

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

+ **RFA No. 63/2019**

% **28th January, 2019**

VISHNU DUTT SHARMA Appellant

Through: Mr. Sunil Lalwani, Advocate
(9891880710)

versus

KASHMIRA & ORS. Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No. 3501/2019 (Exemption)

1. Exemption allowed subject to just exceptions.

CM stands disposed of.

CM No. 3502/2019 (delay in re-filing)

2. For the reasons stated in the application, delay in re-filing is
condoned, subject to just exceptions.

CM stands disposed of.

RFA No. 63/2019

3. 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 08.05.2018 by which the trial court has dismissed the suit for possession, damages and permanent injunction filed by the appellant/plaintiff with respect to the floors over the ground floor of Shop No. 1531/28, Nai Walan, Karol Bagh, Delhi. At this stage itself, it may be noted that the appellant/plaintiff does not claim ownership of the shop on the ground floor bearing no. 1531/28. Also, and admittedly, the adjacent property no. 1532/28 is owned by the appellant/plaintiff and the floors above the property no. 1532/28 are not claimed by the respondents/defendants to become part of property no. 1531/28. In other words, the appellant/plaintiff claims that not only the floors above the property no. 1532/28 are the floors of property no. 1532/28, but that even the floors above the ground floor shop no. 1531/28 are alleged not to be the floors of property no. 1531 but a part of the property no. 1532/28.

4. The facts which emerge on record are that the respondents/defendants are successors-in-interest of Sh. Parmanand

Sharma and Sh. Gajan Ram Sharma. Admittedly, the ground floor of Shop no. 1531/28 was purchased by Sh. Parmanand Sharma and Sh. Gajan Ram Sharma in terms of the Agreement to Sell dated 03.11.1979. The appellant/plaintiff pleads that the floors above Shop no. 1531/28 did not form a part of the property no. 1531/28 and these floors being first floor and above floor/portions were not owned by Sh. Parmanand Sharma and Sh. Gajan Ram Sharma but by the appellant/plaintiff.

5. The respondents/defendants contested the suit and denied that the first floor, second floor and the portion above the second floor, falling above Shop no. 1531/28 on the ground floor were not owned by them. It is pleaded by respondents/defendants that their predecessors-in-interest, Sh. Gajan Ram Sharma and Sh. Parmanand Sharma had purchased the shop on the ground floor being no. 1531/28 and portions/floors above thereof from Sh. Som Dutt Sharma, Sh. Daya Shankar Sharma, Sh. Rudar Dutt Sharma and Sh. Vidya Dutt Sharma in terms of the Agreement to Sell dated 03.11.1979. It was pleaded that the respondents/defendants had always been in ownership and possession of the floors above the ground floor property/Shop no.

1531/28. The respondents/defendants denied that the mother of the appellant/plaintiff had permitted the floors above Shop no. 1531/28 to be used only during Diwali and that thereafter the respondents/defendants and their predecessors-in-interest continued and remained in illegal possession on the floors above the ground floor of property no. 1531/28.

6. After the pleadings were complete, the trial court framed the following issues:-

1. Whether the suit is barred by limitation as alleged in the preliminary objection no.6 of the written statement? OPD
2. Whether the suit is not properly valued for the purposes of court fees and jurisdiction as alleged in the preliminary objection no.7 of the written statement? OPD
3. Whether the plaintiff is the owner of the suit property comprising first floor, second floor and third floor with terrace rights shop bearing no. 1531/28, Naiwala, Karol Bagh, New Delhi-110 005 as shown in the blue colour in the site plan? OPP
4. Whether the plaintiff is entitled for the decree of possession as prayed for? OPP
5. Whether the plaintiff is entitled for the recovery of damages/mesne profit, if yes, then at what rate and for what period? OPP
6. Whether the plaintiff is entitled for the decree of permanent injunction as prayed for? OPP
7. Relief.”

7. The evidence which has been led on behalf of the parties is recorded in paras 14 to 18 of the impugned judgment and these paras read as under:-

"Evidence of plaintiff"

14. Plaintiff examined himself as PW-1 and tendered his affidavit in examination-in-chief as Ex. P1 and relied upon following documents:-

1. Death Certificate of Inderman Sharma as Ex. PW1/1
2. Relinquishment Deed dated 07.12.1979 as Ex. PW1/2
3. Death Certificate of Shakuntla Sharma as Ex. PW1/3
4. Registered Relinquishment Deed dated 10.02.2006 as Mark A
5. Death Certificate of Saroj Bala as Ex. PW1/5
6. NOC in favour of plaintiff as Mark B
7. Site Plan as Ex. PW1/7
8. Agreement to Sell dated 03.11.1979 as Ex. PW1/8
9. Legal Notice dated 05.08.2005 as Ex. PW1/9
10. Complaint dated 21.12.2005 to SHO, Karol Bagh as Ex. PW1/10
11. Complaint dated 04.01.2006 to SDM, Karol Bagh as Ex. PW1/11
12. Reply filed by the defendants as Ex. PW1/12
13. Rejoinder as Mark D (Ex. PW1/X)
14. House Tax Receipts as Mark A to Mark H
15. Reply of MCD dated 25.05.2007 as Ex. PW1/18
16. Reply of MCD dated 31.07.2007 as Ex. PW1/19
17. Photographs of suit property as Mark I
18. Copy of Passport of Ranjeet Kumar as Ex. PW1/D1
19. Copy of Passport of Gajan Ram as Ex. PW1/D2
20. Copy of Ration Card of Gajan Ram as Ex. PW1/D3
21. Copy of Election Card of Ranjit Kumar as Ex. PW1/D4
22. Copy of Ration Card in the name of Ranjit Kumar as Ex. PW1/D5
23. Site Plan Ex. PW1/D6

He was cross examined by the defendants.

15. Plaintiff examined Sh. Rajbir, Licensing Clerk, Health Department, MCD, Karol Bagh as PW-2 and proved the attested copies of record Ex. PW2/1 (colly.) He was cross examined. Sh. Satyapal, Record Attendant, Department of Delhi Archives was examined as PW-3 who produced Release Deed dated 07.12.1979, Agreement to Sell dated 05.11.1979 registration no. 4659, Agreement to Sell dated 05.11.1979 registration no. 4660 and Lease Deed dated 09.08.1965 and proved the same as Ex. PW3/1 to Ex. PW3/4 respectively. He was cross examined. Sh. O.P. Dahiya, Zonal Inspector, MCD Office was examined as PW-4 and proved the document dated 25.05.2007 as Ex. PW4/1 and document dated 31.07.2007 as Ex. PW4/2. He was cross examined.

16. Plaintiff also examined Sh. Rajesh Kumar witness from Sub Registrar Office as PW-5 who produced and proved the death certificate of Inderman Sharma as Ex. PW5/A. Sh. Rambir witness from Sub Registrar Office III was examined as PW-6 who produced and proved the Relinquishment Deed dated 10.02.2006 as Ex. PW6/A. He was cross examined. Sh. Rajender Prasad from the House Tax Department was examined as PW-7 who produced the receipt bearing no. 745052 and proved the same as Mark B-3 and proved the House Tax Receipt bearing no. 576031 as Mark B-7. He was cross examined.

17. Plaintiff also examined Sh. Randhir Kumar Sharma as PW-8 who tendered his affidavit in examination-in-chief as Ex. PW8/A. He was cross examined by the defendants. Thereafter, plaintiff closed his evidence.

Evidence of defendants

18. Defendant no. 3 examined himself as DW-1 who tendered his affidavit in examination-in-chief as Ex. DW1/A. He was cross examined by the plaintiff. Thereafter defendants closed their evidence."

8. The trial court has held (and consequently dismissed the suit) that the floors above the property/Shop no. 1531/28 can only and in fact only form a part of the property no. 1531/28. The trial court notes that the appellant/plaintiff did not dispute that Shop no. 1531/28

was purchased by the predecessors-in-interest of the respondents/defendants in terms of the Agreement to Sell dated 03.11.1979 . The trial court has also found, as a fact, that there are no documents filed and proved nor any evidence led on behalf of the appellant/plaintiff by which the appellant/plaintiff claims ownership of any property bearing no. 1531/28. The trial court has also noted that the documents relied upon by the appellant/plaintiff being the Release Deed dated 07.12.1979 (Ex.PW3/1) and the Lease Deed dated 29.04.1965 (Ex.PW3/4) admittedly did not pertain to property no. 1531/28 but pertained to property no. 1532/28. The trial court has further noted that it is not the case of the appellant/plaintiff as per the plaint and nor is such evidence led that the portion above Shop no. 1531/28 bears no. 1532/28. The trial court has importantly noted that the property no. 1532/28 which is claimed in ownership by the appellant/plaintiff as per the site plan filed by the appellant/plaintiff being Ex.PW1/7, is in fact separately shown and is situated behind property no. 1531/28. The trial court has finally noted that in the Legal Notice dated 05.08.2005/Ex.PW1/9 sent by the appellant/plaintiff to Smt. Kaushalya Devi wife of Sh. Gajan Sharma Ram (wrongly written as Jagan Nath), being the defendant no.4 in the suit, the appellant/plaintiff

did not at all claim any rights to the shop no. 1531/28 nor the areas above Shop no. 1531/28 but by the Legal Notice the appellant/plaintiff only questioned that there existed no documents (as per the appellant/plaintiff) to show that the respondents/defendants were owners of the area above Shop no. 1531/28. The relevant portions of the judgment of the trial court in this regard, containing the appropriate discussion and reasoning, are paras 21 and 24 to 29 and these paras read as under:-

"21. From the pleadings and examination-in-chief of the plaintiff it can be seen that as per plaintiff predecessors-in-interest of the defendants purchased the shop No. 1531/28 which consisted of shop on ground floor and room thereon which was connected to the first floor. Said purchasers were in possession of the shop on ground floor. Plaintiff is silent who was in possession of the room on the said shop and first floor thereon which was connected through the room above the shop. Though plaintiff deposed that he was carrying out his business and residing in the remaining portion alongwith his family but it is not clear whether he was referring to the said room above the shop and first floor connected through said room or if he is referring to another property. If he meant rooms above the shop then it is not clear in which portion he was residing and from which portion he was carrying out his business. It is also not clear whether he was accessing the said upper portion through the shop or by way of independent way. It is also not clear in what capacity he was occupying the said upper portions. He claims that his father was owner of the portion above the shop No. 1531/28 but how his father was the owner of the said portion has neither been pleaded in the plaint nor has been deposed in examination-in-chief by the plaintiff. Similarly, not a single recognised document of title in respect of the suit property i.e. portion above the shop No. 1531/28, in favour of plaintiff's father has also been placed or proved on record.

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24. Perusal of the Release Deed Ex PW3/1 which is in favour of the mother of the plaintiff, shows that the same is in respect of property No. 1532/28, Naiwala, Karol Bagh, Delhi whereas it is not the case of plaintiff either in his plaint or in his examination-in-chief

that portions above the shop No. 1531/28 bears property No. 1532/28. Hence, Release Deed Ex PW3/1 is of no use to the plaintiff to prove his ownership in respect of the suit property. Further agreement to sells Ex PW3/2 and Ex PW3/3 are in favour of predecessors-in-interest of the defendant and are in respect of shops No. 1530/28 and 1531/28 Naiwala Karol Bagh, Delhi. Lease Deed dt. 29th April 1965 Ex PW3/4 favouring Shatrughan, Inderman and Bharat Singh, All sons of Bikram Singh, is in respect of a plot of Nazul land containing by admeasurement 117 sq. yds. bearing Khasra No. 896 Plot No. __, situated in Block No. E of Naiwala, Delhi.

25. In the release deed Ex PW3/1 it is mentioned that property bearing municipal No. 896, Khatauni No. 218, Khata No. I, measuring 117 sq. yds. stands in the name of Sh. Inderman Sharma, Shri Shatrughan Sharma and Sh Bharat Singh. It is further mentioned that Inderman was owner to the extent of 1/3rd share in the said property. It is further mentioned that releasee had become absolute and exclusive owner to the extent of 1/3rd (undivided) share in the property bearing No. 1532/28 Naiwala, Karol Bagh, New Delhi. Thus the Lease Deed Ex PW3/4 is in respect of property bearing No. 1532/28. and not in respect of property bearing No. 1531/28. It also necessarily leads to the conclusion that Shatrughan and Bharat Singh each were also co-owner to the extent of 1/3rd share in the property No. 1532/28, Naiwala, Karol Bagh. Interestingly plaintiff himself mentions to be resident of 1532/28, Naiwala, Karol Bagh, Delhi.

26. Ex PW4/1 and Ex PW4/2 are in fact reply under RTI sent by MCD to the plaintiff but same is not serving the purpose of the plaintiff so far as his ownership of the upper portion of the property No.1531/28 is concerned. Similarly, house tax receipts Mark B-1 to B - 12 are in respect of property No. 1532/28, 1546/28 and 1547/28 Naiwala, Karol Bagh, Delhi. These documents are also of no help to plaintiff to prove that he is owner of the upper portion of property No. 1531/28. Relinquishment Deed dt 10.02.2006 Ex PW6/A is also in respect of property No.1532/28 and not in respect of portion above the shop No. 1531/28.

27. Neither it is the case of the plaintiff nor is there any evidence on record to suggest that portion above the shop No. 1531/28 bears No.1532/28. Admittedly, 1532/28 is situated behind 1531/28 as shown in the site plan Ex PW1/7. Ld. Counsel for plaintiff did argue that the upper portion of shop No. 1531/28 forms part of property No.1532/28 but he could not show such stand from pleadings nor could he show any evidence from the record which could support his stand. No doubt witness of the plaintiff PW8 Randhir Kumar Sharma did

attempt to convey that portion above the shop No.1531 is part of property No.1532 when he in his examination-in-chief deposed that *"the possession of the property above shop i.e. No. 1532/28, Naiwala, Karol Bagh, New Delhi - 110005, was always with the family of the plaintiff"*. However, if his this part of the testimony is read correctly he mean to say portion above the shop No.1532/28 and not portion above the shop No. 1531/28. In the last part of his examination-in-chief PW8 deposed that *"the shop which belong to the defendant is only No.1531/28, Naiawala, Karol Bagh, New Delhi-110005 whereas the room and construction thereon forms part of property No.1532/28, Naiwala, Karol Bagh, New Delhi - 110005"*. But it is well settled law that any evidence which is beyond pleading cannot be taken into consideration. Since it was never the case of the plaintiff that portion above the shop No. 1531/28 bears No. 1532/28, hence, testimony of PW8 to that extent cannot be considered at all. Though plaintiff has been able to prove that he is owner of property bearing No.1532/28 but he failed to prove that portion above the shop No.1531/28 bears property No. 1532/28 and thus he failed to prove that he is owner of the portion above the shop No.1531/28, Naiwala, Karol Bagh, Delhi.

28. Besides above falsity if plaintiff's case gets exposed from the contents of his legal notice dt 5.08.2005 Ex PW1/9 sent to Kaushalya Devi, W/o Jagan Nath. Sh. Jaganath as per plaintiff himself was one of the purchaser of Shop No. 1531/28 on 3.11.1979. Relevant portion of the notice is quoted here under:-

"1. That my client is the owner of property No. 1632/28 Niawal Karol Bagh, New Delhi being legal heirs of late Shri Inder Man Sharma. My client inherited all his rights in the property and other co-owners have already sold their shares in the property in question.

2. That you purchased shop No. 1531/28, Naiwala, Karol Bagh, New Delhi -5 on the ground floor shop, you have been claiming of having purchased the entire ground floor shop with terrace as when my client enquire about the documents you had always misguided my client.

3. That some days my learnt that you have purchased the property in question some where in the year i.e. 3.11.1979. My client thereafter got the search done in the office of SR Asaf Ali Road, New Dlh and it was only then he could lays his hand on agreement to sell in favour of Shri Jagan Nath Sharma and Shri Parmanand on dated 3.11.1979.

4. That my client is shocked that you have purchased ground floor i.e. shop No. 1531/28, Naiwala Karol Bagh, New Delhi-5

and committed fraud, thereby extending your shop to the upper portion.

5. That my client has not been able to trace any title document in your favour in respect of the upper portion of the shop No. 1531/28 Naiwal Karol Bagh, New Delhi.

6. That moreover my client is the owner of the said property it seems that you have played a calculated fraud with the motive to cause wrongful loss to my client and wrongful gain to yourself.

7. That your said act amount to a criminal offence of cheating and misappropriation of the property to your own use."

29. Thus, it can be seen that in the notice Ex PW1/9 plaintiff did not claim himself to be the owner of the portion above the shop No.1531/28 nor has he set up the story that Shri Parmamand approached mother of the plaintiff and with her permission raised construction over the shop after demolishing old portion and then sought possession of the upper portion for the purpose of diwali festival etc. as stated in the plaint. From the contents of the notice Ex PW1/9 it is clear that plaintiff concocted a false story to file the present suit. In any case plaintiff has failed to prove that he was/is the owner of the portion above the shop No. 1531/28, Naiwala, Karol Bagh, Delhi.

Hence, in view of the above discussion issue No. 3 is decided against the plaintiff and in favour of the defendants."

(Underlining Added)

9. No argument have at all been raised on behalf of the appellant/plaintiff which can in any manner upset the abovestated valid reasoning and conclusions given by the trial court. Once area above the property no. 1532/28 forms part of 1532/28 of which ownership is claimed by the appellant/plaintiff and because of floors above 1532/28 falling in property no. 1532/28, then there is no reason why the floors above the shop no. 1531/28 would not form part of the property no.

1531/28 but would mysteriously become property no. 1532/28 as claimed by the appellant/plaintiff. Also, there cannot be any doubt that the area above property no. 1531/28 cannot be a part of 1532/28 because in the site plan filed by the appellant/plaintiff himself, property no. 1532/28 is shown behind property no. 1531/28.

10. In view of the aforesaid discussion, there is no merit in the appeal. Dismissed. All pending applications are also disposed of.

JANUARY 28, 2019/ib

VALMIKI J. MEHTA, J

