of Smt. Prasin Kaur and all the remaining documents of title, including Agreement to Sell, possession letter and receipt of sale consideration were executed in favour of the father of the parties (defendants No.5, since deceased).

5. The plaint goes on to narrate in para 5 that the plaintiff had been occupying the entire ground floor and half constructed portion of the second floor of the suit property, while the respondent/defendant No.1 was occupying the first floor and the remaining unconstructed portion of the second floor. Smt. Prasin Kaur had expired intestate on 17.8.2000 and on

her demise, all the parties are entitled to an equal share in the suit property, being class-1 legal heirs.

6. A joint written statement was filed by all the respondents/defendants in opposition to the suit wherein, the pleas taken in the plaint were traversed. The respondents/defendants pleaded that the appellant/plaintiff had himself executed a Disclaimer Deed dated 31.8.2005 in favour of his father five years prior to the demise of the mother, wherein he had acknowledged the defendant No.5 to be the absolute owner of the suit property. Given the above facts, he is estopped from claiming ownership of the suit premises by setting up an entirely new case that the mother of the parties was the owner of the suit premises. They went on to clarify that the father of the parties (deceased/defendant No.5) had purchased the suit property from one Shri Budh Singh and Smt. Manjit Kaur, by virtue of a set of sale documents in the form of Agreement to Sell and Payment Receipt, both dated 14.2.1974, against payment of the sale consideration and they had simultaneously handed over the actual physical possession thereof to him. In order to secure and safeguard his interests, the defendant No.5 had got a registered General Power of Attorney executed in favour of his wife, Smt. Prasin Kaur. Therefore, there was no question of her acquiring any ownership rights in the suit premises. It was categorically denied that the appellant/plaintiff was ever in continuous, open, peaceful and exclusive possession of the suit property or any part thereof, as was alleged. It was also denied that the appellant/plaintiff had raised any construction in the suit premises. Instead, the defendants asserted that the defendant No.5 (deceased father of the parties) had purchased and constructed the suit premises from his personal savings in the year 1981, a few years prior to his retirement from a wing of

the Ministry of Defence and as a result, nothing would turn on the mother of the parties dying intestate and nor would her class-1 legal heirs be entitled to inherit any part of the suit premises.

7. The main grievance of the appellant/plaintiff is that the trial court had failed to appreciate that the sale deed dated 22.5.2006 executed by the defendant No.5 in favour of his son, respondent/defendant No.1, was in fact a forged and fabricated document. As per the appellant, the respondent/defendant No.1 had never paid any amount towards the sale consideration of the suit premises to the defendant No.5 and therefore, a decree of declaration ought to have been passed, declaring the said registered document as null and void.

8. Explaining the background in which the defendant No.5 had executed the sale deed in favour of the respondent/defendant No.1, the defendants had stated in para 7 of the written statement that the behaviour of the appellant/plaintiff and his family was always humiliating towards his parents; upon his retirement, defendant No.5 had started his own business on the ground floor of the suit premises which the appellant/plaintiff had usurped taking advantage of his old age; that the defendant No.5 had sold the suit premises to the respondent/defendant No.1 by executing a registered sale deed dated 22.5.2006, against valid consideration of Rs.2.00 lacs; that the appellant/plaintiff had purchased his own property at Fateh Nagar, New Delhi and had shifted there along with his family in January, 2005, which was much prior to the execution of the sale deed by the defendant No.5 in favour of the respondent/defendant No.1; after executing the sale deed, the appellant/plaintiff had proceeded to execute a Relinquishment Deed on 31.8.2005, relinquishing his share in the suit property in favour of his

father/defendant No.5. This being the position, the respondents/defendants stated that the appellant/plaintiff was not left with any right, title or interest in the suit premises, for him to seek any relief in respect thereof.

9. As for the plea taken by the appellant/plaintiff that in the sale deed 22.5.2006 executed by the defendant No.5 in favour of the respondent/defendant No.1, it had been wrongly mentioned that the mother of the parties was alive on the date of execution of the said document, whereas she had expired in the year 2000, the respondents/defendants have sought to explain the same in para 18 of the written statement by asserting that in any case, the defendant No.5 was the absolute owner of the suit property which he had purchased against valid consideration and therefore, a mere error in the recitals of the sale deed, would not be of any significance.

10. It may be noted that the suit was initially instituted by the appellant/plaintiff in the High Court in the year 2007. On 8.2.2012, the following issues were framed :-

“1. Whether the plaintiff is entitled for a decree of declaration, for declaring the sale deed dated 22.5.2006 and registered as document No.10610, in additional book No.1, vol. No.13907 at pages No.148 to 155 as null and void and also of no effect? OPP

2. Whether the plaintiff is entitled to be declared as joint owner of the property bearing No.C-76, New Delhi, admeasuring 100 sq. Yards, part of Khasra No.537, situated in village Tihar, colony known and recognized as Fateh Nagar, New Delhi ? OPP

3. Whether the plaintiff is entitled to a decree of permanent injunction as prayed for? OPP

4. Whether the plaintiff is stopped from challenging his ownership by setting up a new case of Smt.l Prasin Kaur to be the owner? OPD

5. *Whether the plaintiff has no locus-standi to file the present suit? OPD*

6. *Relief.”*

11. After framing of issues, several opportunities were granted to the appellant/plaintiff to lead the evidence, but he had failed to take any steps. On 10.2.2014, counsel for appellant/plaintiff had submitted that it was not considered necessary to lead any evidence. Counsel for the respondents/defendants had stated that in view of the appellant/plaintiff refusing to lead any evidence, they too were not required to adduce any evidence. In any event, the onus to prove issues No.(1) to (3) was cast on the appellant/plaintiff.

12. Subsequently, the suit was transferred to the District Court after the pecuniary jurisdiction of the High Court was enhanced. Vide judgement dated 7.9.2016, the learned trial court dismissed the suit of the appellant/plaintiff on the ground that the onus to prove issues No.1, 2 and 3 had been placed on him as he had asserted a right, title and interest in the suit premises and had sought a decree of declaration, for declaring the sale deed as null and void but at the same time, he had failed to lead any evidence in support of his case. Referring to and relying on the provisions of Sections 101 and 102 of the Indian Evidence Act, 1872 that relate to burden of proof and prescribe on whom the burden of proof lies, it was held that unless such a burden is discharged by the party on whom the onus rests by leading affirmative evidence, the opposite party is not required to prove his case. It was further observed that the suit for declaration instituted by the appellant/plaintiff would not be maintainable unless he could prove that

he is entitled to some right in the property and having failed to demonstrate the same in terms of Section 34 of the Specific Relief Act, 1963 and having declined to enter the witness box, he would not be entitled to any relief. It was also noted that contrary to the contention of the appellant/plaintiff, the respondents/defendants had not made any admissions with regard to the right, title or interest in respect of the suit premises for any adverse inference to be drawn against them.

13. Learned counsel for the appellant canvassed that the trial court had failed to return any findings on the plea that the Sale Deed executed by defendant No.5 in favour of the respondent No.1/defendant No.1 was a forged and fabricated document.

14. On perusing the impugned judgment, it transpires that the aforesaid plea taken by the appellant/plaintiff was duly considered by the learned trial court that had observed that as the appellant/plaintiff had failed to prove that the sale deed had been executed in a fraudulent manner, he is not entitled to a decree of declaration. This Court is of the opinion that the appellant/plaintiff having failed to enter the witness box without offering any justification for staying away, the trial court had every reason to conclude that an adverse inference ought to be drawn against him. It was for the appellant/plaintiff herein to prove that the Sale Deed executed by the defendant No.5 in favour of the respondent No.1/defendant No.1 was a forged and fabricated document and no amount was paid towards the sale consideration by the respondent No.1. The said plea was not supported by the appellant/plaintiff as he elected not to enter the witness box. He did not state on oath the facts that he had pleaded in the plaint before the trial court. As the appellant avoided the witness box, he could not be cross-examined by

the other side. This by itself is considered sufficient for rejecting the claim of the appellant/plaintiff that the transaction of sale between the deceased defendant No.5 and the respondent No.1/defendant No.1 was a fraudulent transaction.

15. There are a catena of decisions by the Privy Council, the Supreme Court and several High Courts, where it has been held that ordinarily, it is the duty of the party to lead the best evidence in his possession, which could throw light on the issue in controversy and if such material evidence is withheld, the Court is entitled to draw an adverse inference under Section 114(g) of the Evidence Act. It is also a settled legal position that when a party to the suit does not appear in the witness box and state his own case on oath and does not offer himself to be cross-examined by the other side, a presumption shall arise that the case set up by him is not correct and this shall give rise to an adverse inference against him [Refer: (i) Murugesam Pillai vs. Gnana Sambandha Pandara Sannadhi, AIR 1917 PC 6 (ii) Sardar Gurbakhsh Singh vs. Gurdial Singh and Anr., AIR 1927 PC 230 (iii) Kirpa Singh vs. Ajaipal Singh and Ors., AIR 1930 Lah. 1 (iv) Martand Pandharinath Chaudhari vs. Radhabai Krishnarao Deshmukh, (1930) 32 BOMLR 924, (v) A. Raghavamma and Anr. vs. A. Chenchamma and Anr., AIR 1964 SC 136 (vi) Gulla Kharagjit Carpenter vs. Narsingh Nandkishore Rawat, AIR 1970 MP 225 (vii) Arjun Singh vs. Virender Nath and Anr., AIR 1971 All 29 (viii) Bhagwan Dass vs. Bhishan Chand and Ors., AIR 1974 P&H 7 (ix) Musaaddin Ahmed vs. State of Assam, AIR 2010 SC 3813 (x) Khatri Hotels Pvt. Ltd. and Anr. vs. UOI and Anr., (2011) 9 SCC 126 and (xi) Union of India vs. Ibrahim Uddin and Anr., (2012) 8 SCC 148.

16. In the case in hand, the onus was on the appellant/plaintiff to prove issues No.1 to 3 by leading cogent evidence. Much less producing any cogent evidence, the appellant/plaintiff declined to enter the witness box to state his own case on oath and in those circumstances, the trial court cannot be faulted in drawing an adverse inference against him.

17. The next circumstance relied on by learned counsel for the appellant for discarding the Sale Deed dated 22.5.2006 executed by the defendant No.5 in favour of the respondent No.1/defendant No.1 is that it mentions that the mother of the parties was alive at the time of execution whereas she had expired on 17.8.2000. Even if the said position is factually correct, not much would turn on the date of demise of the mother of the parties, who was only a general power of attorney holder in relation to the suit premises, whereas the primary documents of sale, i.e., the Agreement to Sell and the Payment Receipt, both dated 14.02.1974 were all executed by the erstwhile joint owners, Sh. Budh Singh and Smt. Manjit Kaur in favour of the defendant No.5, the deceased father of the parties.

18. Pertinently, the appellant/plaintiff has not challenged the legality or validity of the said documents of sale executed by the erstwhile owners of the suit premises in favour of his father, defendant No.5. Nor has he disputed executing a Disclaimer Deed dated 31.08.2005, in favour of his father wherein he had acknowledged him to be the owner of the suit premises. The said document was executed by the appellant/plaintiff five years after his mother's demise. The aforesaid document clinches the case in favour of the respondents. Apart from the above, there is no admission made by the respondents/defendants in their written statement that would have gone to the advantage of the appellant/plaintiff for a finding to have been

returned in his favour by the trial court.

19. Having carefully examined the impugned judgment in the light of the arguments advanced by learned counsel for the appellant, this Court is of the opinion that the appeal lacks merits. The impugned judgment is sustained and the appeal is accordingly dismissed in *limine*, along with the pending applications.

HIMA KOHLI, J

DECEMBER 06, 2016

sk/ ap/rkb

