

\$~34

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

% *Judgment delivered on: 20.03.2018*

+ **RSA 47/2018, CAV 222/2018, C.M.Nos. 10494-95/2018**

PURAN CHAND (SINCE DECEASED THR HIS LRS)

..... Appellant

Through: Mr. Bharat Arora, Advocate

Versus

PRABHAT (SINCE DECEASED THR HIS LRS) Respondent

Through: Nemo.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (Oral)

1. This second Appeal impugns an order dated 03.01.2018 passed by the learned ASCJ in RCA No. 18/2016 which allowed the respondents' appeal against the judgment and decree dated 20.12.2014 in Suit No. 313 of 2014, a suit for mandatory injunction. The appellant contends that he is the owner of the property – C-57, Shiv Gali, Nanak Chand Basti, Kotla Mubarakpur, New Delhi (referred to as 'suit property') by way of a family settlement but the impugned order has recorded that the plaintiff has proven his right, title and interest to the property by way of a registered Sale Deed of 1966.

2. The impugned order considered the judgment of this Court in ***Karan Madaan & Ors v. Nageshwar Pandey* 2014 (3) CLJ 589 DEL** which held that when a registered document of title exists, oral evidence denouncing the same would be inadmissible. It was held:

“41. Proviso 4 to Section 92 permits the establishment of the existence of any "distinct, subsequent oral agreement to rescind or modify" the contract, grant or disposition of property, except in cases in which such contract, grant or disposition of property is required, by law, to be in writing, or has been registered as per the law for the time being as to registration of documents.

42. In the present case, the disposition of the suit property was required by law to be in writing and by a registered instrument, and it has been so executed in writing and registered. Proviso 4, therefore, cannot be invoked by the defendant, in any case. Moreover, the defendant is not claiming a "subsequent" oral agreement. He is claiming an oral agreement/understanding which, according to him, existed at the time of execution of the sale deed. Consequently, Proviso 4 has no application to the defence/ case set up by the defendant. Provisos 5 & 6 have no application to the facts of the present case, as the defendant does not plead any custom, or any issue with regard to the language used.”

3. In view of the aforesaid, the contentions of the appellant are that an oral settlement partitioning the family property i.e. the aforementioned suit property and another property bearing no. C-93, Shiv Gali, Nanak Chand Basti, Kotla Mubarakpur, New Delhi, between the brothers is untenable.

4. It is also not in dispute that the first suit filed by the respondent (plaintiff) in the year 2007 had sought a mandatory injunction against the appellant from creating any third party right or interest in the suit property, interim injunction had been granted. The suit is still pending for disposal. A second suit bearing no. 315/2007 was filed by the same plaintiff against

the same defendant/present appellant, seeking demolition of the unauthorised construction in the suit property carried out by the appellant. This second suit was dismissed on the ground that, at the time the construction was being undertaken, the plaintiff had not made any complaint either to the police or to the municipal authority or to any other competent statutory body, therefore, the Trial Court concluded that there was an element of acquiescence in the plaintiff not taking immediate steps, against the said construction in the rear portion of the suit property, as well as on the First Floor. It held:

“Now coming to the second aspect whether plaintiff has proved or established that the illegal or unauthorised construction carried out in the suit property by the defendants. Nothing on record suggest that plaintiff has filed any written complaint to the police or to the MCD qua the raising of unauthorised structure by the defendants at the suit property. Admittedly no legal notice or any kind of caution notice have been issued by the plaintiff to the defendants asking them to restrain from carrying illegal and unauthorised construction at any point of time. No witness from the MCD or any other competent authority has been called or examined by the plaintiff to prove whether there is any illegal or unauthorised construction existed at the suit property. Although it has not been proved on record whether plaintiff was residing or in possession of the suit property at the time of filing of the present suit but if we assume plaintiff was present in the suit property at the time of construction then it is highly improbable to believe that plaintiff has done any effort to stop the illegal or unauthorised construction meaning

thereby the plaintiff himself acquiesced to the same. Although it is not proved on record whether there is any illegal or unauthorised construction there in the suit property but still plaintiff failed to explain as to why he slept quiet all through and let the construction be carried. The relief of injunction being an equitable relief can be granted to a person who comes before the court with clean hands which is not the case herein. The plaintiff has sought restoration of the suit property to its original position by ordering removal of illegal and unauthorised structure but the plaintiff has miserably failed to show on record the exact status of suit property prior to filing of the suit bearing no. 315/07 and the status as on 02.05.2009 when the present suit was filed.

The report of the Local Commissioner filed on record Ex. PW 1/5 cannot be considered as proof of construction being illegal or unauthorised. The best witness would have been the MOD official who has not been examined by the plaintiff to prove this case. Hence, no cause of action is there with the plaintiff.

In view of the above observation and the evidence lead, both these issues stands decided against the plaintiff and in favour of the defendants.”

5. However, in appeal by the plaintiff, the first Appellate Court set aside the order of dismissal and decreed the suit, on the ground that the suit was filed immediately upon the knowledge of the construction, and filing of the suit itself constitutes sufficient protest against the illegal and unauthorized constructions.

6. This Court would concur with the reasoning for and the conclusion in the impugned order, because a report to the police or municipal authority or any other statutory body could only be a measure taken to protest against the illegality; such step can be an argument in support of his grievance but, it is not necessary or mandatory in law nor would it defeat his claim in a suit. The plaintiff had filed a suit, in which notice was issued. The suit seeking mandatory injunction and demolition of the illegal construction itself constitutes a complaint seeking redressal as per law. The impugned order further considered the deposition of DW-3 insofar as he has admitted that he had carried out unauthorized construction in the property. He has deposed as under:

"It is correct that I have carried unauthorised construction on the suit property as stated in para no. 9 of my affidavit. I do not have any document to show that my father is the owner of the suit property. I have not taken any permission from the MCD or the plaintiff before carrying any construction".

7. A Local Commissioner appointed by the Court also reported that fresh constructions have been carried out in the rear portion of the suit property which was otherwise shown as an open land in the map filed by the plaintiff in the suit. Additional constructions have been carried out on the first floor. Insofar as no such permission had been taken from the plaintiff or from any of the statutory authorities, and has been so admitted by the appellant that it is unauthorized, therefore, the suit was liable to be and indeed was decreed

by the impugned order. The appellant has also shown no right, title or interest in the suit property since his ownership is duly established by way of a registered Sale Deed in favour of the plaintiff.

8. In the circumstances, no substantial question of law arises in this second appeal. There is no reason to interfere with the impugned order. This appeal is without merit and it is accordingly dismissed.

MARCH 20, 2018/acm

NAJMI WAZIRI, J.

