

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

% **Date of decision: 4th July, 2018**

+ **RSA 383/2016 & CM No.25973/2018 (u/O V R-20 CPC)**

CHANDER DUTT SHARMA **Appellant**

Through: Mr. Siddharth Aggarwla, Adv.

Versus

PREM CHAND & ORS **Respondents**

Through: Mr. Rajiv Bajaj and Ms. Sagrika Wadhwa, Advs. for R-2.

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 dated 22nd August, 2016 in RCA No.61779/2016 (Old RCA No.09/2016) of the Court of Additional District Judge-09, Tis Hazari Courts, Delhi of dismissal of the appeal filed by the appellant against the judgment dated 30th October, 2010 in Suit No.212/2003 (Unique ID No.02401C0399722003) of the Court of Rakesh Kumar-I, Civil Judge, North Delhi, Tis Hazari Courts, Delhi of dismissal of the suit filed by the appellant/plaintiff against the respondents/defendants for recovery of possession of property No.RZ-B-54 admeasuring 200 sq. yds, Mahavir Enclave, New Delhi.

2. The appeal came up first before this Court on 20th December, 2016, when it was renotified for 17th January, 2017 and the Trial Court record was requisitioned.

3. Vide subsequent order dated 24th May, 2017, notice of the appeal was ordered to be issued. In response to the said notice, the counsel for the respondents No.2&3 has been appearing and the other respondents remain unserved.

4. The counsel for the appellant/plaintiff has filed CM No.25973/2018 for service by publication of the other respondents and also informs that the respondent No.4 Pyara Singh has died and application for substitution of his legal heirs has been filed, though has not been listed.

5. Finding, that the order dated 24th May, 2017 issues notice of the appeal, without giving any reason and without recording what substantial question of law arises for consideration in this second appeal and without which it is not to be entertained and further having gone through the file and being *prima facie* of the opinion that no substantial question of law arises, rather than adjourning the appeal for service of the respondents and/or for substitution of legal heirs of the respondent No.4, the counsel for the appellant/plaintiff has been asked to address on the said aspect and to show as to what substantial question of law arises in this second appeal against concurrent judgments of the two Courts below of dismissal of the suit of the appellant/plaintiff for recovery of possession of immovable property.

6. The counsel for the appellant/plaintiff has been heard and the Trial Court record perused.

7. The appellant/plaintiff instituted the suit from this which appeal arises, pleading (i) “that the plaintiff purchased a House No.RZ-B-54, Mahavir Enclave, New Delhi in the year 1992 from defendants No.5&6 Pyara Singh and his wife Amarjit Kaur”, through one Roop Chand, father of the respondents No.1 to 3 Prem Chand, Krishan Lal and Vijendra Kumar and husband of defendant No.4 Bhagwati (the defendant No.4 Bhagwati has since died and the present respondents No.1 to 3 were substituted also as her heirs); (ii) that the said Roop Chand was a Special Police Officer of

the area at the relevant time and doing the business of property dealer; (iii) that the documents of sale and purchase of the property by the respondents No.4&5 Pyara Singh and Amarjit Kaur in favour of the appellant/plaintiff were prepared by the said Roop Chand and the appellant/plaintiff had transacted also with the said Roop Chand only; (iv) that the respondents No.4&5 were the owners of 90 sq. yds and 110 sq. yds. respectively of the aforesaid house admeasuring total 200 sq. yds.; (v) that the respondent No.4 Pyara Singh also executed a General Power of Attorney (GPA), Agreement to Sell, Affidavit and Receipt in favour of the appellant/plaintiff, all dated 3rd July, 1992 against consideration of Rs.80,000/-; (vi) that the respondent No.5 Amarjit Kaur also executed GPA, Agreement to Sell, Affidavit and Receipt, all dated 19th June, 1992 against consideration of Rs.1,98,000/-; (vii) that the respondents No.4&5 also executed their Wills dated 3rd July, 1992 and 22nd June, 1992 in favour of the appellant/plaintiff and the said Wills were got registered on 6th July, 1992 and 22nd June, 1992 respectively; (viii) that the appellant/plaintiff, after purchasing the house, handed over the same to Roop Chand to keep watch on the property as Roop Chand was the Special Police Officer and the appellant/plaintiff was residing far away from the said property; (ix) that a few days later, on the appellant/plaintiff expressing desire to sell the property, Roop Chand asked the appellant/plaintiff to also hand over the original documents and which were so handed over by the appellant / plaintiff to Roop Chand; (x) that when nothing was heard from Roop Chand, the appellant/plaintiff visited the property in the month of 1993, when he found that his lock on the property had been changed; (xi) that the appellant/plaintiff, on making enquiry, also found that Roop Chand

manipulated documents in connivance with the respondents No.4&5; (xii) that an FIR was also lodged by the appellant/plaintiff against Roop Chand; (xiii) that the respondents No.1 to 3 and their mother Bhagwati were in unauthorised use and occupation of the property.

8. The respondents No.1 to 3 /defendants and their mother contested the suit by filing a written statement, *inter alia* denying any purchase of the property by the appellant/plaintiff or delivery of possession of the property to the appellant/plaintiff. It was also disputed that the appellant/plaintiff was ever in possession of the property. The said respondents No.1 to 3 /defendants on the contrary claimed that the deceased defendant no.4 Bhagwati was holding the title to the property. Para 9 of their written statement, to which attention has been drawn by the counsel for the appellant/plaintiff, is as under:

“9. Para 9 of the plaint is also wrong, incorrect and the same is denied. It is denied that said Shri. Roop Chand manipulated and fabricated some false and illegal documents in connivance with the defendants Nos. 5 and 6 as alleged. It is submitted that in fact the said Shri. Roop Chand purchased the suit property from the defendant Nos.5 and sold the same to the defendant No.4 on 7.6.1994. The false story has been concocted by the plaintiff only to grab the suit property which is owned by the defendant No.4.”

9. The respondents No.4 & 5 Pyara Singh and Amarjit Kaur also filed their written statement, admitting receipt of sale consideration from the appellant/plaintiff and delivery of possession of the property to the appellant/plaintiff.

10. On the pleadings of the parties, the following issues were framed in

the suit:

- “1. *Whether the plaintiff is the lawful owner of the suit property? OPP*
2. *Whether the defendants no.1 to 4 are the owners in possession of the suit property in their own right?OPD*
3. *Whether the suit has not been properly valued for the purpose of court fees and jurisdiction? OPD (Defendants no.1 to 4)*
4. *Whether the suit is time barred? OPD (Defendant no.5)*
5. *Whether the plaintiff is entitled to the relief of possession? OPP*
6. *Relief.”*

11. The Suit Court dismissed the suit, observing/finding/holding (a) that the appellant/plaintiff had no title document in his favour and the documents such as GPA, Agreement to Sell, Affidavit and Receipt of sale consideration do not constitute title to immovable property; the Wills executed by the respondents No.4&5 in favour of the appellant/plaintiff were of no avail since the respondents No.4&5 were alive; (b) that the appellant/plaintiff had not produced the originals of the GPA, Agreement to Sell, Wills etc. and had produced only photocopies and the only explanation tendered for not producing the originals was that the originals had been handed over to Roop Chand; (c) that no prudent person could hand over the originals to a property dealer, even if intended to sell the property; the said documents were thus not proved according to law; (d) that though the respondents No.1 to 3 and their mother Bhagwati had also not proved title to the property but since according to the appellant/plaintiff also, the respondents No.4&5 i.e. Pyara Singh and Amarjit Kaur were

owners of the property and the said defendants had not taken any action against the respondents No.1 to 3 and their mother Bhagwati, for recovery of possession of the property, the presumption was that the possession of the respondents No.1 to 3 and their mother Bhagwati, was lawful; (e) that issues No.3 & 4 were decided in favour of the appellant/plaintiff for want of evidence by the respondent/defendants; and, (f) that the appellant/plaintiff having not proved title to the property, were not entitled to recovery of possession thereof.

12. On First Appeal having been preferred by the appellant/plaintiff, the First Appellate Court in its judgment, though has set aside the finding of the said Suit Court, of the GPA, Agreement to Sell, Affidavit and Receipt etc. having not been proved, reasoning that the cancellation by the defendants No.4&5 of the GPA, Agreement to Sell and Wills etc. itself proves the execution of the documents, has held that the appellant/plaintiff had failed to prove that he was put in possession of the property or was at any time in possession of the property.

13. The counsel for the appellant/plaintiff has argued, that the possession of the appellant/plaintiff of the property which has been disbelieved by the First Appellate Court is abundantly proved from the Agreement to Sell which has been held to be proved and which records that possession of the property had been delivered by the respondent No.4&5 to the appellant/plaintiff. He has thus contended that the consistent orders of the Courts below of dismissal of suit are liable to be interfered with in second appeal.

14. On the aspect of substantial question of law, the counsel for the appellant/plaintiff draws attention to para 4 of the Memorandum of Appeal

where as many as seven substantial questions of law purportedly arising have been listed.

15. I have perused the purported substantial questions of law and enquired as to how they constitute questions of law lest substantial questions of law. The counsel for the appellant/plaintiff contends that the Question No.IV, as under is a substantial question of law:-

“IV Whether the respondents no.1 to 3 were having no right to possess the suit property and were rank trespassers and whether the appellant is required to prove absolute title in such cases.”

16. I am afraid, the aforesaid also does not qualify as a substantial question of law. Rather, the question as framed also, is purely a question of fact.

17. The counsel for the appellant/plaintiff then states that the Courts below have not appreciated the evidence correctly.

18. The same is contrary to the domain of the second appeal.

19. No substantial question of law arises.

20. As far as the contention of the counsel for the appellant/plaintiff, of the recital in the Agreement to Sell executed by respondents No.4&5 in favour of the appellant/plaintiff, of respondents No.4&5 having put the appellant/plaintiff in possession of the property alone constituting a proof of delivery of possession, is concerned, no merit is found therein also for the following reasons:

(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.

(D) The suit is admittedly not under Section 6 of the Specific Relief Act and is under Section 5 of the Specific Relief Act.

(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.

(H) From the cancellation of Agreement to Sell, GPA etc. by the respondents No.4&5, on the basis whereof the first Appellate Court has held the Agreement to Sell, GPA etc. to have stood proved, it appears that the respondents no.4&5 also were reneging therefrom. A cause of action for the appellant/plaintiff to sue for specific performance had thus accrued. The appellant / plaintiff however till date has not sued therefor.

(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.

21. The counsel for the appellant/plaintiff now also contends that the respondents no.1 to 3 also did not prove title in their favour.

22. There is no merit in the aforesaid contentions also.

23. The case of the respondents No.1 to 3 was not for trial in the suit; it was the case of the appellant/plaintiff which was for trial and which the appellant/plaintiff has failed to prove.

24. There is thus no merit in the appeal.

25. Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

JULY 04, 2018

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