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

Date of Decision: 07th December, 2021

+ **RSA 89/2021 & CM APPLs. 43542/2021, 43543/2021 &
43544/2021**

MOHD. IRFAN AHMAD Appellant
Through: Mr. Faiyaz Hasan and Mr. Shoeb
Shakil, Advocates.
versus

SARWAR ALI ANSARI Respondent
Through: Mr. Alamgir, Advocate.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done in physical Court. Hybrid mode is permitted in cases where permission is being sought from the Court.
2. The present appeal arises out of the impugned judgement dated 16th August, 2021, by which the Appellate Court in ***RCA SCJ 13/18*** titled ***Mohd. Irfan Ahmad v. Sarwar Ali Ansari***, has dismissed the appeal challenging the impugned judgment dated 13th August, 2018 passed by the Trial Court in ***Suit No.601518/2016*** titled ***Mohd. Irfan Ahmed v. Sarvar Ali Ansari***.
3. A suit for permanent injunction and mandatory injunction was filed by the Appellant/Plaintiff (*hereinafter "Plaintiff"*) in respect of the property bearing No.113A, Boundary Dargah, Adhchini Village, New Delhi-110017 (*hereinafter "suit property"*). The case of the Plaintiff was that the Defendant/Respondent (*hereinafter "Defendant"*) had demolished the boundary wall of the suit property and had encroached upon the open space

in the suit property. The Trial Court had framed the issues in the suit and had recorded the evidence in the matter. The Trial Court then came to the conclusion that the suit property for which relief is being sought by the Plaintiff is not identifiable. There is a detailed discussion in the Trial Court's judgment in this regard and as to how there is a discrepancy between the documents filed by the Plaintiff and the property for which the relief is being sought. Further, the Trial Court held that a simple suit for injunction is not maintainable in the absence of a prayer for declaration. The Trial Court further came to the conclusion that the Plaintiff has failed to establish title over the suit property. Relevant paragraphs of the Trial Court judgment read as under:

“31. In view of the above discussion and judgment, the present suit for injunction simplicitor is not maintainable and the plaintiff in the present case was required to amend the suit to seek declaration of ownership over the suit property, but he has failed to do the same.

32. The plaintiff has alleged that the defendant has made unauthorized construction in the suit property, which allegedly belongs to the plaintiff. Defendant has denied the said allegations. The plaintiff has failed to place on record any material to prove the aforesaid allegation. In order to successfully discharge the onus of the present issue, the plaintiff is required to show that some construction is being done by the defendant in the property of the plaintiff and that the said construction is unauthorized and illegal. In the discussion made above, court has already reached the

finding that the plaintiff has failed to establish that the yellow portion in Ex.PW1/10 belongs to the plaintiff. In view of this, coupled with the fact that there is no material on record to show that the defendant has made any unauthorized construction, no ground is made out to allow the relief of permanent injunction, sought by the plaintiff.

33. In view of the above discussion as well as in view of the fact that the plaintiff has failed to establish his title over the suit property and for the reason that the suit property is not identifiable, the present issue is decided against the plaintiff and in favour of the defendant.”

4. This judgment was appealed before the Appellate Court. Even the Appellate Court has upheld the judgment of the Trial Court and has held that the mutation documents reflecting the names of the Plaintiff or the Defendant have not been brought on record. It held that there were various discrepancies in the case put up by the Plaintiff and it has accordingly, dismissed the appeal.

5. In the present second appeal, the submission of Mr. Hasan, ld. counsel for the Plaintiff, is that the plea of mandatory injunction has not properly been considered, though the plaint had been amended. He further submits that the Plaintiff was dispossessed during the pendency of the suit by breaking open the boundary wall, which led to the amendment of the suit and the construction in this area is only kachcha in nature and, therefore, the Plaintiff had no other option but to proceed in this manner.

6. Ld. counsel for the Defendant, who has entered appearance on

advance copy being served, submits that the Plaintiff is a trespasser and has created false and fabricated documents. None of the documents, on the basis of which title is pleaded, are registered in favour of the Plaintiff. Even the suit property number is mentioned as 113 at some places and 113A at other places. He further submits that in fact, the case of the Plaintiff is a completely unbelievable case, inasmuch as between 10:30 am and 3:00 pm, the wall was stated to be constructed, however a 6' X 62' long wall could not be constructed in few hours. He also submits that this is a proxy litigation on behalf of one Sh. Peer Syed Afzal Nizami who had also filed a suit in respect of this suit property whose plaint was rejected, and appeal was also dismissed. He thus submits that the appeal does not deserve to be entertained.

7. Ld. counsel for the Plaintiff at this stage, submits that the Local Commissioner may be appointed to identify the property.

8. Heard the counsels and perused the record. It is a well-established position in law that in a second appeal, this Court is not to do a fact-finding exercise. In **Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and Ors., AIR 1999 SC 221**, the Supreme Court held that:

The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this Section, The substantial question of law has to be distinguished from a substantial question of fact.

9. Similarly, in **Sugani v. Rameshwar Das & Ors., AIR 2006 SC 2172**, it was held that:

The mere appreciation of the facts, the

documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as a substantial question of law. Where the first appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal.

10. This Court finds that the question as to the nature of construction and other submissions made on behalf of the Appellant are entirely factual issues. No substantial question of law has been raised in this appeal. This Court has perused both the judgments of the Courts below and the discussion therein is detailed on facts and has been reached after appreciation of evidence on record, no interference is called for as no substantial questions of law arise in the second appeal.

11. Accordingly, this second appeal is dismissed. All pending applications are disposed of.

**PRATHIBA M. SINGH
JUDGE**

DECEMBER 7, 2021/dk/MS