

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

+ **RFA No. 857/2018**

% **16th October, 2018**

SHANKAR LAL

..... Appellant

Through: Mr. Sanjay Poddar, Sr.
Advocate with Mr. Shivam Goel,
Advocate (Mobile No. 9871339314).

versus

RAJINDER SINGHAL & ORS

..... Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 43446/2018 (for exemption)

1. Exemption allowed, subject to all just exceptions.

C.M. stands disposed of.

RFA 857/2018 and C.M. Appl. No. 43445/2018 (for stay)

2. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the trial court dated 18.07.2018 by which the trial court has dismissed the suit for possession and *mesne* profits

filed by the appellant/plaintiff with respect to the area shown in red colour in the site plan attached to the plaint which forms a part of the property bearing no. W-24, Okhla Industrial Area, Phase-II, New Delhi. When we look at the site plan, which is at page 97 of the appeal paper book, it is seen that the disputed portion is essentially about half of the basement and mezzanine floor and the portion above the mezzanine floor, which is called, the first floor.

3. The facts of the case are that the appellant/plaintiff pleads that the entire property W-24, Okhla Industrial Area, Phase-II, New Delhi was purchased with the joint funds of the father Sh. Ghasi Ram and his two sons Sh. Moti Lal and Sh. Shankar Lal (appellant/plaintiff herein). Between the father and the two sons, including the appellant/plaintiff, Sh. Shankar Lal, a compromise was entered into in a partition suit filed by Sh. Moti Lal. As per the Compromise Deed dated 11.01.1994, whereas 60% of the ground floor came to be owned by one son Sh. Moti Lal, 40% of the ground floor came to be owned by the other son i.e. the appellant/plaintiff, Sh. Shankar Lal. The father, Sh. Ghasi Ram, came to be the owner of the basement and the mezzanine floor of the property. The father, Sh. Ghasi Ram, is

pleaded to have executed a Will dated 21.03.1990 bequeathing portions of the ground floor and first floor to his two sons being Sh. Shankar Lal, the appellant/plaintiff, and Sh. Moti Lal, the other son. It was pleaded that the respondent/defendant took illegal and unauthorised possession of the disputed portions which had been bequeathed to the appellant/plaintiff, and the respondent/defendant also inducted a tenant in the basement portion and started realising rent. Hence, the subject suit for possession and *mesne* profits was filed with respect to the area shown in the red colour in the site plan Ex. PW1/10.

4. The suit was contested by the six defendants. It was pleaded in the written statement filed by the defendants that respondent no.6/defendant no. 6, Smt. Kamlesh Devi, who is the wife of respondent no.1/defendant no. 1, Sh. Rajinder Singhal, had purchased the disputed portion from the father, Sh. Ghasi Ram, in terms of the documentation dated 19.07.1996 including the Power of Attorney, Affidavit, Agreement to Sell etc. It was, therefore, pleaded that since respondent no.6/defendant no. 6 was the owner of the suit property, therefore, the suit for possession and *mesne* profits must fail.

5. After the pleadings were complete, the trial court framed issues and parties led evidence, and these aspects are recorded in paras 7-9 of the impugned judgment, w read as under:-

“07. On the basis of the pleadings of the parties vide order dated 25.07.2007 following issues were framed:-

1. Whether the suit is bad for non-joinder of legal heirs of deceased Ghasi Ram? **OPD 1 & 6.**
2. Whether the plaintiff has not come to the court with clean hands and has suppressed the material facts ? **OPD 1 & 6.**
3. Whether the suit is barred by limitation? **OPD 1 & 6.**
4. Whether this court has no pecuniary jurisdiction to entertain and try this suit? **OPD 1 & 6.**
5. Whether Sh. Ghasi Ram sold the suit property to the defendant no.6, if so, its effect? **OPD 1 & 6.**
6. Whether the plaintiff is owner of the suit property? **OPP.**
7. Whether the defendants no. 2 to 5 have been inducted in the suit premises by the defendants no.1 & 6. **OPP.**
8. Whether the plaintiff is entitled to mesne profits/damages, if so, at what rate and for what period? **OPP.**
9. Whether the plaintiff is entitled to interest, if so, at what rate? **OPP.**
10. Relief.

08. In order to prove his case plaintiff has examined 5 witnesses. PW-1 is the plaintiff himself who has exhibited certified copy of compromise Deed as Ex.PW1/1, the plan which was annexed with the said compromise is Ex. PW1/2. Statement of Moti Lal and plaintiff was Ex. PW1/3 and the Statement of Ghasi Ram was Ex.PW1/5, Decree sheet Ex. PW1/6, Will Ex. PW1/7, the plan along with the Will was Ex. PW1/8, Ex.PW1/9 was the original plan which was annexed with the will, site plan is Ex. PW1/10. PW2 had produced the record of the case titled as Moti Lal Vs. Ghasi Ram. PW-2 had produced the record of suit no. 130/93 titled as Moti Lal

Vs. Ghasi Ram PW-3 and 4 were summoned witnesses had produced the record pertaining to Will. PW-5 Smt. Gomti Devi was an attesting witness to the Will.

09. On the other hand defendant examined DW1 Rajinder Singhal, DW2 Anil Verma was summoned to produce the record with regard to cheque no. 36349. DW3 produced the record pertaining to CA no. 101879100. DW3 produced the Revenue record of plot no. 24.”

6. At this stage, it is required to be stated that the respondents/defendants proved the documentation dated 19.07.1996 as Ex.PW1/D1 to Ex.PW1/D7, executed by the father, Sh. Ghasi Ram, in favour of the respondent no. 6/defendant no. 6. It is also noted that in these documents, the father, Sh. Ghasi Ram, in his own handwriting, has made written endorsements that he has sold to the respondent no. 6/defendant no. 6, the basement and half portion of the ground floor along with the passage on the ground floor for ingress and egress.

7. The trial court has held that, in view of the compromise entered into between the parties dated 11.01.1994/Ex.PW1/1, the father was the owner of the disputed portion being the basement and the first floor of property bearing no. W-24, Okhla Industrial Area, Phase-II, New Delhi. The trial court has further held that the appellant/plaintiff cannot rely upon an earlier Will dated 21.03.1990 executed by Sh. Ghasi Ram because the later compromise between the

father and the sons in the court dated 11.01.1994 will supersede the Will. The Will shall operate after the lifetime of a person and during his lifetime, such a person, being Sh. Ghasi Ram in this case, can always enter into a contractual agreement to transfer whatever is owned by him, although the same may have been bequeathed in a different manner by the Will, as the Will would only come into operation after his lifetime. The trial court also held that the Compromise Deed/Ex.PW1/1 has to be read as a whole whereby the father was the owner of certain portion, and it is this portion which stood transferred to respondent no. 6/defendant no. 6 in terms of the compromise Ex.PW1/1 dated 11.1.1994. The trial court has further noted that the appellant/plaintiff in his cross-examination admitted that the documents Ex.PW1/D1 to Ex.PW1/D7 did bear the signatures of the father and that this set of documents have never been challenged by the appellant/plaintiff, and not even by the father, Sh. Ghasi Ram, in his life time. The trial court also notes that appellant/plaintiff does not state the month and year specific to when the respondents/defendants came into illegal possession of the disputed

portion. The relevant discussion of the trial court for rejecting the case of the appellant/plaintiff reads as under:-

“Both the issues are interconnected and are being taken up together. The onus to prove issue no. 5 was upon defendant no. 1 and 6 and the onus to prove issue no. 6 was upon the plaintiff. It is the case of the plaintiff that he became the owner of the suit property by virtue of a compromise pursuant to which a decree was passed, the said compromise deed has been exhibited as Ex. PW1/1. In the same breath he says that he is also become the owner by virtue of the Will executed by Ghasi Ram on 21.03.1990. He cannot claim ownership on the basis of two different sets of documents either he could claim ownership on the basis of the will or on the basis of Ex.PW1/1. When the compromise was arrived at in the year 1994 the Will which was executed in the year 1990 loses its value. Moreover the said Will has not been proved in accordance with law as PW-5, who is the attesting witness to the said Will has stated in her examination in chief stated that she cannot identify the signatures of Ghasi Ram and in the cross examination she admits that she had no knowledge about the contents of the Will Ex. PW1/7. She further admits that the said Will was not prepared in her presence. This being the factual position, it cannot be said that the plaintiff has derived any right on the basis of the said Will. The will thus has not been proved in accordance with law. He cannot sail in two boats for claiming ownership over the property. The plaintiff was unsatisfied with the Will and therefore he had filed a civil suit for partition in which compromise decree was passed. He thus cannot turn around and say that he is the owner by virtue of two set of documents i.e. will and Compromise Deed. Therefore, plaintiff cannot go beyond the compromise to claim title over the suit property. Subsequent to the compromise Ghasi Ram had sold the property to defendant no. 6 by virtue of Ex. PW1/D1 to ExPW1/D7 which clearly records the he had transferred his rights in the basement, 50% of ground floor including front courtyard. The site plan which has been exhibited in the compromise is exhibited as Ex.PW1/2. Half portion of the basement fell in the share of Ghasi Ram which he was entitled to Sell. There is no clarity from the site plan Ex. PW1/2 as to who was the owner of the other portion of basement, but if compromise deed Ex. PW1/1 is to be read as a whole it clearly records that portion A consisting of basement would fall in the share of Ghasi Ram. The compromise does not say that half of the basement has fallen in the share of Ghasi Ram. It records that basement has fallen in the share of Ghasi Ram. PW-1 in his cross examination has admitted that basement had fallen in the share of his father by virtue of the compromise. The compromise was never challenged by the plaintiff till date. As per the

compromise ground floor was divided into two portions at a ratio of 60:40. The 60% portion of the ground floor had fallen in the share of Moti Lal and 40% portion in favour of Shanker Lal. Plaintiff was not the owner of the basement, therefore, he cannot challenge the sale made by Ghasi Ram. He was also not the owner of ground floor portion which was sold to defendant no. 6. The portion which was sold by Ghasi Ram had fallen in the share of Moti Lal, who it seems had no grievance to such a sale. Ghasi Ram sold basement and half of the ground floor to defendant no. 6 by virtue of Ex. PW1/D1 to Ex.PW1/D7. Plaintiff in his cross examination admitted that documents bears the signatures of his father. These set of documents have not been challenged by the plaintiff. No suit was filed by the plaintiff seeking cancellation of these documents as null and void. Interestingly plaintiff does not say in his plaint the date, month, or year on which defendant no. 1 came into the possession of the property. The plaint in this regard is completely silent. No replication was filed by the plaintiff thereby controverting the averments made in the written statement to this effect. The validity of these documents were never challenged. Thus issue no. 5 is decided in favour of the defendant and issue no. 6 is decided against the plaintiff.”

(Underlining Added)

8. At this stage, the Compromise Deed dated 11.01.1994 entered into between the parties needs to be reproduced, since it appears that the appellant/plaintiff is unnecessarily taking advantage of the language in the said Compromise Deed by trying to confuse that the said portion sold to the respondent no.6/defendant no.6 was the mezzanine floor whereas what is being claimed by the appellant/plaintiff is the first floor. This Compromise Deed dated 11.01.1994 reads as under:-

“COMPROMISE DEED

The plaintiffs and defendants respectfully submits as under:-

1. That the parties to be above noted suit have compromised on the following grounds as under:-

a) That as per Panchayat compromise dated 28.11.1984 the Portion 'C' as shown in the site plan filed herewith shall exclusively belong to plaintiff No.1 i.e. Shri Moti Lal and the portion bearing ground floor i.e. 60.1.

b) That the portion 'B' as shown in the site plan shall exclusively belongs to the plaintiff No. 2 i.e. Shri Shankar Lal and the portion bearing ground floor i.e. 40.1.

c) **That the portion 'A' and 'A-1' as shown in the site plan shall belongs to the defendant, father of the plaintiffs i.e. Sh. Ghasi Ram and the portion shall consist of Basement and Mezzanine Floor.**

d) That the said Factory bearing No. W-24, Okhla Industrial Area, Phase-II, New Delhi has been purchased by the joint funds of the family i.e. plaintiffs and the defendants.

e) That the defendant shall not interfere and dispossess forcibly the peaceful possession of the portions of the plaintiffs and similarly the plaintiff will not interfere and dispossess the defendant forcibly.

f) That the plaintiffs shall pay 33% of the House Tax i.e. Sh. Shankar Lal and Sh. Moti Lal to the defendant and who shall deposit the same to the said Departments and similarly the water and electricity bills would be paid in the ratio of 33% by the plaintiffs and the defendant excluding income tax, sales tax and other Government dues and also independent loans taken by the plaintiffs or the defendant. All other shall be borne by the plaintiffs and the defendant exclusively by themselves.

g) That the plaintiffs from now onwards shall pay the 33% of the House tax, water and electricity bills to the defendant as the plaintiffs are having their independent business and so they are having their independent income tax assessment sales tax and other Government Departments dealings separately.

In view of the above compromise deed, the compromise. decree be passed.

Plaintiff No. 1 & 2 & Deft.

Through

Delhi
Advocates

Dated:: 11/1/94"

(Emphasis Supplied)

9(i). A reading of the aforesaid Compromise Deed shows that all that existed at the time this Compromise Deed was entered into between the two sons and the father was the basement, the ground floor and the mezzanine floor i.e. a floor above the ground floor. Whereas the two sons being the appellant/plaintiff (Sh. Shankar Lal) got 40% of the ground floor, the other son, Sh. Moti Lal, got 60% of the ground floor. The father got the basement as well as the mezzanine floor, and these aspects are clear from paragraphs 'a)' to 'c)' of the Compromise Deed. The further portion of the Compromise Deed shows that except the aforesaid constructed portions of the basement, ground floor and the mezzanine floor, no other construction existed when the compromise deed was entered into between the father and two sons and infact the further paragraphs of the compromise deed show that effectively one third rights each in the suit property vested with Sh. Ghasi Ram and his two sons, Sh. Shankar Lal, the respondent/plaintiff and Sh. Moti Lal, the other son.

9(ii). Admittedly, as per the documents Ex.PW1/D1 to Ex.PW1/D7, the father, Sh. Ghasi Ram, in his own handwriting has mentioned the factum of his selling the basement and half of the ground floor to respondent no.6/defendant no.6. To the extent of respondent no.6/defendant no.6 becoming the owner of half of the basement is concerned, the same cannot be disputed by the appellant/plaintiff.

10(i). The two endorsements in hand by Sh. Ghasi Ram on the documentation Ex.PW1/D1 to Ex.PW1/D7, shows that the respondent no.6/defendant no.6, besides the basement, also got ownership of half of the ground floor alongwith the passage on the same ground floor. In reality, since Sh. Ghasi Ram was not the owner of the ground floor, as this ground floor vested with his two sons in the ratio of 60:40, 60% vesting with Sh. Moti Lal and 40% vesting with the appellant/plaintiff, actually what was meant by the description of the property sold in terms of the documentation Ex.PW1/D1 to Ex.PW1/D7 and as purchased by the respondent no.6/defendant no.6 was infact the mezzanine floor, and this portion is sometimes confused as the ground

floor because the mezzanine floor is actually not the first floor but is a floor between the ground and the first floor.

10(ii). As per Section 8 of the Transfer of Property Act, 1882, every transfer has the effect of transferring whatever a person could transfer. The father, Sh. Ghasi Ram, could have transferred the basement and the mezzanine floor, and therefore, the documentation Ex.PW1/D1 to Ex.PW1/D7 must necessarily be read as the respondent no.6/defendant no.6 having received from Sh. Ghasi Ram the ownership of half of the basement and half of the mezzanine floor, the latter being described as the ground floor in the documentation Ex.PW1/D1 to Ex.PW1/D7. The provision of Section 95 of the Evidence Act, 1872 has been made for this very reason and this Section provides that when the language used in a document is plain in itself but is unmeaning in reference to the existing facts, then such evidence can be given to show that the language in the document was used in a peculiar sense. Section 95 of the Evidence Act reads as under:-

“95. Evidence as to document unmeaning in reference to existing facts.—When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.”

11. Therefore, in view of Section 95 of the Evidence Act, the expression 'half of ground floor' used in the documentation Ex.PW1/D1 to Ex.PW1/D7 will necessarily have to be read as the mezzanine floor portion. In fact, the mezzanine floor will include any area even above the mezzanine floor because at the stage when the Compromise Deed dated 11.01.1994 was entered into, there only existed a constructed building upto the mezzanine floor and once the mezzanine floor is sold, the portion falling above the mezzanine floor would also fall to the person who receives ownership of the mezzanine floor, such person being the respondent no.6/defendant no.6 in the present case.

12. A reference to the site plan filed with the plaint shows that the appellant/plaintiff by the suit seeks half of the basement, portion of the mezzanine floor, and the portion above the mezzanine floor. Thus, the appellant/plaintiff is seeking possession of that portion of the property which was already sold by the father Sh. Ghasi Ram under the Compromise Deed dated 11.01.1994 to the respondent no.6/defendant no.6 in terms of the documentation dated 19.07.1996 being Ex.PW1/D1 to Ex.PW1/D7.

12. Conclusively, it is seen that the appellant/plaintiff is acting clever because he is seeking an unfair benefit by relying on a confusion in language of the documentation dated 19.07.1996 executed by the father, Sh. Ghasi Ram, in favour of respondent no.6/defendant no.6. However, this sort of smartness is taken care of by the Legislature by bringing in the provision of Section 95 of the Evidence Act and which has to be read with Section 8 of the Transfer of Property Act, as already discussed above.

13. There is no merit in the appeal and the same is hereby dismissed.

OCTOBER 16, 2018

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VALMIKI J. MEHTA, J