

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

% *Judgment Reserved on: February 21, 2017*
Judgment Delivered on: February 28, 2017

+ **RSA 199/2014**

SH.PAPPI

..... Appellant

Through: Dr.L.S.Chaudhary, Mr.Ajay
Choudhary, Ms.Reema Bhola &
Mr.Viresh Chaudhary, Advocates.

versus

SH.RAMESH KUMAR

..... Respondent

Through: Mr.S.H.Ansari & Mr.Anshu Shukla,
Advocates.

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT

1. This RSA under Section 100 of the Code of Civil Procedure has been filed by the appellant (defendant in Civil Suit No.411/06/02) impugning the judgment of the First Appellate Court dated 26th May, 2014 vide which the judgment passed by learned Trial Court has been reversed.
2. The learned Trial Court, vide common judgment dated 23rd March, 2011, disposed of two civil suits i.e. Civil Suit No.410/06/02 filed by Sh.Pappi (appellant herein) and Civil Suit no.411/06/02 filed by Sh.Ramesh Kumar (respondent herein) and both the suit were dismissed.
3. Feeling aggrieved, RCA No.7/2014 was preferred only by Sh.Ramesh Kumar. Vide judgment dated 26th May, 2014 RCA No.7/2014 has been

allowed by the First Appellate Court as a result thereof, the Civil Suit No.411/2006 has been decreed.

4. Now, by filing this Regular Second Appeal, the judgment of the First Appellate Court passed in RCA No.7/2014 is being challenged by Sh.Pappi (defendant in Civil Suit No.411/06/02).

5. The parties to this litigation are real brothers and both are claiming ownership rights in respect of the property No.B-245, Sultanpuri, Delhi. Undisputedly both are in possession i.e. the appellant/defendant is in possession of the first floor of the said property and the respondent/plaintiff is in possession of ground floor of the said property. The Civil Suit No.411/06/02 was filed by the respondent/plaintiff Sh.Ramesh Kumar for seeking possession of the first floor from his brother Sh.Pappi claiming himself to be owner of the said property and status of his brother to be that of a licensee.

6. On 13th November, 2014, after hearing learned counsel for the parties, while admitting the appeal, the following substantial question of law was formulated:

Whether the suit for possession can be decreed on the basis of unregistered, undated and photocopies of the documents?

7. Learned counsel for the appellant has contended that learned Trial Court failed to appreciate that the documents on the basis of which respondent/plaintiff was claiming his title as owner and that of the appellant/defendant to be of licensee, are not admissible in evidence. The documents are photocopies of unregistered documents and the original documents in favour of Ramesh Kumar were never produced before the learned Trial court. The original documents Ex.PW1/E (Colly.) are in respect of sale transaction between Sh.Subhash Chand and Sh.Lal Singh. It

has been further submitted that the suit property was purchased by selling another joint family property and both the parties have been residing in the suit property in their independent capacity as co-owner. The status of the appellant/defendant since beginning was that of a co-owner and this fact has been duly proved from the testimony of their other two brothers (PW-2 and PW-3) who have corroborated the version of the appellant/defendant.

8. Learned counsel for the appellant has contended that in these facts learned First Appellate Court could not have passed a decree for possession against the appellant/defendant on the basis of reasoning that the respondent/plaintiff had a better title in comparison to the appellant/defendant. Learned counsel for the appellant has prayed for setting aside of the judgment of the First Appellate Court as there was no evidence to prove either the better title or relationship between the parties to be that of an owner and licensee.

9. Learned counsel for the respondent has submitted that the learned First Appellate Court corrected the illegality committed by learned Trial Court while dismissing the suit filed by the respondent/plaintiff by ignoring the title documents in his favour. It has been contended that the suit No.410/2006 filed by the appellant/defendant against his brother, respondent herein, seeking declaration to the effect that he is a co-owner, was dismissed. He has not challenged the dismissal of his suit. Thus, once there is a finding by the civil Court that appellant is not co-owner of the suit property, the First Appellate Court has rightly decreed the suit on the basis of the title document in favour of the respondent/plaintiff Ramesh Kumar.

10. The facts are not in dispute to the extent that both the parties are residing in the suit property at different floors. Civil Suit No.410/2006 filed by the appellant herein stands dismissed is also not in dispute. Civil Suit

No.411/2006 was filed by the respondent herein Sh.Ramesh Kumar pleading that he purchased the suit property on 29th April, 1998 from Sh.Lal Singh for ₹60,000/-. In May, 1998 he permitted his younger brother, who was newly wedded at that time, to stay on the first floor for a short duration but when his brother failed to vacate the same, he served him with a legal notice and on his failure to vacate despite legal notice, he filed Civil Suit No.411/2006 seeking declaration, permanent injunction as well mandatory injunction.

11. Learned Trial Court dismissed the Civil Suit No.411/2006 observing that :

- (i) As required under the law, there was no valid title document of Property No.B-245, Sultanpuri, Delhi in favour of the respondent/plaintiff.
- (ii) These documents are photocopies only and except the Will, are unregistered.
- (iii) The unregistered documents cannot confer any title or interest in the immovable property.
- (iv) The original of the documents in favour of Ramesh Kumar have not been placed on record and the documents are undated and incomplete.
- (v) The Will is witnessed by only Sh.O.P.Jinghan, Advocate and does not confer any title during lifetime of testator.
- (vi) Testimony of the respondent/plaintiff Ramesh Kumar that the property No.K-752, Mangolpuri, Delhi was sold for ₹72,000 which amount was handed over to his mother, was full of contradictions. His statement about the source of funding the suit property was to be disbelieved in view of the material discrepancies appearing in his cross-examination.
- (vii) PW-2 & 3, the other two brothers of the parties specifically stated that the suit property was purchased jointly by the parties after selling joint family property No.K-752, Mangolpuri, Delhi.

12. In view of the un-rebutted testimony of PW-2 & 3, the other two brothers of the parties, the learned Trial Court held that the suit property was purchased from the sale proceeds of joint property of the parties. Hence the respondent/plaintiff was not entitled to seek possession from the appellant/defendant. However, limited relief was granted to the extent that the appellant/defendant was restrained from selling or creating any third-party interest in the suit property.

13. The First Appellate Court, vide impugned judgment, set aside the judgment of the learned Trial Court and held the respondent/plaintiff to be entitled to the decree of possession by holding that he was having a better title. The judgment of the learned Trial Court was reversed and the suit of the plaintiff was decreed by the First Appellate Court by observing as under:-

'16. Issue No.1 : Whether the plaintiff is entitled for a decree of possession as prayed for? OPP.

16.1 The Ld.Trial Court held that the plaintiff has failed to prove the ownership of the suit premises and he is not entitled for the relief of possession. The plaintiff has filed the present suit and stated that he purchased the suit property by virtue of document Ex.PW1/A to PW1/E. It is stated by the plaintiff that some time after purchase of the suit premises, he allowed his brother (defendant) to reside in the suit premises as licensee. It is stated that his brother (defendant) has refused to vacate the suit premises.

The onus to prove this issue is upon the plaintiff. The defendant in his written statement has not disputed that the suit property was purchased in the name of the plaintiff. Even though, the defendant raised the issue that he is the co-owner of the suit property as the same was purchased by the joint funds of the plaintiff and defendant. However while deciding the Issue No.3, it has already come on record that the defendant has fails to prove that he is the co owner of the suit premises.

'17. The issue of ownership of plaintiff is on the basis of documents i.e.GPA, WILL, agreement to sell etc. is not in dispute therefore, the judgment of Hon'ble Supreme Court of India reported as Suraj Lamps and Industries vs. State of Haryana 183(2011)DLT(1) SC is not applicable. The ownership of the plaintiff qua the suit premises is not in dispute. The present suit is not based upon the title of plaintiff qua the suit premises. The plaintiff has filed the present suit on the ground that the defendant no.1 has been inducted in the suit premises as Licensee and the defendant has now refused to vacate the suit premises. The provisions of Indian Evidence Act lays down the burden to prove a fact upon the person who assert upon the existence of a fact. In the present case, the ownership of the plaintiff qua the suit premises is not in dispute. The defendant has not denied the ownership of the plaintiff qua the suit premises. No other person has also come before the Court to deny the ownership of the plaintiff qua the suit premises. Only the question which need to be determined by the Court is whether the defendant was inducted as Licensee in the suit premises and whether the plaintiff is entitled to recover the possession of the suit premises from the Licensee. The plaintiff examined himself as PW-1 and deposed on oath that the defendant was inducted in the suit premises as Licensee due to love and affection being the real brother of the plaintiff. The plaintiff deposed that the defendant was allowed to reside in the suit premises after his marriage as their parents have thrown him out after the marriage. The defendant in his cross examination has also admitted that he was inducted in the suit premises after the marriage. The defendant has admitted his existence in the suit premises after the date of purchase of suit premises. The defendant has come in the possession of the suit premises on a later date from the date of purchase of the same. Therefore, the onus was upon the defendant to prove the factum or nature of his possession in the suit premises which the defendant has failed to do . The defendant has also fails to prove any other right on which he was inducted in the suit premises. The ownership of the property in favour of the plaintiff is not denied by the defendant. The defendant has come in the suit premises on the later date from the date of purchase. The defendant has fails to prove his co-ownership in

the suit premises. The defendant has also failed to prove any other right by which he came into the possession of the suit premises.

In the present case, the plaintiff is claiming the ownership of the suit premises which is admitted by the defendant. Therefore, from the facts on record it is clear that the plaintiff is having better title or better entitlement of the suit property qua the defendant.

18. On this issue I have relied upon one judgment of Hon'ble High Court of Delhi reported as Ramesh Chand vs. Suresh Chand & Anr. 188 (2012) DLT 538 wherein it was held that

“A right to possession of immovable property arises not only from complete ownership right in property but having better title or better entitlement to possession of property than qua the person who is in actual physical possession thereof.”

The plaintiff by leading the evidence has proved on record that the defendant was mere a Licensee in the suit premises. The License is terminated by the plaintiff therefore, the defendant has no right to remain in the possession of the suit premises. Accordingly, the plaintiff is entitled for recovery of the possession from the defendant. This issue is decided in favour of the plaintiff and it is held that the plaintiff is entitled for decree of possession against the defendant as prayed for.’

14. In my view, the substantial question of law has to be answered in favour of the appellant/defendant and against the respondent/plaintiff. The reasons are given hereunder:

(i) It is an admitted fact by the parties that before entering into the transaction in respect of the suit property, the parties had sold joint family property No.K-752, Mangolpuri, Delhi and thereafter, within a week, this house was purchased.

(ii) The other two brothers PW-2 & 3 have proved that this property was purchased out of sale proceed of property No.K-752, Mangol Puri, Delhi and to that extent their testimony has remained un-rebutted.

(iii) The fact that immediately after purchase of the suit property on 29th April, 1998 and his marriage appellant Pappi shifted on the first floor of the suit property in May, 1998, without paying any license fee or rent to his elder brother and has been living there since then, established that he was living on the first floor not as licensee but in his independent capacity as this property was purchased out of the sale proceeds of their joint family property.

(iv) The respondent/plaintiff has claimed his ownership rights on the basis of photocopies of Special Power of Attorney which is not proved. The receipt Ex.PW1/D is bearing signature/thumb impression of Sh.Lal Singh and even the date of execution of the receipt is not mentioned. The receipt Ex.PW1/D is extracted hereunder:-

‘RECEIPT

Received a sum of ₹60,000/- (Rs. Sixty Thousand only), from Shri Ramesh Kumar son of Shri Har Prakash resident of K-752, Mangolpuri, Delhi, against the sale of Built up property bearing No.B-2/45, built on land measuring 25 sq.yds., situated at Sultanpuri, Delhi, with all its rights, titles and interests of the land under the said property, (hereinafter called the property) in full and final settlement, nothing remains due out of sale price, as per terms and conditions of agreement to sell dated _____.

IN WITNESS WHEREOF, I have signed this Receipt at Delhi, on this _____ day of _____ 1998, in the presence of the following witnesses:-

WITNESSES:-

1.

2.

Sd/-
EXECUTANT
Shri Lal Singh
S/o Shri Bhan Singh
R/o B-2/45, Sultanpuri,
Delhi.'

(v) In the possession letter, the date, month or year have been left blank as to when the possession was handed over and it even does not bear the signature of the person who has taken over the possession or the date of handing over the possession.

(vi) The original documents placed on record, which were collectively exhibited as Ex.PW1/E, also included Will executed by one Sh.Subhash Chand in favour of Sh.Lal Singh. The Will during life time of executant cannot confer any title on Sh.Lal Singh himself which could be transferred by him to respondent/plaintiff Ramesh Kumar.

(vii) The photocopy of Affidavit Ex.PW1/E by Sh.Subhash Chand is also in respect of transfer of interest by him in favour of Sh.Lal Singh and cannot confer any title on Sh.Ramesh Kumar.

(viii) The documents executed by Sh.Subhash Chand in favour of Sh.Lal Singh are Ex.PW1/E (Colly.) and are Will, Receipt, Agreement for Sale and purchase (which is unregistered and on stamp paper of ₹2/-) and an affidavit by Sh.Subhash Chand regarding transaction in favour of Sh.Lal Singh. The respondent/plaintiff Sh.Ramesh Kumar is claiming his title on the basis of photocopy of documents but none of these documents which are photocopies, unregistered, insufficiently stamped are admissible in evidence and could not have been relied upon by the First Appellate Court to hold that

the respondent/plaintiff Ramesh Kumar was having better title, hence entitled to seek possession from his younger brother in respect of first floor.

(ix) Similarly, the Receipt is also in respect of the transaction between Sh.Subhash Chand and Sh.Lal Singh whereby ₹75,000 was received by Sh.Subhash Chand. The Agreement to Sell on a stamp paper of ₹2 is also between Sh.Subhash Chand and Sh.Lal Singh and is an unregistered document. There is no document in respect of possession being handed over by Sh.Subhash Chand to Sh.Lal Singh and further the possession being taken from Sh.Lal Singh by the respondent/plaintiff Sh.Ramesh Kumar.

(x) Sh.Lal Singh is claiming his title through Sh.Subhash Chand and Subhash chand did not execute any Special or General Power of Attorney in favour of Lal Singh authorizing him to further act on his behalf. Photocopy of General Power of Attorney Ex.PW1/A is on a plain paper with thumb impression/signature of Lal Singh in favour of Ramesh Kumar is neither on a stamp paper nor registered and he was not even authorized to execute any such Power of Attorney.

(xi) The Agreement to Sell Ex.PW 1/B is a photocopy executed between Sh.Lal Singh and Sh.Ramesh Kumar on a stamp paper of ₹2/-. The column required to be filled i.e. date of execution, name and signature of witnesses are also blank on the photocopy Ex.PW1/B and is inadmissible in evidence.

(xii) Both the parties are just having possessory rights in respect of the suit property. While the appellant is in possession of the first floor, respondent is in possession of the ground floor. The photocopies of the unregistered documents, which are incomplete and even date of execution are left blank, are inadmissible in evidence and do not in any manner vest any right or title in favour of Sh.Ramesh Kumar, respondent/plaintiff so as to hold that he is having better title in respect of the suit property.

15. Learned First Appellate Court while holding the respondent Ramesh Kumar having better title and thus, entitled to seek possession in Civil Suit No.411/06/02, has given undue weightage to the effect of dismissal of the Civil Suit No.410/2006 and by ignoring that vide the common judgment dated 23rd March, 2011 the learned Trial Court has not held any of the parties to be owner of the suit property and rightly so. The photocopies of unregistered Special Power of Attorney with many columns left blank and the photocopy of receipt cannot confer any right or title on any of the parties so as to be declared as owner or co-owner.

16. It is admitted by the respondent/plaintiff that the suit property was purchased by him within a week of sale of joint family property in Mangol Puri. Learned First Appellate Court also failed to consider that PW-2 and PW3 - other two brothers of the parties categorically stated that suit property was purchased out of the sale proceeds of the joint family property i.e. K-752, Mangolpuri, Delhi. Though there is absolutely no title document in favour of Sh.Ramesh Kumar, the photocopies of Receipt, Possession Letter, photocopy of unregistered Will, Agreement to Sell and General Power of Attorney on plain paper placed on record are inadmissible in evidence. Even otherwise also the documents Ex.PW1/E (Colly.) do not confer any title on Sh.Lal Singh which could be transferred to Sh.Ramesh Kumar.

17. The oral evidence led by the parties can only suggest that out of the sale proceeds of joint family property, the suit property was purchased by the elder brother for his own benefit as well for the benefit of his younger brother. The relationship between the parties was such that the respondent/plaintiff was holding the property in trust for the benefit of his younger brother as well. The younger brother Pappi, after his marriage, shifted to the first floor presuming him to be a co-owner. When it is

established that both the brothers i.e. party to this litigation owned a joint family property which was sold to acquire the suit property, the presumption arises that it was a joint property. The burden was on the respondent/plaintiff to establish that the suit property was acquired by him without aid of joint family funds which he failed to discharge. Although date of execution of the documents is not mentioned in the documents of so called 'sale transaction' but as per the respondent/plaintiff it was purchased on 29th April, 1998 and the appellant/defendant had been residing there since May, 1998 i.e. soon after his marriage.

18. It was a case where the respondent/plaintiff Sh.Ramesh Kumar was not having even the Agreement to Sell registered in his favour so as to seek protection under Section 53(A) of the Transfer of Property Act. Just by placing on record unregistered documents Ex.PW1/E (Colly.) (except Will) executed by Sh.Subhash Chand in favour of Sh.Lal Singh i.e. receipt, possession letter, Agreement for Sale and Purchase and Affidavit, the respondent/plaintiff Ramesh Kumar could not have claimed any ownership right in the suit property when Lal Singh himself got no such right which he could transfer to him.

19. The Will by Sh.Subhash Chand in favour of Sh.Lal Singh is registered. Till Sh.Subhash Chand, who executed Will in favour of Sh.Lal Singh, from whom Sh.Ramesh Kumar claimed to have purchased the suit property, was alive, no right can be claimed on the basis of this Will. It is said that so long as the testator is alive, a Will is not even worth the paper on which it is written, as the testator can at any time revoke it.

20. Section 17 of the Registration Act clearly provides that any document (other than testamentary instruments) which purports or operates to create, declare, assign, limit or extinguish whether in present or in future "any right,

title or interest” whether vested or contingent of the value of ₹100 and upwards to or in immovable property requires compulsory registration.

21. Section 49 of the Registration Act provides that no document required by Section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affected such property, unless it has been registered. Registration of a document gives notice to the world that such a document has been executed.

22. Legal position is well settled by the Supreme Court in the decision reported as Sudhir Engineering Company vs. Nitco Roadways Ltd. 1995 II AD (Delhi) 189 wherein it was held that endorsement of exhibit number on the documents does not per se prove the documents to enable it to be admissible in evidence.

23. The respondent/plaintiff himself is not having any document on the basis of which he can claim any ownership right in the suit property. It is a case where none of the brother is having any title in the suit property but mere possessory rights.

24. When both the brothers are having possessory rights and unrebutted testimony of their other two brothers (PW-2 and PW-3) is to the effect that the parties to this litigation occupied the suit property after jointly purchasing it out of the sale proceeds of a joint family property, the learned First Appellate Court could not have decreed the suit holding that respondent/plaintiff Ramesh Kumar was having better title.

25. The respondent/plaintiff was holding the suit property in trust on behalf of his brothers. Thus, he could not have been granted decree for possession of the first floor of Property No.B-245, Sultanpuri, Delhi in possession of appellant/defendant by terming him to be a licensee. Thus, the

findings of the learned First Appellate Court being based on no evidence suffers from perversity.

26. In view of the aforesaid discussion, the substantial question of law is decided in favour of the appellant and against the respondent and the impugned judgment of the First Appellate Court dated 26th May, 2014 is set aside and that of the learned Trial Court dated 23rd March, 2011 is restored by allowing this Regular Second Appeal.

27. The substantial question of law is answered in favour of the appellant and against the respondent.

28. The appeal is allowed.

29. No costs.

30. LCR be sent back alongwith copy of this order.

FEBRUARY 28, 2017
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PRATIBHA RANI
(JUDGE)

