

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

+ **RSA No. 73/2017**

% **25th May, 2017**

**BADRI PRASAD (DECEASED) THROUGH LEGAL HEIR
KRISHAN KUMAR** Appellant

Through: Mr. Alok Kumar and Mr. Neeraj
Kr. Gupta, Advocates.

versus

VEER CHAND & ORS. Respondents

**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 under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff (since deceased and now represented by his legal heir), impugning the concurrent judgments of the courts below; of the Trial Court dated 22.5.2010 and the First Appellate Court dated 2.11.2016; dismissing the suit for possession and mandatory injunction filed by the appellant/plaintiff with respect to the suit property being plot no.A-95, Mandoli Road, Nathu Colony, Delhi.

2. The facts of the case are that the appellant/plaintiff claimed that he was the owner of the suit property since December

1964 in terms of the registered sale deed dated 21.12.1964. It was further pleaded in the plaint that the appellant/plaintiff was residing at Khari Baoli, Delhi at the time of purchase of the suit property and the appellant/plaintiff thereafter had shifted to Lucknow. When the appellant/plaintiff came to Delhi in December 1977 the plot was lying vacant but in March 1978 it was found that the half portion of the plot was occupied by one Mr. M.I.K. Bhasani and against whom the suit for possession was filed. During the pendency of the suit of the appellant/plaintiff against Mr. M.I.K. Bhasani it came to the appellant's/plaintiff's notice that the respondent no.1/defendant no.1 has filed the suit for injunction against Mr. M.I.K. Bhasani restraining Mr. M.I.K. Bhasani from dispossessing the respondent no.1/defendant no.1 from a portion of the plot admeasuring 50 sq. yds. Appellant/plaintiff moved an application under Order I Rule 10 CPC in the suit filed by the respondent no.1/defendant no.1 but the same was dismissed. The subject suit hence came to be filed for possession and injunction against the respondent no.1/defendant no.1.

3. Respondents/defendants contested the suit and pleaded that the suit property was not owned by the appellant/plaintiff and which suit property was in occupation and possession of the respondents/defendants. All the contents of the suit plaint were denied.

4. Originally, the suit was dismissed by the trial court vide its judgment dated 17.4.1998. In an appeal against the said judgment the first appellate court set aside the judgment and decree vide its order dated 1.4.2003 by framing the additional issue as to whether the suit property forms part of khasra no. 988/791/683, as was the case of the appellant/plaintiff or the property falls in khasra no. 702 of Village Saboli, Illaka, Shahdara, Delhi. The remand order of the first appellate court was taken in an appeal to this Court but that appeal was dismissed and hence the suit had to be decided afresh after evidence to be led on the additional issue framed by the first appellate court vide its order dated 1.4.2003.

5. Evidence was thereafter led by the parties and these aspects are noted in paras 18 to 21 of the judgment of the first appellate court and which paras read as under:-

“18. To prove this issue, Shri Rajiv Sharma has been examined as CW1, who was working as Kanoongo at that time. His report is Ex.CW1/1. This witness has not been cross examined by the plaintiffs or the defendants, as he was examined as Court witness.

19. PW2 Shri Engine Kujur is also kanoongo. Demarcation, as well as, Aksizra were prepared by him, which is Ex.PW2/2. According to this witness, the suit property is part of khasra no. 988/791/683 of village Saboli, Delhi. This witness has been cross examined at length on behalf of the defendants. In the cross examination this witness has admitted that the suit property constitute part of khasra no. 683, which has been mentioned in the Aksh Sajra.

20. PW3 is Kishan Arora, SDM, Seemapuri. He has produced the Khasra no. 988/791/663/1/2, which is recorded in the name of Bharta and Nathu. Photocopy of the record is Ex.PW3/1 and Ex.PW3/2.

21. DW1 Shri Vir Chand was examined and cross examined.”

6. Trial court in terms of the evidence led held by its impugned judgment dated 22.5.2010 that as per the demarcation report proved as Ex.CW1/1 the suit property was found not to be falling either in khasra no. 988/791/683 or in khasra no. 702, and that the suit property was found actually to be forming part of essentially/mainly khasra no. 698 with a little portion falling in khasra no. 699, and accordingly, the trial court dismissed the suit because the suit property was not situated in khasra as was the case of the appellant/plaintiff in the plaint being khasra no. 988/791/683. The first appellate court has upheld the findings and conclusions of the trial court as per its judgment dated 2.11.2016 and the relevant paras of the judgment of the first appellate court are paras 25 and 26 and which paras read as under:-

“25. After framing of the additional issue by the Hon’ble High Court of Delhi, demarcation of the suit property was conducted and report has been filed Ex.CW1/1 and Ex.CW1/2. First report is about the demarcation, in which manner it was conducted. According to the observations of the Id. Trial court, this demarcation has not been objected in any manner. Ex.CW1/1 is the site plan. According to which, major part of the property is falling in khasra no. 698, whereas, some part of the property is falling in khasra no. 699. According to the documents placed on record the Id. Trial court record i.e photocopy of sale deed of 1964 in the name of one Balbir Singh executed in favour of Badri Prasad, is in respect of khasra no. 988/791/683, in the area of village Saboli, Illaka Shahdara, Delhi. Whereas, according to Ex.CW1/2, major part of the suit property is falling in khasra no. 698 and one portion is falling in under khasra no. 699. So, the sale deed is not related to the suit property, in any manner.

26. In the suit, the plaintiff is claiming the ownership of the portion of the suit property, which the plaintiff is seeking possession from the defendant, is falling under khasra no. 683, which is not proved and is contrary to the demarcation report Ex.CW1/1 and Ex.CW1/2. The demarcation has been conducted by CW1 in his official capacity and

manner of the demarcation in which it has been conducted is not challenged by either of the party. CW1 was working as Kanoongo at that time. He has identified the signatures of the persons, who has signed the same at pt.X and Y. He has stated that demarcation was carried out by him in presence of both the parties and this witness has not been cross examined by either of the party i.e. appellants or respondents, before the Id. Trial court. So, the demarcation report Ex.CW1/1 and CW1/2 remained unrebutted and unchallenged. Hence, there is no illegality in the findings of the Id. Trial court, on this issue framed by the appellate court on 01.04.2003. In view of findings on this issue, other issues have been decided accordingly by the Id. Trial court i.e. issues no. 1 to the extent that plaintiff is not the owner of the suit property. No finding has been given by the Id. Trial court on issue no. 2, as to whether the defendant is a tress passer in the suit property. In view of the finding that plaintiff is not the owner of the suit property, the issue regarding the possession, recovery of damages and mandatory injunction have also been decided against the plaintiff.”

7. It is clear from the reference of the judgment of the trial court, as also paras 25 and 26 of the judgment of the first appellate court, that the demarcation report which was proved along with the site plan Ex. CW1/1 & Ex.CW1/2, showed that the major part of the suit property in possession of the respondents/defendants was situated in khasra no. 698 with a little part in khasra no. 699, whereas the case of the appellant/plaintiff was that the suit property purchased by the sale deed of the year 1964 was in different khasra no. 988/791/683. No khasra numbers in possession of the respondents/defendants as per the demarcation report and the site plan Ex.CW1/1 and Ex.CW1/2 was that of the sale deed relied upon by the appellant/plaintiff. The first appellate court also notes that there was no cross-examination of the revenue official who proved the demarcation report and the site plan. Accordingly, the courts below have given a finding on the basis of

evidence on record that the suit property does not fall in khasra no. 988/791/683 in the area of village Saboli, Illaka Shahdara, Delhi and of which ownership was claimed by the appellant/plaintiff.

8. A second appeal under Section 100 CPC lies if there arises a substantial question of law. Arriving at conclusions on the basis of evidence on record is in the realm of the jurisdiction of the trial court and the first appellate court and which jurisdiction in the present case has been rightly exercised by the courts below because admittedly the demarcation report and the site plan, Ex.CW1/1 and Ex.CW1/2, showed that the suit property did not fall in khasra number which was purchased by the appellant/plaintiff in terms of the sale deed of the year 1964.

9. There is therefore no reason whatsoever to interfere with the impugned judgments of the courts below.

10. No substantial question of law arises. Dismissed.

MAY 25, 2017
ib/AK

VALMIKI J. MEHTA, J