

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

% **Date of decision: 27th September, 2018**

+ **RSA 342/2015**

SHAKUNTLA DEVI & ORS

..... Appellants

Through: Mr. Sanjeev Anand and Mr. Varun K.
Bala, Advs.

Versus

DEV ANAND & ANR

..... Respondents

Through: R-1 in person.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 2nd July, 2015 in RCA No.06/12 (Unique ID No.02401C0237222012) of the Court of Additional District Judge (Central)] of dismissal of First Appeal preferred by the three appellants namely (i) Shakuntala Devi, (ii) Mukesh, and (iii) Dinesh against the judgment and decree [dated 25th April, 2012 in Suit No.15/96 of 1987 of the Court of Additional Senior Civil Judge] allowing the suit filed by the respondent no.1/plaintiff for recovery of possession of immovable property and for *mesne* profits.

2. This appeal came up before this Court first on 16th September, 2015 when notice thereof was ordered to be issued without recording any satisfaction that the same entailed any substantial question of law and without framing any substantial question of law, and *status quo* with regard to possession of the subject immovable property was ordered to be maintained. The said interim order was confirmed on 6th March, 2017. Vide order dated 20th July, 2016, Trial Court record was requisitioned and Suit

court record and the First Appellate Court record has been received. The appeal has since been adjourned from time to time. In none of the subsequent orders also, any satisfaction of the appeal entailing any substantial question of law has been recorded and no substantial question of law has been framed.

3. Supreme Court, in ***Surat Singh Vs. Siri Bhagwan*** (2018) 4 SCC 562 and ***Vijay Arjun Bhagat Vs. Nana Laxman Tapkire*** 2018 SCC OnLine SC 518 has held that a Second Appeal cannot be entertained and notice thereof also cannot be issued without the High Court framing a substantial question of law.

4. For the aforesaid reason, though the counsel for the respondents has not appeared inspite of passover, but the counsel for the appellants/defendants has been heard and the records perused. The respondent no.1/plaintiff however appears in person.

5. The respondent no.1/plaintiff instituted the suit, from which the present appeal arises, as far back as on 24th September, 1987, pleading (i) that the respondent no.2/defendant, in or about December, 1980, had represented to the respondent no.1/plaintiff that land measuring 400 sq. yds. forming part of Khasra No.64/4/2 and 5 situated in Village Palam, Abadi Raj Nagar, Palam Colony, New Delhi was owned jointly by the respondent no.2/defendant and his late brother Hari Om Sharma; that Hari Om Sharma had since died leaving the appellants/defendants as his wife and children; that in an oral partition between the respondent no.2/defendant on the one hand and the appellants/defendants on the other hand, all the joint properties were partitioned and in which partition, a piece of land measuring 201 sq. yds. forming part of Khasra No.64/4/2 and 5 in Village Palam, Abadi Raj

Nagar, Palam Colony, New Delhi fell to the share of the respondent no.2/defendant and the respondent no.2/defendant was the exclusive owner thereof and desirous to sell the same; (ii) that on the respondent no.1/plaintiff agreeing to purchase the property aforesaid, the respondent no.2/defendant, on 18th December, 1980, executed an Agreement to Sell in favour of the respondent no.1/plaintiff against the receipt of entire sale consideration and delivered possession of the property in part performance of the Agreement to Sell; the respondent no.2/defendant also executed General Power of Attorney, Special Power of Attorney, receipt, affidavit etc. with respect to the said 201 sq. yds. of land in favour of the respondent no.1/plaintiff; (iii) that the respondent no.1/plaintiff constructed a boundary wall around the said land and was in possession of the said land; however, the residence of the respondent no.1/plaintiff was at a distance of 15 k.m. from the said land; (iv) that when the respondent no.1/plaintiff visited the said land on 24th August, 1987, he found that the lock on the gate to the land had been broken and the appellants/defendants had trespassed over the said land; and, (v) that the respondent no.1/plaintiff approached the Police but possession could not be recovered. Hence the suit for recovery of possession and *mesne* profits.

6. The counsel for the appellants/defendants has argued, (i) that the respondent no.2/defendant supported the claim of the respondent no.1/plaintiff; (ii) that the appellants/defendants contested the suit claiming that the respondent no.2/defendant, vide Agreement to Sell, Power of Attorney etc. all dated 27th April, 1987, agreed to sell the said 201 sq. yds. of land to the appellants/defendants and also executed Power of Attorney etc. with respect to the said land in favour of the appellants/defendants and denying Agreement to Sell of the year 1980 in favour of the respondent

no.1/plaintiff; that the respondent No.2/defendant, in pursuance to the Agreement to Sell dated 27th April, 1987, handed over possession of the property to the appellants/defendants; (iii) that the respondent no.2/defendant denied the Agreement to Sell etc. of 27th April, 1987 in favour of the appellants/defendants; (iv) that the suit was allowed in the year 2004; (v) that the appellants/defendants preferred First Appeal and after getting demarcation done of the property, also applied for amendment of the written statement to plead that the subject land was not situated in Khasra No.64/4/2 and 5 but in Khasra No.68/24; (vi) that the First Appellate Court allowed the application for amendment and resultantly also allowed the First Appeal and remanded the suit for decision afresh, after framing an issue on the plea taken by way of amendment; (vii) that the parties thereafter led further evidence; (viii) that the Suit Court however, vide judgment dated 25th April, 2012, again allowed the suit for possession and *mesne* profits; (ix) that the First Appellate Court, vide impugned judgment, has dismissed the appeal of the appellants/defendants agreeing with the findings of the Suit Court; and, (x) that there is animosity between the appellants/defendants and the respondent no.2/defendant and they have been embroiled in several litigations with respect to other properties.

7. I have enquired from the counsel for the appellants/defendants, whether the Agreement to Sell and other documents dated 27th April, 1987 set up by the appellants/defendants are also with respect to land in Khasra No.64/4/2 and 5 or with respect to Khasra No.68/24.

8. The counsel for the appellants/defendants states that the documents in favour of the appellants/defendants are also with respect to Khasra No.64/4/2

and 5 .

9. I have further enquired from the counsel for the appellants/defendants that if that is so, what was the necessity of the additional issue got framed “whether the property is situated in Khasra No.64/4/2 and 5 or in Khasra No.68/24? OPD 2 to 4”.

10. The counsel for the appellants/defendants states that it was the claim of the appellants/defendants that since the land in possession of the appellants/defendants was in Khasra No.68/24, the suit for recovery of possession of Khasra No.64/4/2 and 5 was not maintainable.

11. I may at this stage record that the consistent findings of the Suit Court and the First Appellate Court are of the appellants/defendants having not been able to prove that the subject land was in Khasra No.68/24.

12. The counsel for the appellants/defendants states, that Khasra No.68/24 is also jointly owned by the appellants/defendants and the respondent no.2/defendant. However he admits that the same has not been proved.

13. I have next enquired from the counsel for the appellants/defendants, whether the *inter se* litigation between the appellants/defendants and the respondent no.2/defendant is of prior to 1987 or post 1987.

14. The counsel for the appellants/defendants states that it is of post 1987. However, on being informed that he will be held responsible for the statement, the counsel on enquiry from the appellant no.2 Mukesh Sharma present in Court states that there was a litigation *inter se* appellants/defendants and respondent no.2/defendant in 1980 and the disputes arose immediately thereafter.

15. I have further enquired from the counsel for the appellants/defendants that if the appellants/defendants and the respondent no.2/defendant, since prior to 1987 were in litigation, how it can be believed that the respondent no.2/defendant, on 27th April, 1987, executed Agreement to Sell etc. in favour of the appellants/defendants.

16. The counsel for the appellants/defendants now again changes his stand and states that the *inter se* litigation is of post 1987.

17. Such conduct is not understandable. In response, the counsel for the appellants/defendants states that though there is *inter se* litigation but there is nothing on record as to when the said litigation commenced.

18. The counsel for the appellants/defendants has also contended that since the suit was for recovery of possession on the basis of title and the Agreement to Sell etc. do not constitute title, the suit could not have been allowed.

19. The suit, as aforesaid, was on the basis of title as well as on the basis of prior possession, as is permissible under Section 5 of the Specific Relief Act, 1963 read with Article 64 of the Schedule to the Limitation Act, 1963. The appellants/defendants, by claiming to have agreed to purchase the subject land from the respondent no.2/defendant, admit title and possession of the respondent no.2/defendant of the subject land. Once the respondent no.2/defendant has claimed that he, in pursuance to Agreement to Sell, had delivered possession to the respondent No.1/plaintiff, there is no reason for this Court to, in Second Appeal, interfere with the consistent findings of facts arrived at by the Suit Court and by the First Appellate Court.

20. Even otherwise, in the entire arguments, the counsel for the

appellants/defendants has been unable to state the substantial question of law if any which the Second Appeal entails.

21. Resultantly, there is no merit in the appeal.

22. Dismissed.

23. No costs.

24. The Suit Court record and the First Appellate Court record be sent back forthwith.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 27, 2018

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