

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

+ **RSA No.350/2016**

% **19th July, 2017**

SHRI BHUSHAN LAL SAWHNEY Appellant

Through: Mr.Anurag Lakhotia, Advocate.

versus

SHRI RAM RICH PAL SHARMA (DECEASED) THROUGH
LEGAL REPRESENTATIVES (LRs) Respondents

Through: Mr. Ashok Gurnani, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.43481/2016 (for condonation of delay)

1. For the reasons stated in the application, delay of 57 days
in filing the appeal is condoned.

C.M. stands disposed of.

RSA No.350/2016

2. (i) This Regular Second Appeal under Section 100 of Code
of Civil Procedure, 1908 (CPC) is filed against the judgment of the
first appellate court dated 9.12.2015 by which the first appellate court
has set aside the judgment of the trial court dated 26.8.2015. Trial

court by its judgment dated 26.8.2015 had allowed the application of the appellant/defendant under Section 144 of CPC and directed the respondents/plaintiffs to restore possession of the suit property to the appellant/defendant. It may be noted that possession of the suit property was taken from the appellant/defendant in execution of the judgment and decree dated 2.5.2012 passed in the suit between the parties. The judgment dated 2.5.2012 was set aside by the first appellate court vide its judgment dated 17.1.2015. Since the judgment of the trial court dated 2.5.2012 decreeing the suit for possession was set aside in appeal in terms of the judgment dated 17.1.2015, hence the appellant/defendant applied for restitution and therefore was successful before the trial court in terms of the judgment dated 26.8.2015.

(ii) The first appellate court by its judgment dated 9.12.2015, and which is impugned in the present RSA, set aside the judgment of the trial court dated 26.8.2015 and the first appellate court directed only maintenance of *status quo* by the respondents/plaintiffs and with the possession of the suit property continuing with the respondents/plaintiffs. The suit property is an area of 410 sq. yds. forming part of Khasra no.2981/104, village Chandrawali now known

as property no. 641-D, Delhi Shahdara, near Loni Road, Ram Nagar, Shahdara, Delhi.

3. The following substantial question of law arises for disposal of this appeal:-

“Whether the first appellate court has committed a complete illegality and perversity in ignoring and in fact breaching Section 144 CPC inasmuch as the admitted position is that the respondents/plaintiffs had taken possession of the suit property in terms of the judgment of the trial court passed in suit dated 2.5.2012 and which judgment and decree has been set aside in execution of the judgment of the first appellate court dated 17.1.2015?”

4. The operative part of the judgment dated 2.5.2012 passed in the suit, decreeing the suit, reads as under:-

“40. Thus, in view of my finding on the aforesaid issues, the suit is decreed in favour of the plaintiff and against the defendant no.1. A decree of possession is passed in favour of the plaintiff and against the defendant no.1 in respect of the suit property measuring 410 sq. yds. forming part of Khasra no.2891/104, Village Chandrawali (bearing no.641-D, now known as Delhi Shahdara, Near Loni Road, Ram Nagar, Shahdara), as shown in red colour in the Site Plan Ex.PW-1/2.

A decree of permanent injunction is passed in favour of the plaintiffs and against the defendant no.1, his agents, associates, servants, etc. restraining them from transferring, assigning, parting with possession or creating third party interest in any manner and form in respect of the suit property, as shown in red colour in the Site Plan Ex.PW-1/2.

The plaintiff shall also be entitled to mesne profits/damages @ Rs.500/- p.m., w.e.f. 01.09.1987 till the handing over of the vacant possession of the suit property by defendant no.1 to the plaintiff. The mesne profits shall increase @ 15% every years, as mentioned in para 39 of this judgment. The plaintiff shall also be entitled to simple interest on the arrears of mesne profits @ 12% p.a. from the end of each illegal month of occupation and till payment of arrears alongwith interest to the plaintiff.

The plaintiff shall also be entitled to the cost of the suit. The plaintiff is directed to deposit the deficient Court Fees within two weeks from today. Decree sheet be drawn on payment of deficient Court Fees by the plaintiff. File be consigned to record room after completion of necessary formalities.”

5. The first appellate court hearing the appeal against the judgment dated 2.5.2012 passed in the suit decreeing the suit for possession and *mesne* profits, passed its judgment dated 17.1.2015 setting aside the judgment of the trial court. The first appellate court by its judgment dated 17.1.2015 after setting aside the judgment and decree dated 2.5.2012 remanded the matter to the trial court to decide two issues. The following are the relevant paras of the judgment of the first appellate court:-

“19. The only point that can be considered in the appeal is with regard to the maintainability of the suit and the decree on the ground that the Id. court below having held the property to be agricultural in nature vide its order dated 11.04.1990, by an interim order had treated the same as having lost the agricultural character in the final judgment. If it has lost the character of agriculture nature, the plaintiff ought to have paid the court fee as per the market value on the suit and not as valued in para 16 of the plaint by paying Rs.5 and paise-60 for the main relief, though court fee is paid on the damages/mesne profits. This aspect needs to be looked into afresh by the court below to answer the following two aspects of the matter:-

- a) Whether the suit property as on the date of filing of the suit was agricultural land or not?
- b) If not whether the suit of the plaintiff is under valued and whether proper court fee is paid or not?

These above issues are imperatively to be decided since in case the court holds it to be an agricultural land, the ruling of our Hon’ble High Court in **Usha Gupta Vs. Subhash Chand Tyagi** (supra) would come into play. If this ruling is to be followed then the suit before the Civil Court would not be maintainable. On the other hand, if it has lost the agricultural character, the civil court is empowered to entertain the suit following the ruling in **Neelima Gupta** (supra) but upon the payment of the court fee on the market value of the suit property as on the date of filing of the suit.

20. In view of the above conclusion, this court is of the opinion that the matter requires a reconsideration at the hands of the Id. court below, which

shall decide only the above two issues. Consequently, the appeal is being disposed of by the following order:

ORDER

The appeal stands disposed by setting aside the judgment and decree in Suit No.860/2006 dated 02.05.2012 on the files of Ld. SCJ-cum-RC (N/E), Karkardooma Courts with a direction to render its findings on the above two issues also by receiving evidence on either side intimated the above two issues only and render. Thus, the matter is remitted back to be dealt in accordance with law.

Parties to appear before the ld. court below on 18.02.2015.

Trial court records be sent alongwith a copy of this judgment. File be consigned to Record Room.”
(underlining added)

6. It is seen that when the first appellate court passed its judgment dated 17.1.2015 the judgment and decree dated 2.5.2012 has been set aside. Once the judgment and decree dated 2.5.2012 is set aside, all reliefs granted by the same will be set aside. No doubt, first appellate court by its judgment dated 17.1.2015 only ordered decision of the suit on two issues, first being of whether the suit land was agricultural land and second being of the valuation of the suit, and however indubitably the decision on the first issue with respect to the suit land being agricultural land or not went to the root of the matter and this issue if is decided in favour of the appellant/defendant, then, the suit would have to be dismissed as civil court would have no jurisdiction. Therefore once the judgment and decree of the trial court dated 2.5.2012 has been set aside by the first appellate court as per its judgment dated 17.1.2015, the appellant/defendant was undoubtedly entitled to restitution in terms of Section 144 CPC.

7.(i) Learned counsel for the respondents/plaintiffs placed reliance upon the provisions of Order XLI Rule 23 to 25 CPC and it is argued that once the remand order was only on two issues, the impugned judgment rightly denied restitution to the present appellant/defendant.

(ii) I cannot agree with the arguments urged on behalf of the respondents/plaintiffs because the operative portion of the judgment dated 17.1.2015 of the first appellate court sets aside the judgment and decree dated 2.5.2012 as a whole. Merely because there is also a remand order would not mean that the judgment and decree dated 2.5.2012 has not been set aside. Admittedly, the respondents/plaintiffs had taken possession of the suit premises in execution of the judgment and decree dated 2.5.2012 and therefore once the judgment has been set aside, restitution has to naturally follow even on a simple and plain reading of Section 144 CPC. There is nothing in the provisions of Order XLI Rules 23 to 25 CPC which provides that in case the judgment and decree of the trial court is set aside and remand is only on two issues, yet the judgment and decree will be deemed not to be set aside and that the respondents/plaintiffs can continue to have the

benefit of a judgment and decree which stands set aside by the judgment of the first appellate court.

8. In this view of the matter it is clear that the first appellate court has committed a clear error by violating the provision of Section 144 CPC. Substantial question of law is answered in favour of the appellant/defendant. Impugned judgment of the first appellate court dated 9.12.2015 is set aside and the judgment of the trial court dated 26.8.2015 is restored. Appeal is accordingly allowed. Parties are left to bear their own costs.

JULY 19, 2017
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VALMIKI J. MEHTA, J

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