

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

+ **RSA No. 170/2008 & C.M.No. No. 14512/2017**

% **27th April, 2017**

CHHOTAY LAL & ORS. Appellants

Through: Mr. Jagat Rana, Advocate.

versus

MANOHAR LAL & ORS. Respondents

Through: Mr. V.P.Rana, Advocate for R-
2,3 and 4.

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 appellants/defendants impugning the concurrent judgments of the courts below; of the Trial Court dated 31.8.2005 and the First Appellate Court dated 11.4.2008; by which the suit for injunction filed by the respondents/plaintiffs was decreed and appellants/defendants were restrained from interfering within peaceful possession of the suit land admeasuring 311 sq. yds. forming part of Khasra No. 304/2014, extended abadi of Village Bawana, Delhi.

2. The facts of the case are that the respondents/plaintiffs filed the subject suit for permanent injunction claiming ownership rights in the suit land. It was pleaded that the suit land was originally owned jointly by the ancestors of the parties. It was pleaded that since the predecessor-in-interest of the respondents/plaintiffs was the half owner of the total suit land admeasuring 750 sq. yds. situated in Khasra No. 304/2014, hence the predecessor-in-interest of the respondents/plaintiffs was given possession of 375 sq. yds. of the land. Out of this 375 sq. yds. some of the land was encroached upon by some of the appellants/defendants, and therefore, respondents/plaintiffs remained only in possession of 311 sq. yds. of land, and with respect to which the subject suit was filed.

3. The appellants/defendants as per their written statement contended that the respondents/plaintiffs were not the owners of the suit land because an oral family settlement had taken place in around the year 1953-54 whereby the predecessor-in-interest of the respondents/plaintiffs gave up rights in the suit land because he got other land. Appellants/defendants claimed to be in possession of the suit land. Suit was therefore prayed to be dismissed.

4. After pleadings were completed trial court on 10.10.2002 framed the following issues:-

- “1. Whether the plaintiffs is in possession of the suit property as shown red in the site plan attached with the plaint? OPP
2. Whether the plaintiffs is entitled to the discretionary relief as prayed? OPP
3. Relief.”

5. Whereas the respondents/plaintiffs examined four witnesses, appellants/defendants examined five witnesses. It is however important to note that the evidence led by the appellants/defendants was only oral evidence without the contentions in the written statement, especially of the family settlement being proved by documentary evidence, on the other hand respondents/plaintiffs filed documentary evidence to show ownership of suit land which was owned by the respondents/plaintiffs and which was done by calling the Patwari/revenue official of Village Bawana who proved the *Khatauni* of the suit land as Ex.PW2/1. This *Khatauni* shows the ownership of the persons of the land and this *Khatauni* showed that respondents/plaintiffs were the co-owners of the suit land to the extent of half. The Patwari, PW-2 had stated that he had brought the *khasra girdawari* pertaining to the year 2002-2003, however, it is noted that there is no *khasra girdawari* on record proved as a document.

6. At the time of admission of this regular second appeal the following substantial question of law was framed:-

“Whether the finding returned by the trial court and upheld by the appellate court with regard to holding of respondent Nos.1 and 2 being in possession of a parcel of land measuring 311 square yards Khasra No.304/14 of Village Bawana is suffering from any perversity? If so, to what effect?”

7. The fact of the matter is that whereas the respondents/plaintiffs did lead evidence of their co-ownership of the suit land, appellants/defendants failed to prove that their predecessor-in-interest and thereafter the appellants/defendants became the sole and exclusive owners of the land comprising Khasra No. 304/2014. Accordingly, the trial court as per its judgment held that once the parties are co-owners, the respondents/plaintiffs on account of co-ownership itself were entitled to use and possession of the suit land because every co-owner is entitled to possession of the common owned property. The relevant observations of the trial court for decreeing the suit read as under:-

“As such in view of aforesaid testimony of PW’s and DW’s, it is apparent that the defendants has not been able to prove by any documentary or oral evidence that oral partition between their fathers and fathers of the plaintiffs took place. Furthermore, had there been any oral exchange between the parties then same would have been incorporated in the revenue records during the period of more than last 50 years. Moreover, as per averments in the plaint, the consolidation proceedings took place in the year 1953-54 which fact has not been denied by the defendant no.1 and 2 in their written statement as well as by defendant no.3 to 6. Had the oral exchange took place in the year 1953-54 that would have been incorporated in the consolidation proceedings which admittedly held in 1953-54. Therefore, also the contention of the defendants that oral partition took place and land in dispute was given in exchange to the father of the plaintiffs is not believable. It is also evident that defendants have also made no effort to challenge the revenue records during the last 50 years after the oral exchange had taken place. The defendant would have made effort to get the revenue records corrected. The defendants have not even challenged the revenue records in

present suit by making counter claim. It has been admitted by the DW's that no application has been filed to get the revenue entries or records corrected which shows the plaintiffs as owner of ½ share out of kh.no.304/14.

Even the defendants has not specified that which land has been given to the fathers of the plaintiffs in exchange when the oral partition took place. The defendants has not specified the land which has been given in lieu of exchange to the father of the plaintiffs. However, in cross examination of DW2 he has stated that property which was given to the father of the plaintiffs in exchange bears no.710 and is situated between the property of Zile Singh and Chajju. This witness categorically admitted that he has not stated the number and location of the property in the written statement. While DW 3 categorically stated in the cross examination that property given to the plaintiffs father in exchange bears no number. As such the testimony of DW's are even contradictory in respect of property which was given to the father of the plaintiffs in exchange when the oral partition took place irrespective to the fact that no such document has been placed on record regarding the fact that property which was given to the father of the plaintiffs in exchange bears no.710 as stated by DW2.

The plaintiffs has categorically stated in the plaint as well as in the evidence that suit property is the vacant plot. In the written statement the defendants has also admitted that suit property is vacant plot. In the cross examination DW2 stated that suit property is partly built up. This witness again stated that entire suit property is built up. DW3 states in the cross examination that suit property is vacant on the spot except Kurelly means cow dung. While dW4 in the cross examination states that it is correct that suit property shown as red in the site plan is vacant on the spot. He further stated that it is correct that entire land except suit property in Kh.No.304/14 is built up. As such the testimony of DW's are contradictory to each other regarding the construction over the suit property. On the other hand, the testimony of PW's has remained un-controverted so far this aspect of matter is concerned.

The defendants though has disputed the possession of the plaintiffs over the suit property but the stand of the defendant in this respect is also shaky as in the written statement the common defence of the defendants is that suit property is in possession of the defendants. However, in the examination in chief of the DW1, DW1 says that suit property is physically occupied by defendant no.3 to 6. Similarly, DW2 stated in the examination in chief that suit property is physically occupied by defendant no.3 to 6 has not come into the witness box to prove their possession and DW1 and DW2 cannot prove the possession of defendant no.3 to 6. Therefore it cannot be accepted that the suit property is in the physical possession of defendant nok.3 to 6 when defendant no.3 to 6 has not entered into the witness box to prove the factum of possession over the suit property. The defendants has also not led any positive evidence to prove their possession over the suit property which the plaintiffs pleaded and proved that in the revenue records, the plaintiffs has been shown the owner of ½ share out of Kh No. 304/14 by examining PW2, Patwari who has brought the Khatauni of suit land and also admitted by the defendants, then it was for the defendants to prove contrary, but no contrary evidence has been placed on record by the defendants to prove their possession over the suit property. The defendants could have summoned the

Khasra Girdawari to prove their possession if the Khasra girdwari was maintained in respect of suit land, though the plaintiffs has categorically stated that no Khasra Girdawari is prepared in respect of residential plots. Had there been any khasra girdawari which shows the physical possession of the parties over the land. The same could have been summoned and proved by the defendants but the defendants has not led any evidence to prove their possession over the suit property.

The Defendants has not placed any document to show that they ever lodged any protest to the revenue authorities that they are in the possession of the suit property and all the entries made in the name of the plaintiffs are wrong and incorrect. The Ld. Counsel for defendant has argued that plaintiffs has not proved the site plan and site plan filed by the plaintiffs is wrong and site plan filed by the defendants is correct. Although, the site plan filed by the plaintiffs has not been exhibited and is only marked but DW1 in the cross examination has admitted the site plan filed by the plaintiffs. He has categorically stated that I can understand the site plan mark C portion shown as mark X is the suit property in the site plan mark C. He further stated that it is correct that main entry in the suit property is from Bawana to Kanjhawala Road. He further admits that when we enter in the suit property from main road there is a house of Ishwar, Sukhbir and Devi Singh, defendant no.7 to 9 towards right hand. In the same Gali adjoining to the plot of defendant no.7 to 8 there is a plot of Rajo and there is a lot of Talley and then there is a gali and across it the suit property is situated. When the defendants admits the contents of the site plan filed by the plaintiffs it cannot be said that site plan filed by the plaintiffs is incorrect especially when the defendant has not been able to prove that the site plan filed by them is correct. Though, the defendants has stated that site plan filed by the plaintiffs is incorrect and site plan filed by them is correct. In examination in chief DW1 stated that site plan filed by the plaintiffs is incorrect and correct site plan is filed by defendant no.3 to 6 which is Ex.DW1/1. Similarly, DW3 stated in the examination in chief that site plan filed by the plaintiffs is incorrect and site plan filed by the defendant no.3 to 6 as Ex.DW1/1 is correct. But I am unable to accept the arguments of the counsel for defendant that defendant has proved the site plan and site plan filed by the plaintiffs has not been proved. Ld. Counsel for plaintiffs has rightly pointed out that DW1 and DW2 cannot prove the site plan as defendant no.3 to 6 has not entered into the witness box to prove the site plan filed by them. DW1 and DW2 cannot prove the site plan on behalf of defendant no.3 to 6.

In view of the above discussion I have no hesitation to hold that plaintiffs has been able to prove their possession over the suit property.”

(underlining added)

8. There is absolutely no illegality and perversity in the aforesaid discussion and conclusions drawn by the trial court because onus of proof was upon the appellants/defendants to show that they had

become the exclusive owners of the suit land by virtue of the family settlement but no documentary evidence whatsoever was filed by the appellants/defendants to show that there was a family settlement or how the family settlement was acted upon by the appellants/defendants, and their predecessor-in-interest being shown the exclusive owners of the suit land, and on the contrary respondents/plaintiffs filed the *Khatauni* as Ex.PW2/1 which showed them to be the co-owners of the suit land. This position in the revenue records is reflected for as long as 50 years. Also, it is noted that the suit land is admitted to be a vacant plot of land, and therefore in law possession follows title and hence possession of suit property has to be taken as that of the respondents/plaintiffs. Accordingly, the respondents/plaintiffs were rightly held by the courts below to be the owners and in possession of the suit land.

9. Learned counsel for the appellants/defendants sought to argue that onus of proof showing that respondents/plaintiffs were the owners and in possession has not been discharged by the respondents/plaintiffs, however, I cannot agree with this argument in view of the fact that the respondents/plaintiffs have proved their ownership in terms of the *Khatauni* Ex.PW2/1 and since the property is

a vacant plot of land possession follows title, and therefore, respondents/plaintiffs are in possession of the suit land.

10. Learned counsel for the appellants/defendants then argued that the respondents/plaintiffs are guilty of concealment of fact with respect to an earlier suit filed in 1950's, and which showed partition, however, admittedly there is no such document which is filed and proved in the trial court with respect to any partitioning having been taken place and consequently of the appellants/defendants and their predecessor-in-interest becoming the sole and exclusive owners of the land situated in Khasra No. 304/2014, and therefore, this argument of the appellants/defendants is rejected.

11. In view of the above, the substantial question of law is answered in favour of the respondents/plaintiffs. This Regular Second Appeal is accordingly dismissed, leaving the parties to bear their own costs.

APRIL 27, 2017/ib

VALMIKI J. MEHTA, J