

\$~A-29

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

%

Date of Decision: 26.02.2021

+ RSA 23/2021

SHRI RAM MEHAR

..... Appellant

Through: Mr. Sahdev Singh Tomar, Advocate

versus

ALI MOHD. & ORS.

..... Respondents

Through:

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

CM APPL. 7888/2021 (Exemption)

Exemption allowed, subject to all just exceptions.

Application stands disposed of.

RSA 23/2021 & CM APPL. 7889/2021 (Stay)

1. Present Regular Second Appeal has been filed under Section 100 of the Code of Civil Procedure, 1908 impugning the judgement of the First Appellate Court dated 10.02.2020 in Appeal No. CIS-RCA DJ-84/2018 titled ***Ram Mehar vs. Ali Mohd. & Ors.*** preferred by the Appellant herein against the Judgement and Decree of the learned Civil Judge – 01, South District, whereby the Suit for recovery of possession of immoveable property was dismissed on 20.07.2018.

2. The brief background facts necessary to decide the Appeal are as follows:

(a) The Appellant/Plaintiff filed a suit for possession against the Respondents on the ground that he was in possession of the Suit Property bearing Khasra No. 1572/2 (3-18) and 1731 (4-13) measuring 8 Bighas 11 Biswas, situated in the Revenue Estate of Village Chattarpur, New Delhi. It was averred in the plaint that:

(i) The Appellant on being released from the Jail was in search of a job when Respondent No. 1 herein/Defendant No. 1 (in the suit) approached him with a proposal to take on lease the Suit Property for cultivation and in consideration demanded a sum of Rs. 2 Lacs in cash, as refundable security amount, to be refunded to the Appellant on expiry of the lease or earlier, if the owner of the Suit Property seeks possession of the same. As per the plaint, Appellant was informed that the agricultural land was owned by one Smt. Mahender Kaur Anand/Defendant No. 3 and the father of Defendant No. 1, namely, Shri Nazar Khan was appointed by her as a caretaker, with an understanding that in exchange for the right to possess and cultivate the Suit Property, Shri Khan would protect the Suit Property from encroachment by third parties.

(ii) Father of Defendant No.1 continued to be in possession until his demise in May, 2004 and thereafter Defendant No.1 stepped into his shoes and continued to be in possession of the Suit Property.

(iii) Appellant took the Suit Property on lease for 3 years from 24.04.2006 to 24.04.2009 with an understanding that it shall be extended for a further period of 7 years on increased monthly lease rent. Accordingly, Defendant No. 1 executed the Lease Deed, General Power of Attorney, Indemnity Bond, Possession Letter, Receipt and Affidavit, all dated 25.04.2006, in favour of the Appellant. Appellant thereafter made some construction and

started cultivation.

(iv) Appellant remained in absolute possession of the Property from 10.01.2007, for more than 260 days. It was later learnt by the Appellant that Respondent Nos. 2 to 6 herein, claimed themselves to be the owners of the property, having purchased the same from Mahender Kaur and a suit for recovery was filed by the Appellant. On 07.03.2007, some unknown persons entered the house of the Appellant and assaulted him and the family members and set it on fire, in which the original Lease Deed, GPA, Indemnity Bond etc. all dated 25.04.2006 were burnt.

(b) Defendant No. 2 expired during the pendency of the suit and his LRs were brought on record who thereafter contested the proceedings and are Respondent Nos. 2 to 6 herein.

(c) The arguments put forth before the Trial Court by the Appellant were (i) Defendant No. 1 being the Caretaker had given the suit property on lease to the Appellant for cultivation against valid documents executed by him; (ii) Defendant No. 2 illegally took possession from the Appellant; (iii) actual owner is not traceable; (iv) photocopies of the property's documents were submitted since the originals were burnt in the fire; (v) the lady claiming to be Ms. Mahender Kaur is not the real Mahender Kaur i.e. Defendant No. 3, as the original Mahender Kaur has expired.

(d) Legal Representatives of Defendant No. 2 contested the suit and submitted that (i) plaintiff had no locus standi with respect to the suit property; (ii) it was a collusive suit between Plaintiff and Defendant No. 1, who had himself never come to the Court; (iii) no evidence showing possession was led by the Plaintiff; (iv) the suit property was a Government Land and Defendant No. 1 had no right to lease the property to the Plaintiff

as the property was acquired by the Government under Right to Fair Compensation & Transparency in Land Acquisition, Rehabilitation & Resettlement Act, 2013.

(e) In support of his case the Appellant relied on documents mark 'A' to mark 'M', all of which were photocopies and did not produce the originals on the ground that the same were destroyed in a fire at his house.

(f) The Trial Court held that under the Indian Evidence Act, a document is required to be proved by the original unless grounds for leading secondary evidence are made out under Section 65 of the Act. Reliance was placed on certain judgements of the Supreme Court for the said proposition. It was also noted that the Plaintiff had not produced the originals and also that no evidence was led to prove the assertion that due to fire at the house, the original property documents were destroyed. Also, no attempt was made by the Appellant to prove documents at Mark 'A' to Mark 'C' by summoning witnesses or originals from the Revenue Authorities, as these documents were certified copies of Khasra Girdawari, Jamabandi and Nakal Aksh Shijra.

(g) Another reason that weighed with the Trial Court in dismissing the suit was that the Appellant claimed to have derived his right from the deceased father of Defendant No. 1 who himself was a caretaker. As a caretaker, Defendant No. 1 could not have transferred a right better than his own and therefore, no ownership/lease rights had passed in favour of the Appellant.

(h) The First Appellate Court has dismissed the Appeal preferred by the Appellant by observing that (i) Defendant No. 1 had stepped into the shoes of his father, who was the caretaker and could at best have the rights of a

caretaker in the property; (ii) he did not acquire any interest in the property and therefore, could not have transferred or leased the suit property to the Appellant; (iii) Appellant claims to have come into possession of the suit property pursuant to a Lease Deed and other documents allegedly executed by Respondent No. 1/Ali Mohammad, but only photocopies of the said documents were placed on record and the Appellant failed to produce the originals of the said documents; (iv) Under Section 64 of the Indian Evidence Act, contents of the documents must be proved by primary evidence, i.e. the document itself in original and only in exceptional cases, secondary evidence can be led; (v) Appellant had taken a position that due to fire in the house, the documents were destroyed and therefore claimed that his case fell under Section 65(c) of the Indian Evidence Act. To avail benefit of Clause (c), Appellant was required to prove destruction of documents, however, except for a bare statement, he could not produce evidence to substantiate his case and therefore, failed to make out a case for leading secondary evidence.

3. In the present Appeal, counsel for the Appellant has sought to argue that the Appellant had filed 27 documents out of which the documents marked as Mark 'D' to Mark 'I' were Lease Deed, GPA etc. all dated 25.04.2006, but the originals could not be produced as the same were burnt in fire. The fire in the house of the Appellant is an undisputed fact. The documents placed on record being exhibit PW-1/3 to PW-1/5 are part of the Writ Petition (Crl.) 259/2007 filed in this Court and establish physical possession of the Appellant from 25.04.2006 to 10.01.2007 as well as his forcible dispossession.

4. It is contended that the Trial Court and the Appellate Court have overemphasised the issue of secondary evidence under Section 65 of the Indian Evidence Act, overlooking that the documents placed on record which were part of the criminal writ proceedings were sufficient evidence to prove the case of the Appellant and the law that where a person is in settled peaceful possession, he is not required to prove his possession from the lawful owner. Trial Court and Appellate Court were duty bound to go into the details of the documents placed on record to ascertain the true identity of Respondent No. 7, Smt. Mahender Kaur Anand, more particularly, in view of the Status Report filed in the Criminal Writ Petition, which casts serious doubt regarding the title of late Shri Purushottam Goyal/Defendant No. 2, who claimed to have purchased the property from Smt. Mahender Kaur.

5. I have heard the learned counsel for the Appellant and also perused the documents placed on record by the Appellant as well as the judgements of the Trial Court and the First Appellate Court.

6. As per the Appellant's own case, he came into possession of the suit property on 25.04.2006 by virtue of Sale Deed, GPA, Receipts etc., photocopies of which were filed before the Trial Court. The originals of the documents were admittedly never produced. Section 64 of the Indian Evidence Act lays down that contents of the documents must be proved by primary evidence, i.e. the original of the document itself. Section 65 enumerates cases in which secondary evidence of the documents is permissible and is as follows:

“65. Cases in which secondary evidence relating to documents may be given.—Secondary evidence may be given of the existence, condition or contents of a document in the following cases—

(a) when the original is shown or appears to be in the possession or power—

of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the court, or

of any person legally bound to produce it, and

when, after the notice mentioned in Section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in1[India] to be given in evidence2;

(g) when the original consists of numerous accounts or other documents which cannot conveniently be examined in Court and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.”

7. In cases falling under (a), (c) and (d), secondary evidence of the contents of the documents is admissible. Appellant claimed loss of the documents in a house fire and his case therefore, according to him, falls under Section 65(c) of the Indian Evidence Act. In order to avail the benefit of the exception, Appellant was required to prove destruction of the documents in the fire, but no such evidence was led and only a statement was made, which is not sufficient to make out a case for leading secondary evidence. Appellant also placed on record certified copies of Revenue documents such as Khasra Girdawari etc. as Mark ‘A’ to Mark ‘C’, but in my view, the same also does not help the appellant, as, firstly, the revenue record was never summoned to prove the said documents and secondly the said documents from the photocopies itself, do not show the possession of the Appellant over the suit property, as the whole case of the Appellant was based on possessory rights.

8. The law relating to proving documents by Secondary Evidence is no longer res integra. In case of *U. Sree vs. U. Srinivas (2013) 2 SCC 114*, it

was held by the Supreme Court that in the absence of foundational evidence for leading secondary evidence, secondary evidence is inadmissible. Reliance was placed on an earlier judgement in the case of ***Ashok Dulichand vs. Madahavlal Dube (1975) 4 SCC 664***, where it was held as follows:

“7. ... According to clause (a) of Section 65 of Evidence Act, secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in possession or power of the person against whom the document is sought to be proved or of any person out of reach of, or not subject to, the process of the court of any person legally bound to produce it, and when, after the notice mentioned in Section 66 such person does not produce it.”

9. In case of ***J. Yashoda v. K. Shobha Rani, (2007) 5 SCC 730 : (2007) 3 SCC (Cri) 9***, the Court held as under:

“9. ...Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the section.”

10. In ***M. Chandra v. M. Thangamuthu [(2010) 9 SCC 712***, the following observations were made which are useful to the present case:

“47. We do not agree with the reasoning of the High Court. It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be

admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasised that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party.

11. In ***H. Siddiqui vs. A. Ramalingam (2011) 4 SCC 240***, the Supreme Court held as under:

“12. ...In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original.”

12. Thus there is no infirmity in impugned orders holding that the Appellant could not lay down a foundation for producing secondary evidence.

13. I also find no infirmity in the finding of the Trial Court and the First Appellate Court that Respondent No. 1 being only a caretaker of the property and having acquired no right or interest as a lessee in the same could not have passed on a better right or interest in favour of the Appellant. It is settled that Caretaker/ Watchman/ Servant can never acquire interest in

the property despite long possession and Courts should not come to rescue such persons and protect possession. Therefore, in my view, the Appellant could not have claimed any right on the premise that Respondent No.1 had transferred the leasehold rights to him. In ***Maria Margarida Sequeira Fernandes v. Erasmo Jack de Sequeira***, (2012) 5 SCC 370, the Supreme Court observed as under:

“97. Principles of law which emerge in this case are crystallised as under:

(1) No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.

(2) Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.

(3) The courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.

(4) The protection of the court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or licence agreement in his favour.

(5) The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession.”

14. Insofar as the argument that Respondent No. 7 from whom Respondent Nos. 2 to 6 claimed to have purchased the property is not the real Mahender Kaur, is concerned, the Courts below have rightly held in the impugned orders that the issue of ownership was not before the said Courts and only recovery of possession was sought on the premise that the Appellant was earlier in possession of the Suit Property, between 25.04.2006 till 10.01.2007. Thus, there was no occasion for the Courts to enter into the issue of ownership. Appellant has been unable to discharge the onus of establishing and proving possession and thus no question of law, lest substantial question of law arises in the present appeal.

15. In *Veerayee Ammal vs. Seeni Ammal (2002) 1 SCC 134*, it was held that merely because on appreciation of evidence, another view is also possible, it would not clothe the High Court to assume jurisdiction by terming an issue of fact as a substantial question of law. I may refer to the judgement in *Sir Chunilal V. Mehta vs. Century Spinning and Manufacturing Co. Ltd. AIR 1962 SC 1314* and the judgment in *Kashmir Singh vs. Harnam Singh (2008) 12 SCC 796*, wherein it was held that the test to determine if a question is substantial is to see if it is of general public importance or directly or substantially affects the rights of the parties and if so whether it is finally settled or calls for discussion or an alternative view.

16. In *Santosh Hazari vs. Purushottam Tiwari (2001) 3 SCC 179*, it was held that to be a ‘substantial’ question of law, it must be debatable, not previously settled by law and must have a material bearing on the decision of the case.

17. Applying these parameters, none of the questions raised in the present appeal can be termed as ‘substantial questions of law’ to enable this Court to

entertain the Appeal.

18. I may also note at this stage that the present appeal is being dismissed at the admission stage. The entire record of the Trial Court and Appellate Court has been filed by the Appellant. The power of the High Court to dismiss the Second Appeal at the admission stage, if no question of law arises, is well recognised and I may only refer to the observations of the Supreme Court in ***Kripa Ram (Deceased) Through Legal Representatives & Ors. Vs. Surendra Deo Gaur & Ors. 2020 SCC OnLine SC 935***, as follows:

“23. Sub-section (1) of Section 100 of the Code contemplates that an appeal shall lie to the High Court if it is satisfied that the case involves a substantial question of law. The substantial question of law is required to be precisely stated in the memorandum of appeal. If the High Court is satisfied that such substantial question of law is involved, it is required to formulate that question. The appeal has to be heard on the question so formulated. However, the Court has the power to hear appeal on any other substantial question of law on satisfaction of the conditions laid down in the proviso of Section 100 of the Code. Therefore, if the substantial question of law framed by the appellants are found to be arising in the case, only then the High Court is required to formulate the same for consideration. If no such question arises, it is not necessary for the High Court to frame any substantial question of law. The formulation of substantial question of law or reformulation of the same in terms of the proviso arises only if there are some questions of law and not in the absence of any substantial question of law. The High Court is not obliged to frame substantial question of law, in case, it finds no error in the findings recorded by the First Appellate Court.”

19. Accordingly, the appeal is dismissed along with the accompanying applications with no orders as to costs.

FEBRUARY 26, 2021
rd

JYOTI SINGH, J