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

Date of decision: 11th March, 2020

+ **RSA 51/2020, CM APPL. 9271/2020 & CM APPL. 9272/2020**

MUKESH SHARMA Appellant

Through: R.K. Burman, Advocate.
versus

SWARN LATA THUKRAL & ORS Respondents

Through: None.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J (Oral)

1. The present is a regular second appeal challenging the decree of possession and damages dated 1st October, 2019 and the order in appeal dated 5th February 2020, upholding the said decree.
2. A suit for recovery of possession and damages was filed by the Plaintiff - Mr. Ramesh Thukral (*through LR's who are the Respondents herein - collectively referred to as 'Plaintiff'*) against Mr. Mukesh Sharma - the Appellant herein/Defendant (*hereinafter 'Defendant'*). The case of the Plaintiff is that the premises bearing no. 105, Desh Bandhu Gupta Market, New Delhi was originally owned by one Mr. Durga Dass Khanna who then executed a sale deed dated 18th February, 1970 through the General Power of Attorney holder - Mr. Gurditta Mal in favour of the Plaintiff - Mr. Ramesh Thukral. Thus, the Plaintiff became owner of the property. The case of the Plaintiff was that the Defendant's father was originally an employee of the previous owner. Despite repeatedly seeking possession, the

same was not handed over. A legal notice was issued on 20th June, 2001 which was thereafter followed up with the suit. The prayer in the suit was as under:

“It is, therefore, most respectfully prayed that this Hon'ble Court may kindly pass a decree of possession in favour of the plaintiff and as against the defendant in respect of shop no. 105, Desh Bandhu Gupta Market, Karol Bagh, New Delhi as is more clearly shown in site plan annexed to the plaint and vacant and peaceful possession of the same be delivered to the plaintiff.

It is further prayed that a decree of future damages/mesne profits be passed in favour of the plaintiff and as against the defendant @ Rs.2000/- per month from the date of institution of the suit and till delivery of the possession. The costs of the suit be awarded to plaintiff.

Any other or further order that this Hon'ble Court may deem just fit and proper be made in favour of plaintiff and against the defendant”

3. In the written statement, the stand of the Defendant was that the Defendant is the owner by way of adverse possession. Paragraph 4 of the written statement is relevant and is set out below:

“4. That without prejudice to the above, it is submitted that the suit of the Plaintiff is hopelessly barred by time and same is liable to be dismissed with heavy costs. It is submitted that the Defendant and his family members etc. through his predecessor in interest and themselves have been in physical possession and in occupation of the shop in question for the last about four decades and the Defendant and his family members etc. have become the owners thereof by adverse possession. The possession of the Defendant and his family members and their predecessor is

hostile and well within the knowledge of the actual owner of the said shop and the said owner is not seen for the last many years. It is submitted that the Defendant and his family members have been in occupation of the shop in question since the year 1992 as the father of the Defendant was unable to look after the shop after 1934. It is further submitted that the Defendant and his family members etc. have not paid any rent to any one in respect of the shop in question and they have been paying the electricity bills, and other dues, to the concerned authorities since before the year 1961 and as such the Defendant and his family members etc have become the owners of the said shop. It is submitted that the Plaintiff has no, right, title or interest in question and he in collusion with some land grabbers has conspired with each other in order to grab the shop of the Defendant. It is submitted that in furtherance of their, illegal designs and motives they have fabricated and manufactured the forged documents in respect of the shop in question and have filed the false, frivolous and baseless suit against the Defendant before this Hon'ble court which is liable to be dismissed with heavy costs.”

4. The issues were framed in the suit vide order dated 26th April, 2004 which are as under:

“1) Whether the suit is not maintainable being without cause of action? OPD

2) Whether the suit is bad for non-joinder or misjoinder of necessary parties? OPD

3) Whether the suit is barred by order 2 rule 2 CPC? OPD

4) Whether the plaintiff is entitled for the relief of possession? OPP

5) Whether the plaintiff is entitled for the relief of Mesne Profit, if so, to what extent? OPP

6) Relief.

5. Subsequently on 14th July, 2004, two additional issues were framed which are as under:

“1. Whether the suit of the plaintiff is barred by time? OPD.

2. Whether the suit of the plaintiff has not been properly valued for the purpose of Court fees and jurisdiction? OPD.”

6. The Trial Court, vide judgment and decree dated 1st October, 2019, decreed the suit. The main issue was whether the Plaintiff was entitled to the relief of possession. The same was decided by the Trial Court in favour of the Plaintiff after appreciating the evidence on record. The finding of the Trial Court on the relief of possession is as under:

“12. The onus to prove this issue was on the plaintiff. The latter has claimed himself to be the owner of the suit property on basis of a registered sale deed brought on record as Ex.PW1/1 and on the basis of mutation documents in his name Ex. PW1/11. In order to prove the said Sale Deed, PW-2, witness from the Department of Delhi Archives was also summoned who brought the record with regard to the Sale Deed dt. 18.02.1970 and the same was exhibited as Ex. PW2/1. The only defence put forward by the defendant was that he has become owner by way of adverse possession. However, in order to prove that a person has become owner by way of adverse possession, he must prove:-

1.that his possession was hostile and the same was in knowledge of the claimant,

2. That he was in actual and exclusive possession of the same,

3. The possession was a continuous one.

The defendant has failed to lead any evidence to prove any of the above. Also in his cross-examination, PW-1 nowhere conceded that the defendant has been in continuous, hostile, actual and in exclusive possession of the suit property for the last 12 years. Therefore, on the basis of testimony of PW-1 and PW-2 and on the basis of the documents relied on by PW-1, court is of the opinion that plaintiff has proved that he has the better title of the suit property than that of the defendant and In absence of any evidence for proving the adverse possession, this issue is decided in favour of the plaintiff and against the defendant. The plaintiff is hereby held to be entitled for possession of the suit property.”

7. After allowing the decree for possession, insofar as *mesne* profits were concerned, since the amount of Rs.2,000/- which was claimed by the Plaintiff was not supported by any evidence on record, no damages/*mesne* profits were awarded by the Trial Court. The suit was thus, decreed only for possession and not damages. The Defendant had not filed any evidence in the suit.

8. In appeal the Appellate Court came to the conclusion that the original order dated 26th April, 2004 wherein the Court directed the Defendant to deposit a sum of Rs.1000/- per month with the Court by the 7th day of each calendar month, having not been challenged by the Defendant, the Defendant is not entitled to any relief. Further, the Court held that the judgment and decree deserved to be confirmed since the basic pre-conditions of adverse possession have not been satisfied by the Defendant. Execution proceedings are now stated to be pending.

9. The present regular second appeal has been filed challenging both the

orders. Ld. counsel for the Appellant/Defendant submits that even though the Defendant has not led any evidence in the matter, the Plaintiff had a duty and onus to prove his title. It is submitted that no Power of Attorney/GPA in favour of Mr. Gurditta Mal were placed on record and hence the title of the Plaintiff is itself dubious.

10. The Court has heard ld. counsel for the Appellant. A perusal of the Trial Court order shows that clearly the Trial Court has arrived at a factual conclusion that the records from the Delhi Archives (Exhibit No. PW2/1), which were produced, show that Mr. Ramesh Thukral - the Plaintiff had ownership rights in the property in view of the sale deed dated 18th February, 1970. The relevant observation of the trial court in respect of the evidence filed by the Plaintiff to prove title is set out below:

“7. As part of the plaintiff evidence (PE), the plaintiff examined plaintiff no.4 as PW1 who tendered his evidence by way of affidavit Ex.PW1/A, wherein he reiterated the averments made in the plaint and relied upon the documents Ex. PW1/1 to Ex.PW1/10. PW-1 was cross-examined and discharged. The plaintiff also examined Sh. Naveen Gandas, Record Lifter from Department of Delhi Archives as PW2, who brought on record the sale deed dt.18.02.1970 as Ex.PW2/1. He was cross examined and discharged.”

11. It is the settled position in law that a mere plea of adverse possession in the written statement would not be sufficient for the Defendant to prove ownership. The plea of adverse possession is one in respect of which heavy onus is cast on the person asserting the same. In a plea for adverse possession, hostile possession has to be proved. As against the title documents of the Plaintiff, the Defendant having not led any evidence in

respect of his plea of adverse possession, the relief of possession has been rightly granted. The Defendant having failed to lead any evidence in this matter, the impugned orders do not warrant any interference. No substantial question of law has been raised in the matter or has been made out in the present case. The appeal is accordingly dismissed. All pending applications are accordingly disposed of.

PRATHIBA M. SINGH
JUDGE

MARCH 11, 2020
Dj/A.S.

