

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

% **Date of decision: 10th August, 2018**

+ **RSA 265/2017 & CM No.42187/2017 (for stay)**

PUSHKAR SINGH BISHT **Appellant**

Through: Mr. Triloki Pandit, Adv.

Versus

BHIM SINGH BISHT **Respondent**

Through: Mr. Rajendra Dutt, Advocate.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 31st January, 2017 in RCA-DJ-5333/2016 of the Court of Additional District Judge-IV, New Delhi District] of dismissal of the first appeal under Section 96 of the CPC preferred by the appellant against the judgment and decree [dated 26th September, 2015 in Suit No.282/2014 (Unique ID No.02401C0097952002) of the Court of Civil Judge-05, Central District] of dismissal of suit filed by the appellant/plaintiff for recovery of possession of immovable property and for recovery of *mesne* profits.

2. The appeal came first before this Court on 21st November, 2017, when though without framing any question of law, notice thereof was ordered to be issued, Trial Court record requisitioned and the parties directed to maintain *status quo* qua title and possession of the property. Though the Suit Court record has not been received and

only the First Appellate Court record has been received, but the counsel for the appellant/plaintiff along with the memorandum of appeal has filed copies of the relevant records of the suit and which have been perused and during the hearing also no need of any other Suit Court record has been felt.

3. The appellant/plaintiff instituted the suit, from which this appeal arises, pleading that (i) the appellant /plaintiff is the sole and absolute owner of property No.RZ-32/3-D, Gali No.3, Mohan Block, West Sagarpur, New Delhi, which was purchased by the appellant/plaintiff from one Ujagar Singh, for valuable consideration and vide sale document dated 29th March, 1990; (ii) the property comprises of ground, first and second floors; (iii) the appellant/plaintiff is residing on the ground floor of the property; (iv) respondent/defendant is the brother of the appellant/plaintiff and was facing hardship with regard to residential accommodation and requested the appellant/plaintiff to allow him to reside for a temporary period on the second floor of the property and which was allowed by the appellant/plaintiff; (v) the respondent/defendant illegally occupied one room on the first floor of the property and inspite of asking of the appellant/plaintiff, has failed to vacate the property and thus possession of the respondent/defendant is illegal.

4. The respondent/defendant contested the suit by filing a written statement, pleading that (i) the parties, along with their father and other siblings, were residing in a tenanted accommodation; (ii) the father of the parties was a government employee and from the funds

received on his retirement and with contribution from the respondent/defendant, purchased the land underneath the property; (iii) the appellant/plaintiff was not having the financial position to purchase any immovable property at that time; (iv) the construction on the property was also made from the funds of the father and the respondent/defendant; (v) the father of the parties died in an incident of fire in the property on 1st December, 1995; and, (vi) the appellant/plaintiff and the respondent/defendant repaired/renovated the property and started residing therein as co-owners thereof.

5. An *ex-parte* decree of possession and recovery of *mesne* profits in favour of the appellant/plaintiff and against the respondent/defendant was passed on 13th May, 2013. The counsel for the appellant/plaintiff informs, that on the respondent/defendant filing an application under Order IX Rule 13 of the CPC, the said decree was set aside and the suit proceeded to trial.

6. On the pleadings of the parties, the following issues were framed in the suit on 22nd January, 2002:

- “(i) *Whether plaintiff has no cause of action to file the present suit? OPD*
- (ii) *Whether suit of the plaintiff is not properly valued for the purpose of Court fees and jurisdiction? OPD.*
- (iii) *Whether defendant is in illegal and unauthorized occupation of the property?*

- (iv) *Whether defendant is liable to pay damages for use and occupation of the property? OPP.*
- (v) *Whether plaintiff is absolute owner in the suit property? OPP.*
- (vi) *Whether plaintiff is entitled to relief claimed? OPP.*
- (vii) *Relief.”*

7. The Suit Court, on the basis of the evidence led by the parties, dismissed the suit, reasoning that (i) the appellant/plaintiff claimed to have title to property on the basis of Agreement to Sell, General Power of Attorney, Affidavit and Receipt; (ii) however, the said documents do not confer any title to the property as per the *dicta* of the Supreme Court in ***Suraj Lamp and Industries Private Limited Vs. State of Haryana***, 2012 (1) SCC 656; (iii) the appellant/plaintiff had sought to prove the Agreement to Sell, Power of Attorney, Affidavit and Receipt by leading secondary evidence; (iv) the copies of the documents sought to be proved by way of secondary evidence were also in a burnt condition and the contents thereof could not be read; (v) the appellant/plaintiff had not deposed as to the contents of the said documents; (vi) no attesting witnesses to the documents had been examined; and, (vii) the appellant/plaintiff had thus failed to prove any title to the property; (vii) moreover, even if it was believed that Agreement to Sell, Power of Attorney, Affidavit and Receipt with respect to the property were in the name of the appellant/plaintiff, the same still did not establish the appellant/plaintiff as owner of the property. Accordingly, the suit was dismissed.

8. The First Appellate Court, vide the impugned judgment, has dismissed the appeal affirming the findings of the Suit Court.

9. The first argument of the counsel for the appellant/plaintiff is that a suit, which had on 13th May, 2013 been allowed, could not on 26th September, 2015 have been dismissed and the Suit Court cannot render inconsistent findings.

10. The aforesaid argument is to be noted to be rejected. The counsel for the appellant/plaintiff forgets that the judgment dated 13th May, 2013 was an *ex-parte* judgment and which, according to the counsel for the appellant/plaintiff also, was set aside. Once the judgment dated 13th May, 2013 was set aside, no reliance whatsoever can be placed thereon.

11. The counsel for the appellant/plaintiff, at this stage, states that the respondent/defendant was earlier appearing in this suit and had thereafter stopped appearing which led to the *ex-parte* judgment dated 13th May, 2013.

12. Even then the position would be the same. The appellant/plaintiff, at the time when the said judgment was set aside, could have protested thereagainst and after acceding to the judgment dated 13th May, 2013 being set aside and the suit being ordered, to be tried afresh, cannot today raise such an argument.

13. The next argument of the counsel for the appellant/plaintiff is that the appellant/plaintiff had proved the Agreement to Sell, Power of

Attorney, Affidavit and Receipt by secondary evidence and the Courts below have wrongly held that they have not been so proved.

14. In view of the reasoning given by both the Courts below, the aforesaid is irrelevant. I have thus asked the counsel for the appellant/plaintiff, as to how the Agreement to Sell, Power of Attorney, Affidavit and Receipt constitute valid documents of title.

15. The counsel for the appellant/plaintiff states that the said documents constituted documents of title, prior to the dicta of the Supreme Court in *Suraj Lamp and Industries Private Limited* supra. Reliance is placed on paras 25 to 27 of *Suraj Lamp and Industries Private Limited* supra as reported in SCC, where it has been clarified that the judgment was not intended to, in any way, affect the validity of sale agreements and powers of attorney executed in genuine transactions and would not affect the cases, where the said documents had been accepted by the DDA or other Developmental or Revenue Authorities to effect mutation.

16. The aforesaid observation does not mean that such documents constituted documents of title, prior to the said judgment. Though this Court in *Asha M. Jain Vs. Canara Bank* 94 (2001) DLT 841 has held that owing to a large scale of transfer of the properties through the medium of Agreement to Sell, Power of Attorney and Will, the documents may be construed as documents of title but the said judgment was specially over ruled in *Suraj Lamp & Industries Private Limited* supra.

17. It cannot thus by any stretch of imagination be said that Agreement to Sell, Power of Attorney, Affidavit and Receipt executed on a date prior to the judgment in ***Suraj Lamp And Industries Private Limited*** supra, were documents of title. All that the observations of the Supreme Court, to which attention is drawn, says is that the said documents will not stand invalidated as to their legal effect. However, at the same time it was declared that the legal effect of the said documents is not to confer title. The counsel for the appellant/plaintiff is misconstruing the said observations to confer status of title on the said documents and which has been declared otherwise by the Supreme Court.

18. Once, even if the documents are to be read, the appellant/plaintiff is not found to have title, the need to go into the question of, whether the documents have been proved by secondary evidence or not, is not felt.

19. I have recently in ***Chander Dutt Sharma v. Prem Chand*** 2018 SCC OnLine Del 9903 held as under with respect to a suit for possession:-

“20.....

(A) *A suit for recovery of possession of immovable property can be filed either under Section 5 or under Section 6 of the Specific Relief Act, 1963.*

(B) *A suit under Section 5, can be filed, either (i) on the basis of prior possession and not on title, when the plaintiff while in possession of the property has been dispossessed, under Article 64 of the Schedule to the Limitation Act, 1963,*

within twelve years from the date of dispossession; or, (ii) based on title, under Article 65 of the Schedule to the Limitation Act, within twelve year from the date when the possession of the defendant becomes adverse to the plaintiff.

(C) A suit under Section 6, can be filed if any person is dispossessed from immovable property without his consent, otherwise than in due process of law, but within six months of the date of dispossession.

.....

*(E) A mere possession of immovable property, even if accompanied with GPA, Agreement to Sell, Affidavit etc., does not constitute title to the immovable property. Reference, if any required in this regard can be made to the dicta of the Supreme Court in **Suraj Lamp & Industries Pvt. Ltd. Vs. State of Haryana** (2009) 7 SCC 363 and (2012) 1 SCC 656 setting aside the dicta of the Division Bench of this Court in **Asha M Jain Vs. Canara Bank** (2001) 94 DLT 841.*

(F) The appellant/plaintiff, claiming only GPA, Agreement to Sell, Affidavit etc. from respondents No.4&5 in his favour, thus had / has no title to the property.

*(G) An agreement purchaser, has no right, title, interest in immovable property and has only a right to seek specific performance of such agreement. Reference if any required can be made to (i) **Jiwan Dass Rawal Vs. Narain Dass** AIR 1981 Del 291; (ii) **Deewan Arora Vs. Tara Devi Sen** (2009) 163 DLT 520; (iii) **Sunil Kapoor Vs. Himmat Singh** (2010) 167 DLT 806; and, (iv) **Samarjeet Chakravarty Vs. Tej Properties Private Limited** 2014 SCC OnLine Del 3809.*

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(I) Though the appellant/plaintiff, under Section 5, had a choice to sue either on the basis of prior possession or on the basis of title but the appellant/plaintiff, inspite of having no title to the property, filed the suit by drafting the plaint not on

the basis of prior possession but on the basis of title. The appellant/plaintiff, throughout the plaint has described himself as purchaser of the property from respondents No.4&5. Owing thereto only, issue also framed in the suit was qua ownership of appellant/plaintiff and not qua possession of the appellant/plaintiff. Rather, the counsel for the appellant/plaintiff today also, upon it being put to him as to why the appellant/plaintiff did not sue for specific performance of the Agreement to Sell, states that there was/is no need to sue for specific performance since the appellant/plaintiff was already owner in possession of the immovable property.

(J) Owing to the appellant/plaintiff having sued on the basis of title which the appellant/plaintiff did not possess, and not on the basis of prior possession, Issue No.1 got framed in the suit, was decided against the appellant/plaintiff.

(K) Though issues are to be framed by the Court but with the assistance of the counsels. If the appellant/plaintiff had sued for possession on the basis of prior possession and the Court had wrongly framed the issue treating the suit as on the basis of title, it was incumbent upon the appellant/plaintiff to apply for amendment of issues and which was not done by appellant/plaintiff.

(L) However, even if the appellant/plaintiff is treated as having sued for possession on the basis of prior possession and even if non seeking of an issue qua prior possession is ignored, the recovery of possession was sought not from respondents No.4&5 but from respondents No.1 to 3 and their mother Bhagwati and it was against respondents no.1 to 3 and their mother that the appellant/plaintiff was required to prove prior possession. For proving such prior possession against respondents No.1 to 3, admission of the respondents no.4&5, in their written statement or in the Agreement to Sell or in their evidence, could not be relied by the appellant/plaintiff. The respondents No.4&5 were not

contesting the claim of appellant/plaintiff and rather filed a written statement admitting the material pleas in the plaint. A plaintiff, to prove case against defendant, cannot rely upon admission of another defendant who is not in contest with the plaintiff.

(M) The appellant/plaintiff was thus required to prove prior possession by some independent evidence.

(N) The counsel for the appellant/plaintiff, on enquiry, admits that save for the recital in the Agreement to Sell of being delivered possession, there is no other evidence led by the appellant/plaintiff of being in possession of the property, to be able to sue for recovery of possession thereof on the basis of prior possession.”

20. The last argument of the counsel for the appellant/plaintiff is that the judgment holds the appellant/plaintiff to be not having any title, when according to the respondent/defendant also, the appellant/plaintiff is a co-owner along with the respondent/defendant.

21. The counsel for the respondent/defendant states that the respondent/defendant does not today also dispute that the parties have rights in equal share in the property.

22. This Second Appeal thus, does not raise any substantial question of law to be entertained.

23. Dismissed.

24. The counsel for the appellant/plaintiff, at this stage has contended that the respondent/defendant has also failed to prove that he is a co-owner.

25. It was not the title of the respondent/defendant, which was at issue but the title of the appellant/plaintiff, who had approached the Court.

26. No costs.

RAJIV SAHAI ENDLAW, J.

AUGUST 10, 2018
M.

