

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **RSA No.273/2015 and C.M. Appl. No.13089/2015 (for stay)**

% **13th July, 2016**

RAJESH SETHI Appellant

Through: Mr. S.K. Grover, Advocate.

versus

KARTAR SINGH GANDHI Respondent

Through: Mr. Munish Chhoker, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908 (CPC) by the defendant against the Judgment of the First Appellate Court dated 2.5.2015 whereby the First Appellate Court set aside the Judgment of the Trial Court dated 9.9.2014 dismissing the suit of the respondent/plaintiff for declaration, possession, etc and accordingly decreed the suit of the respondent/plaintiff for possession with respect to the suit property comprising of 100 sq. yards bearing No. AT/48 Baljeet Nagar, New Delhi.

2. The facts as pleaded by the respondent/plaintiff were that the suit property was purchased by him in terms of Power of Attorneys dated 27.8.1962 and 20.9.1962 from one Smt. Nandu, wife of Sh. Nandan and mother of minor son
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Sh. Balbir Singh, the minor son Sh. Balbir Singh being the owner of the suit property. The case of the respondent/plaintiff further is that the appellant/defendant is the younger son of respondent's/plaintiff's sister Smt. Indira Rani. Smt. Indira Rani was living in Meerut and wanted to shift to Delhi on account of illness of her husband, i.e the father of the appellant/defendant, and the respondent/plaintiff thus allowed his sister's family to stay in the suit property. The brother-in-law of the respondent/plaintiff died in the year 1993 and respondent/plaintiff thereafter asked his sister to vacate the premises as her elder son was earning. After repeated requests the sister along with her elder son Sh. Krishan Lal Sethi vacated the suit property, but the appellant/defendant being the younger son refused to vacate the suit property. Respondent/plaintiff hence filed this suit for declaration and possession against the younger son, namely, Sh. Rajesh Sethi the appellant/defendant.

3. Appellant/defendant contested the suit and pleaded that respondent/plaintiff was not the owner of the suit property but the owner of the suit property was the father of the appellant/defendant i.e, the brother-in-law of the respondent/plaintiff. It is argued that on account of family reasons the documentation pertaining to house tax and water bills were got executed of the suit property in the name of the respondent/plaintiff. Suit was thus prayed to be dismissed.

4. Five issues were framed by the trial court and which read as under:-

“(1) Whether the suit has not been properly valued for the purpose of court fees and jurisdiction and the suit is barred by pecuniary jurisdiction? OPD

(2) Whether the plaintiff is entitled for the relief of declaration, as prayed? OPP

(3) Whether the plaintiff is entitled for relief of possession, as prayed? OPP

(4) Whether the plaintiff is entitled for relief of permanent injunction, as prayed? OPP

(5) Relief.”

5. Trial court decided the issues on merits in favour of the appellant/defendant and against the respondent/plaintiff and held that the respondent/plaintiff was not the owner of the suit property and hence not entitled to the reliefs of declaration and possession. The appellate court while discussing issue nos. 2 and 3 in paragraphs 9 to 12 of the impugned judgment however has held that though the respondent/plaintiff has failed to prove the ownership of the suit property, respondent/plaintiff has a better title to possession of the suit property than the appellant/defendant and therefore the respondent/plaintiff was entitled to the decree for possession. These paragraphs 9 to 12 of the judgment of the first appellate court in favour of the respondent/plaintiff read as under:-

“9. **Issue no. 2 & 3** :- The plaintiff has sought declaration with respect to his ownership regarding the property in question which he claimed to have purchased in the year 1962 from one Sh. Balbir Singh S/o Smt. Nandu and in

support of said contention relied upon Ex.PW1/1 as document of his title to the suit property.

10. Based upon the claim of ownership by the plaintiff, he sought possession of the suit premises from the defendant. It was claimed by the plaintiff that he had permitted his sister alongwith his family to reside in the property in question and defendant is the son of his sister. Father of defendant i.e. his brother in law expired in the year 1993 and thereafter in year 2000, plaintiff requested his sister i.e. mother of defendant to vacate the house because he himself was in need of said house upon which mother and elder brother of defendant vacated the house of plaintiff but defendant failed to vacate the same despite repeated requests made by plaintiff in this respect. Per contra, it was the plea of defendant that the property in question actually belonged to his own father. His mother, as stated by him, was second wife of his father and apprehending that the children of the father of defendant from his first wife may not claim any share in the property in question, some documentary evidence was sought to be created for the satisfaction of mother of defendant and accordingly, father of defendant agreed for creating documentary evidence in favour of plaintiff whereby the plaintiff was permitted/authorised to get water connection/meter in his name in the suit property and with the same purpose, plaintiff managed to create some other false documentary evidence in respect of the suit property, though he never paid even a single penny towards any charges/bills/taxes etc. and all the documents were created with the sole motive of preventing the defendant's mother's step sons from entering into the suit property. It is submitted that on the basis of said documents, now the plaintiff has been trying to establish himself as the owner of the suit property in connivance with his sister and elder brother of defendant. It was also submitted on behalf of defendant that his mother and elder brother have not vacated the suit premises till now and it is only a conspiracy hatched by all of them to get the house vacated from the possession of defendant. However, defendant himself who was examined as DW1 before Ld. trial court admitted in cross examination that his mother and brother had vacated the suit property about three and half years ago at the request of plaintiff. He stated that at the time of death of his father, he was below 15 years of age and was studying whereas his elder brother was earning. He admitted that his elder brother was bearing the family expenses after the death of his father. His mother and brother as admitted by him in cross examination never told him that the suit property belonged to them though volunteered to state that his father had told him so. His wife and his cousin brother who were examined as DW2 and DW3 before Ld. trial court stated about having been informed regarding property in question under the ownership of father of defendant at the time of settlement of marriage between the defendant and his wife.

11. Per contra, the defendant's own mother and elder brother who were examined as PW2 and PW3 supported the case of plaintiff by submitting that the plaintiff was the owner of the property in question and they were merely permitted by the plaintiff to reside in the said premises, PW2 being the sister of

plaintiff. So much so, as stated by PW2 her brother used to pay money for their kitchen expenses and day to day needs every month as her husband was not earning well. She denied that any documentary evidence was created in favour of the plaintiff in order to deprive the step sons of the father of defendant from their right in the property in question.

12. The defendant has failed to place any document on record in support of his contention of ownership in favour of his father regarding the property in question, who turned out to be merely a licensee in absence of any documentary evidence brought on record coupled with the communication of said fact to his mother and brother in favour of plaintiff and DW1 rather at the same time admitted at least the creation of some documentary evidence regarding the ownership of the property in question in favour of plaintiff, for whatsoever reasons. Plaintiff himself as noted already had relied upon GPA in his favour and lease deed in favour of his predecessor in interest. Ex.PW1/1 as noted by Ld. trial court is a document in Persian Script and true translation thereof has also been filed. As further noted by Ld. trial court, the said document records the fact that the suit property had been let out by Nathu widow of Jor Dass to one Nandu wife of Nandan resident of village Shadipur, Delhi for 20 years vide lease deed no. 10128 registered on 21.2.1962 and the plaintiff had been granted an irrevocable General Power of Attorney by Nandu on 20.09.1962. As further noted by Ld. trial court, vide said document lease of Nandu was determined on 20.2.1982, therefore the rights of the plaintiff over the said property also ceased to exist as the suit property would revert back to the lessee or her heirs/successors and the plaintiff as observed had no proprietary/possessory title over the suit property after 20.2.1982. Though it is correct that on the basis of these documents, he does not acquire any ownership right with respect to the property in question but the defendant himself has failed to prove on record the ownership in favour of his father whereby he could continue in occupation of the property in question as a matter of right being one of the LRs of his father, in which circumstances his right in the property accrued only as a license holder in favour of his mother and the defendant continued to occupy the property in question being the family member of his mother under the license granted by the plaintiff only. The contention of Ld. counsel for appellant is appreciable that the reliance and relief sought on the basis of GPA and lease deed having commercial element cannot be allowed to be frustrated by a licensee, or by a person claiming through such licensee, who was inducted by the attorney holder i.e. the plaintiff in the property. Apparently, the dispute between the parties is not a dispute between the original lessor and lessee but is a dispute between a person in whose favour merely the right of permissive user has been created, whereby such permissive user cannot be allowed to challenge the title of the licensor. The reversion of the property to the licensor or her legal heirs/successors is a matter between the original lessor and the lessee and cannot be extended qua the defendant whose possession in the property has been proved to be on record merely of permissive user. Till the time the plaintiff is allowed to have the legal right over the property in question, be it pursuant to the execution of irrevocable GPA or the lease deed and till the possession of

the property in question is not handed over by him to the original owner/lessor, his right to have the possession of the property in question continues against the entire world inclusive of the user permitted by him except for the original owner/lessor. Hence the plaintiff though cannot be declared as owner of the suit property as claimed and is rightly noted by Ld. Trial court but as far as his other right to claim the possession from the defendant is concerned who was merely of a permissive user in the suit property by the plaintiff himself, that right to the plaintiff being holder of better title qua defendant cannot be denied to him. Accordingly issue no. 2 is decided against the plaintiff but issue no. 3 stands decided in favour of plaintiff and against the defendant.” (emphasis is mine)

6. Learned counsel for the appellant very strenuously urged that once the respondent/plaintiff has failed to prove the ownership of the suit property, the suit for possession could not have been decreed. It is also argued that it was the appellant/defendant who through his father is entitled to possession of the suit property because in fact the suit property was owned by and was with the father of the appellant even before 1962 and the appellant/defendant was born in the suit property in 1962. It is argued that in the cross-examination of respondent/plaintiff as PW-1 and the mother of appellant/defendant as PW-2 there are several inconsistencies with respect to the construction made on the suit property, as also the property being a lake (*talab*) when purchased. It is also argued that there are discrepancies between the amount of consideration stated as Rs.800/- in the cross-examination of the respondent/plaintiff as PW-1 and documents which show that the sale consideration is Rs.150/-. The judgment passed by the first appellate court is thus prayed to be set aside.

7. At the outset of the discussion it bears note that both the sister of respondent/plaintiff (i.e, mother of the appellant/defendant) as also the elder

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brother of the appellant/defendant Sh. Krishan Lal Sethi, have appeared in the witness box and deposed in favour of the respondent/plaintiff as PW-2 and PW-3.

8. Before discussing the sustainability of the judgment of the first appellate court I would at this stage want to refer to the recent observations of the Supreme Court in the judgment reported as *Lisamma Antony and Another Vs. Karthiyayani and Another (2015) 11 SCC 782* wherein the Supreme Court has held that once the record of the trial court is complete, the appellate courts should not remand matters but should decide the cases themselves on the basis of record. Remand is only if the suit is decided on a preliminary issue or if additional evidence has to be led before the trial court. In other cases the Supreme Court has mandated with reference to the provisions of Order XLI Rules 23, 23A and 24 CPC that the appellate courts themselves must decide the cases instead of remanding the matter. The relevant observations of the Supreme Court are contained in paragraphs 14 to 17 of this judgment and which read as under:-

“14. Rule 23 of Order 41 of Code of Civil Procedure, 1908, (for short "the Code") provides that where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject all just exceptions, be evidence during the trial after remand.

15. Rule 23A of Order 41 of the Code provides that where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the appellate court shall have the same powers as it has under Rule 23.

16. Rule 24 of Order 41 of the Code further provides that where evidence on record is sufficient, appellate court may determine case finally, instead of remanding the same to the lower court.

17. Needless to say, in the present case, the suit was not disposed of on any preliminary issue by the trial court. The second appellate court should have restrained itself from remanding a case to the trial court. Remanding a case for re-appreciation of evidence and fresh decision in the matter like the present one is nothing but harassment of the litigant. The unnecessary delay in final disposal of a lis, shakes the faith of litigants in the court.”

9. I am referring to the aforesaid case of the Supreme Court while agreeing with the conclusions of the first appellate court as I would also be giving additional reasons to support the conclusions reached by the first appellate court.

10. The issue in the present case is that on the one side i.e the side of the appellant/defendant there is only oral evidence, on the other hand, the respondent/plaintiff has supported his case by documentary evidence. The documentary evidence with respect to the Power of Attorneys in favour of the respondent/plaintiff are the Power of Attorneys Ex. PW1/1 (colly) and these Power of Attorneys are dated 27.8.1962 and 20.9.1962. These Power of Attorneys, and so noted by the first appellate court, show that the executant of the Power of Attorney had a registered lease deed of 20 years of the land from the original owner of the suit property and consequently the Power of Attorneys were executed by the registered lessee of the suit property in favour of the respondent/plaintiff. The appellate court has also rightly noted that it is not as if the original lesser is disputing the title or entitlement of the respondent/plaintiff. The ownership documents with respect to the property in the name of the respondent/plaintiff are

supported by means of property tax records in the name of the respondent/plaintiff for the years 1981-82 and 1983-84; being the property tax challans and the receipts. There are also water bills with respect to water connection in the suit property of the year 1986 in the name of the respondent/plaintiff. Aforesaid aspects are to be taken with the fact that admittedly the suit property of 100 sq. yards falls in an unauthorised colony. Unauthorised colonies are in some way a bane in the city of Delhi because complications and confusions are caused on account of differences between the municipal numbers and the original khasra numbers in the erstwhile agricultural land which are carved out into residential plots. Counsel for the appellant/defendant sought to take advantage of the fact that in the Power of Attorney Ex.PW1/1 the municipal number of the suit property being AT-48 is not written, but what is written is khasra no. 754/21, but, in my opinion, no capital can be made in this regard by the appellant/defendant merely because the property is now described with municipal number instead of the original agricultural khasra number. Any doubt in this regard is removed from the property tax records wherein name of the respondent/plaintiff is shown as the owner of the property AT-48, i.e, the suit property.

11. I, therefore, hold that in fact it is the respondent/plaintiff who is the owner of the suit property and the first appellate court ought to have in fact held that the respondent/plaintiff does not have possessionary title only but in fact has ownership title to the suit property. This is so because a civil suit is decided on

preponderance of probability and whereas the appellant/defendant relies only on oral depositions to claim rights in the valuable immovable property, the respondent/plaintiff has led sufficient documentary evidence to build the preponderance of probability in his favour of being the owner of the suit property. In any case surely the respondent/plaintiff has a better title for claiming possession of the suit property and therefore even assuming the relief of declaration of ownership has to be denied to the respondent/plaintiff, surely however the suit for possession on the basis of better title to the suit property has to be decreed.

12. I cannot agree with the contention urged on behalf of the appellant/defendant that mere oral testimonies given by him in his own favour, and by his witnesses, can create rights in valuable immovable property in favour of the appellant/defendant and divest valuable ownership/better title rights of the respondent/plaintiff as regards the suit property.

13. Contention of learned counsel for the appellant/defendant that there is discrepancy between the amount of consideration admitted in the cross-examination by the respondent/plaintiff as Rs.800/- and that in the Power of Attorney as Rs.150/-, is neither here nor there, because, the Power of Attorney only mentions the original lumpsum amount at Rs.150/- and thereafter yearly lease amount of Rs.30/- was also paid, and consequently, the consideration which the respondent/plaintiff refers to in his deposition would be a total consideration paid

and not the original lumpsum consideration stated in the Power of Attorneys as paid initially.

14. Also, I do not think too much of importance can be given in a case like this to some inconsistency as to whether or not two rooms were constructed by the mother of the appellant/defendant i.e the sister of the respondent/plaintiff as admitted by her as PW-2 in her cross-examination, inasmuch as, to the extent that certain portions of the property were constructed by the respondent/plaintiff stands established on record on account of property tax records being in the name of the respondent/plaintiff i.e the property tax record is with respect to the constructed property in the name of the respondent/plaintiff. Even assuming therefore the respondent/plaintiff allowed his sister on account of marriage of her sons to construct additional rooms, the same will not mean that the respondent/plaintiff would be deprived of his valuable rights of ownership of the suit property and ownership of the suit property will therefore not vest with the appellant/defendant or his father as claimed.

15. The argument of the appellant/defendant that in the cross-examination the respondent/plaintiff has admitted that the suit property was a lake (*talab*), and it shows that no construction could have been made by the respondent/defendant, is a farcical argument, inasmuch as, actually reference to the word '*talab*' by the respondent/plaintiff is to a low lying land of dried water body and obviously for this reason it is referred to by the respondent/plaintiff in his cross-examination as

talab. This argument of the appellant/defendant has no substance because after all surely it cannot be anybody's case that 100 sq. yards of water was purchased in this case, with the fact that there exists construction on the suit property on land and not on water.

16. In view of the above, I do not find any substantial question of law arising for this appeal to be entertained under Section 100 CPC.

17. The appeal is accordingly dismissed.

JULY 13, 2016

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VALMIKI J. MEHTA, J