

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

% **Reserved on : 11th October, 2022**
Pronounced on: 18th January, 2023

+ **RFA 409/2007**

JAI PARKASH TYAGI & ANR Appellants

Through: Mr. Arvind Kr Varma, Sr.
Advocate with Mr. Anirudh
Bakhru, Ms. Umang Tyagi, Ms.
Natasha Dalal and Ms. Samridhi
Sharma, Advocates

versus

MCD Respondent

Through: Mr. Dhanesh Relan, Standing
Counsel with Mr. Arindam Dey,
Advocate

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant regular first appeal under Section 96 of the Code of Civil Procedure, 1908, has been filed on behalf of the appellants who are aggrieved by the impugned judgment passed by the Additional District Judge, Delhi (hereinafter "Trial Court") dated 3rd May 2007 in suit bearing no. 300/2004 titled '*Sardari Lal Tandon & Ors. vs. Municipal Corporation of Delhi*' whereby the suit for possession and recovery of

damages initiated by the plaintiffs therein, including the appellants, was dismissed.

FACTUAL MATRIX

2. A perusal of the record unravels the following facts that have culminated into the controversy which falls for consideration before this Court:-

- i. The entire matter pertains to land comprised in Khasra No. 262/258/217/4 of Village Bharolla, which came to be urbanized and be numbered as plots bearing no. C408, C409, C342 and C343, Majlis Park, Delhi (hereinafter “Suit Property”). The plaintiffs before the Trial Court moved the District Court seeking possession in respect of the said plots alongwith damages of ₹20,000/- per month and damages *pendente lite* from the date of suit till the delivery of possession. The appellant no. 1, being a co-owner of the Suit Property, was arrayed as plaintiff no. 5 in the suit before the Trial Court and appellant no. 2, his son, as plaintiff no. 4. Plaintiff no. 1 to 3 and 6 executed a General Power of Attorney (hereinafter “GPA”) in favour of the appellant no. 2 herein.
- ii. On part of the property lying vacant and falling under plot no. C342 and C343 the said property, the Majlis Park Welfare Association decided to open a charitable dispensary for the purpose of which it started to raise construction over the plot.

Upon being aggrieved by the said actions, the plaintiffs before the Trial Court filed a complaint with the SHO, PS Adarsh Nagar on 28th December 1996 and also, filed a suit for declaration and permanent injunction against the General Secretary and residents of the Association, however, the same was dismissed as withdrawn as the plaintiffs had not furnished a notice in accordance with the Section 478 of the Delhi Municipal Corporation Act, 1957.

iii. The Trial Court ultimately framed the following issues:-

- I. *Whether the possession of the suit land was handed over to defendant?*
- II. *Whether the plaintiff is entitled to possession of the suit land?*
- III. *Whether the plaintiff is entitled to damages? If so, to what amount?*
- IIIA. *Whether the documents of the title purported to be executed by M/s Chief Housing Corporation in favour of plaintiff No 1 are fabricated as stated in para 1 of the written statement?*
- IV. *Relief.*

iv. The issues I, II, III were decided in favour of the defendants while IIIA was decided in favour of the plaintiffs. The Trial Court dismissed the suit and ordered a cost of ₹5,000/-.

- v. The appellants are aggrieved by the said impugned judgment dated 3rd May 2007 and have challenged the same on several grounds as discussed hereinafter.

SUBMISSIONS

3. This Court shall now delineate the submissions made on behalf of the parties in their pleadings, written submissions as well as those made during the course of hearing.

On behalf of the Appellants

4. Mr. Arvind Varma, learned senior advocate appearing on behalf of the appellants submitted that the Trial Court has committed grave error in passing the impugned judgment and has misinterpreted the pleadings and the statements of the Plaintiff Witnesses. It is submitted that the co-ownership of the appellant is not disputed. The Trial Court failed to consider that the Khatauni/Khasra Girdawari as well as the statement of PW-2 proved on record that the appellant no. 1 is the co-owner of the property.

5. It is submitted that the plaintiffs, through their GPA, filed a complaint with the SHO on 28th December 1996, when it was found that the Association had started to raise construction over the Suit Plots.

6. It is submitted that the appellant no. 1 had constructed four rooms and given them to the respondent/ Municipal Corporation of Delhi (hereinafter “MCD”) to provide education to children of the village. However, in 1986, the respondent had constructed a School in the same

area where the Suit Property was and hence, thereafter, the land was lying vacant. For the only reason that the land was lying vacant, the respondent attempted to start a dispensary on the same, without any right or title in the Suit Property/Plot.

7. Learned senior advocate submitted that the respondent had claimed that the plots/ Suit Property was donated to it by one Vilaiyti Ram Khosla, however, there is no iota of evidence to show that any such donation or a transfer by donation had taken place. Moreover, the respondent has produced no document which could demonstrate how the title was transferred. Moreover, there is no compliance to the Transfer of Property Act, 1882, specifically Section 123, which is required to make any kind of conveyance and transfer.

8. Reliance has been placed upon the judgments of **Gomtibai vs. Mattulal, (1996) 11 SCC 681**, where the following has been held:-

“4. Thus, it is seen that the gift of immovable property should be made only for transferring the right, title and interest by the donor to the donee by a registered instrument signed by or on behalf of the donor and must be attested by at least two witnesses. The pre-existing right, title and interest of donor thereby stand divested in the donee by operation of Section 17 of the Registration Act only when the gift deed is duly registered and thereafter the donor would lose title to the property. It must also be proved that the donee had accepted the property gifted over under the instrument. In this case, though the transfer of gift was acted upon by Kusturibai as per the correspondence and evidence on record, but, admittedly, there is no written instrument executed by the donor, namely, the plaintiff and the defendant in favour of their cousin sister

Kusturibai and it was got attested by at least two witnesses and registered in accordance with the provisions of the Stamp Act and the Registration Act. In the absence of compliance of these formalities, at best what could be seen from the partition deed is that the original plaintiff and the defendant have expressed their intention to gift over the land to their cousin sister Kusturibai. As held earlier, in the absence of any registered instrument of gift and acceptance thereof by the donee, the said property could not be said to have been legally transferred in favour of their cousin sister; in other words, the gift is not complete in the eye of law. Therefore, the District Court has rightly set aside the decree of the trial court which was later confirmed by the High Court. We do not find any error of law warranting interference.”

9. A Coordinate Bench of this Court in **Wg. Cdr. (Rtd) R.N. Dawar vs. Ganga Saran Dhama, 1992 SCC OnLine Del 446**, held as follows, which has been relied upon by the learned senior counsel:-

“Only a bahi entry is not sufficient to prove that Patmal was the owner of this land who mortgaged it with Pritam Singh and thereafter Pritam Singh became its owner being a mortgagee. Even if it is presumed as correct that Pritam Singh got this land from patmal as alleged it is not proved that defendant No. 2 became owner by way of gift from Pritam Singh. Under Section 123 of the Transfer of Property Act, a gift of immovable property which is not registered is bad in law and cannot pass any title to the donee. Any oral gift of immovable property cannot be made in view of the provisions of Section 123 of the Transfer of Property Act. Mere delivery of possession without written instrument cannot confer any title. The plea of the defendants that defendant No. 2 of this plot of land became owner by virtue of the gift from Pritam Singh is not tenable reject the same.”

10. The allegations made by the respondent, pertaining to the transfer could only be proved by production of such documents before the Court as per Section 91 and 92 of the Indian Evidence Act, 1872. The sum and substance of the conveyance of property under law cannot take place in the absence of registered instruments demonstrating such a transfer, and such instruments can only be proved by their production in court. Reliance has been placed upon ***V. Anantha Raju & Anr. vs. T.M. Narasimhan & Ors.*** 2021 SCC OnLine SC 969.

11. It is submitted that before the Trial Court as well as this Court, the respondent has failed to furnish any document to show that the respondent had any title whatsoever in the Suit Property. The only plea taken by the respondent is that the title records were destroyed by floods, which has also been reiterated by the Defence Witnesses.

12. The evidence of the only independent witness, PW-2, Halqa Patwari, was disregarded in *toto* by the Trial Court and has not even found mention in the impugned judgment. Moreover, the evidence of PW-1, appellant no. 2 herein, was disregarded only on the ground that he was the GPA holder of plaintiffs 1 to 3 and 6, without appreciating the fact that he himself was also a party to the dispute having personal knowledge of the course of events as well as the registered documents.

13. On the other hand, the MCD has not provided the Court with a singular version of events that transpired. In their Written Statement, they claimed that the suit property was donated to them by the original owner, i.e., appellant no. 1. During oral testimony of the Defence Witness, the respondent improved their stance in contradiction to their own admitted

stance that Suit Property was initially sold by the appellant no. 1 to one Vilaity Ram Khosla of M/s Cheap Housing Construction, who then in turn donated the suit property to the respondent. In support of this version, they failed to produce any valid documents or witnesses.

14. Learned senior advocate submitted that respondent failed to show that it was in the legal possession of the land in question. The issue framed by the Trial Court whether the possession of the suit land was handed over to the defendant was erroneously decided by the Trial Court as the mandatory statutory requirement for valid registered documents to prove a gift or donation was disregarded.

15. It is submitted that the Trial Court ignored that the Defence Witnesses were employees of the respondent and were not independent witnesses. It is further submitted that the said issue was decided in favour of the respondent despite the fact that the pleading before the Court below was in the absence of any registered documents to prove the ownership of the respondent.

16. The DW-1, Dr. Pramod Kumar Sharma, CMO, of the respondent deposed that he could not make a statement regarding the possession of the plot before 1996 since he only joined the dispensary in February 1998. DW-4, Ved Prakash Kannoji, stated that he did not know if the dispensary was being run from 1986 to 1992 and they did not receive any other proof of ownership.

17. It is strongly argued that the plaintiffs before the Trial Court exhibited Sale Deeds, Khatauni, Girdawari establishing the title in the

Suit Property and such documents are a part of public record, that do not require to be proved as per Section 35 of the Indian Evidence Act, 1972.

18. Learned senior counsel relied upon the judgment of ***Regal Traders Pvt. Ltd. & Anr. vs. Lt. Governor of Delhi & Ors., 1990 SCC OnLine Del 154***, wherein the following observations were made:-

“19. Two khasra girdawaris for the year 1988-89 (annexure P-9A to the writ petition and annexure P-25 to the Rejoinder) also clearly show that the petitioners are the recorded owners in respect of field No. 411/1/2/2 measuring 5 bighas 18 biswas and the number of khatauni khata has been shown therein as ‘189’ under column 3. This implies that khatauni which is a record of rights has also been prepared by the revenue authorities. Although in annexure P-9A under column 18 the nature of land has not been specified but in annexure P-25 the nature of land has been shown as ‘ghair mumken Mukkan’ which means ‘uncultivated land under building’. In other words, this is a abadi land. It is settled law that khasra girdawaris are public documents and can properly be proved by the production of certified copies and they are admissible under Section 35 of the Evidence Act. This document should have been given its due weight by the Appellate Tribunal. Although record of right like khatauni has not been produced by the petitioners but there is a definite reference in column 4 of khasra girdawari that the name of the tenure holder as classified in Part I of the khatauni has been given therein who have been described as petitioners as owners of the land in dispute. If the petitioners have not produced the khatauni although khasra girdawari itself sufficiently shows that the petitioners have been recorded as owners on the basis of entries in the khatauni, the respondents could themselves have produced khatauni if it showed the entry otherwise. It

appears that the petitioners filed an application dated 14-1-1988 before the Appellate Tribunal for permission to adduce additional evidence in the form of latest revenue record maintained by the revenue department but that application was not decided. Consequently the petitioners were not permitted to produce the latest revenue records.”

19. Learned senior counsel also relied upon ***Khiali Ram & Anr. vs. Sant Lal***, 1972 SCC OnLine P&H 45, wherein the following was held:-

“6. In my opinion, the learned Additional District Judge has gone completely wrong in assessing the worth of khasra girdawari Exhibit D-2. The main thing which he has missed about that document is that it came into existence when there was no dispute between the parties about any pre-emption matter and when even the sale in dispute was not contemplated. If it be assumed that Khiali Ram manipulated the khasra girdawari entry for Kharif 1964, it would have to be held that he did so in anticipation of a possible sale of the land in dispute in his favour by the vendor—a result which appears to be absurd. The khasra girdawari entries are the record of the acts of a public servant performed in the discharge of his official duties and, therefore, relevant under Section 35 of the Indian Evidence Act. It is true that no presumption of correctness attaches to them but their evidentiary value is not nil, and the Court would be wrong in embarking on an assessment thereof with a presumption that they are not correct or that they cannot be relied upon unless supported by other evidence. Of course, the party which asserts that they are false, is at liberty to prove that they fulfil that character. It may even be that evidence is forthcoming which creates a suspicion about their genuineness. In either case the Court would be justified in rejecting them as unreliable. Apart from such a situation,

however, they must be given the weight they ordinarily deserve and, in the present case, I do not find that any circumstances have been proved such as may indicate the falsity, or even create suspicion about the genuineness, of till entries in Exhibit D-2.”

20. With respect to Issue No. 3A, it is submitted that the issue was framed in pursuance to an application filed by the respondent, however, the respondent did not even attempt to prove that the documents produced by the plaintiffs therein, including the registered sale deed, were fabricated.

21. It is, therefore, submitted that the impugned judgment be set aside.

On behalf of the Respondent

22. The respondents have failed to file and place on record their reply to the appeal, however, they were represented and heard at length and have also placed on record their written submissions, which shall be treated as their objections.

23. Mr. Dhanesh Relan, learned Standing Counsel for the respondent vehemently opposed the instant appeal, the contentions raised therein as well as the arguments advanced during the course of hearing.

24. Learned standing counsel for the respondent submitted that the appellants have not been able to prove, either by their documents or by way of any other evidence, that the Suit Property belonged to them and the other plaintiffs before the Court below. They have failed to establish their case with respect to the ownership. The possession of the Suit Property has been with the respondent since 1958 and none of the actual

owners, that is, plaintiff nos. 1 to 3, 5 and 6 came to the witness stand to prove their own case. Only appellant no. 2, plaintiff no. 4 therein, in the capacity of the GPA holder has pursued the claims and contentions raised.

25. It is submitted that the appellant no. 2 was only the GPA holder for the other plaintiffs and did not have the authority to testify beyond what he had witnessed, including the execution of alleged registered documents. The GPA holder did not have a personal knowledge of the matter of the plaintiff nos. 1 to 3, 5 and 6 and therefore, he could neither depose on his personal knowledge nor could be cross-examine on the facts averred in the plaint. None of the original owners were produced as witnesses before the Trial Court. It is submitted that the appellant no. 2 became party to the suit before the Trial Court only to divert this objection. Moreover, all the parties have not approached this Court impugning the judgment passed by the Trial Court. It is further submitted that none of the essential witnesses were called upon to prove the case of title/ownership.

26. Learned counsel relied upon the following judgments to give force to his arguments, the relevant portions of which are also reproduced hereunder:-

a. Janki Vashdeo Bhojwani v. Indusind Bank Ltd., (2005) 2 SCC 217

“12. In the context of the directions given by this Court, shifting the burden of proving on to the appellants that they have a share in the property, it

was obligatory on the appellants to have entered the box and discharged the burden by themselves. The question whether the appellants have any independent source of income and have contributed towards the purchase of the property from their own independent income can be only answered by the appellants themselves and not by a mere holder of power of attorney from them. The power-of-attorney holder does not have personal knowledge of the matter of the appellants and therefore he can neither depose on his personal knowledge nor can he be cross-examined on those facts which are to the personal knowledge of the principal.

13. Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to “act” on behalf of the principal. In our view the word “acts” employed in Order 3 Rules 1 and 2 CPC confines only to in respect of “acts” done by the power-of-attorney holder in exercise of power granted by the instrument. The term “acts” would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has rendered some “acts” in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

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17. On the question of power of attorney, the High Courts have divergent views. In the case of Shambhu Dutt Shastri v. State of Rajasthan [(1986) 2 WLN 713 (Raj)] it was held that a general power-of-attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the

party. He can only appear in his own capacity. No one can delegate the power to appear in the witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power-of-attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.

18. The aforesaid judgment was quoted with approval in the case of Ram Prasad v. Hari Narain [AIR 1998 Raj 185 : (1998) 3 Cur CC 183] . It was held that the word “acts” used in Rule 2 of Order 3 CPC does not include the act of power-of-attorney holder to appear as a witness on behalf of a party. Power-of-attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of CPC.

19. In the case of Pradeep Mohanbay (Dr.) v. Minguel Carlos Dias [(2000) 1 Bom LR 908] the Goa Bench of the Bombay High Court held that a power of attorney can file a complaint under Section 138 but cannot depose on behalf of the complainant. He can only appear as a witness.

20. However, in the case of Humberto Luis v. Floriano Armando Luis [(2002) 2 Bom CR 754] on which reliance has been placed by the Tribunal in the present case, the High Court took a dissenting view and held that the provisions contained in Order 3 Rule 2 CPC cannot be construed to disentitle the power-of-attorney holder to depose on behalf of his principal. The High Court further held that the word “act” appearing in Order 3 Rule 2 CPC takes within its sweep “depose”. We are unable to agree with this

view taken by the Bombay High Court in Floriano Armando [(2002) 2 Bom CR 754] .

b. ***Man Kaur (Dead) by LRs vs. Hartar Singh Sangha, (2010) 10 SCC 512***

“14. In Vidhyadhar v. Manikrao [(1999) 3 SCC 573] this Court reiterated the following well-recognised legal position

“17. Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct....”

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16. In Shankar Finance & Investments v. State of A.P. [(2008) 8 SCC 536 : (2008) 3 SCC (Cri) 558] this Court explained in what circumstances, the evidence of an attorney-holder would be relevant, while dealing with a complaint under Section 138 of the Negotiable Instruments Act, 1881 signed by the attorney-holder of the payee. This Court held:

“15. ... A power-of-attorney holder of the complainant who does not have personal knowledge, cannot be examined. But where the attorney-holder of the complainant is in charge of the business of the complainant payee and the attorney-holder alone is personally aware of the transactions, and the complaint is signed by the attorney-holder on behalf of the complainant payee, there is no reason why the attorney-holder cannot be examined as the complainant. ...

16. In regard to business transactions of companies, partnerships or proprietary concerns, many a time the

authorised agent or attorney-holder may be the only person having personal knowledge of the particular transaction; and if the authorised agent or attorney-holder has signed the complaint, it will be absurd to say that he should not be examined under Section 200 of the Code, and only the Secretary of the company or the partner of the firm or the proprietor of a concern, who did not have personal knowledge of the transaction, should be examined.”

17. To succeed in a suit for specific performance, the plaintiff has to prove: (a) that a valid agreement of sale was entered into by the defendant in his favour and the terms thereof; (b) that the defendant committed breach of the contract; and (c) that he was always ready and willing to perform his part of the obligations in terms of the contract. If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, necessarily he should step into the witness box and give evidence that he has all along been ready and willing to perform his part of the contract and subject himself to cross-examination on that issue. A plaintiff cannot obviously examine in his place, his attorney-holder who did not have personal knowledge either of the transaction or of his readiness and willingness. Readiness and willingness refer to the state of mind and conduct of the purchaser, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore a third party who has no personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney-holder of the person concerned.

18. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney-holder who has signed the plaint and instituted the suit, but has no personal knowledge of the

transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney-holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney-holder alone has personal knowledge of such acts and transactions and not the principal, the attorney-holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney-holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney-holder, necessarily the attorney-holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorised managers/attorney-holders or persons residing abroad managing their affairs through their attorney-holders.

(e) Where the entire transaction has been conducted through a particular attorney-holder, the principal has to examine that attorney-holder to prove the transaction, and not a different or subsequent attorney-holder.

(f) Where different attorney-holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney-holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his "state of mind" or "conduct", normally the person concerned alone has to give evidence and not an

attorney-holder. A landlord who seeks eviction of his tenant, on the ground of his “bona fide” need and a purchaser seeking specific performance who has to show his “readiness and willingness” fall under this category. There is however a recognised exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or “readiness and willingness”. Examples of such attorney-holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.”

c. ***S. Kesari Hanuman Goud vs. Atijum Jelaii & Ors. (2013)***
12 SCC 64

“23. It is a settled legal proposition that the power-of-attorney holder cannot depose in place of the principal. The provisions of Order 3 Rules 1 and 2 CPC empower the holder of the power of attorney to “act” on behalf of the principal. The word “acts” employed therein is confined only to “acts” done by the power-of-attorney holder, in exercise of the power granted to him by virtue of the instrument. The term “acts”, would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has preferred any “acts” in pursuance of the power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for acts done by the principal, and not by him. Similarly, he cannot depose for the principal in respect of a matter, as regards which, only the principal can have personal knowledge and in respect of which, the principal is entitled (sic liable) to be cross-examined. (See Vidhyadhar v. Manikrao [(1999) 3 SCC 573 : AIR 1999 SC 1441] , Janki Vashdeo Bhojwani v. Indusind Bank

Ltd. [(2005) 2 SCC 217] , Shankar Finance and Investments v. State of A.P. [(2008) 8 SCC 536 : (2008) 3 SCC (Cri) 558 : AIR 2009 SC 422] and Man Kaur v. Hartar Singh Sangha [(2010) 10 SCC 512 : (2010) 4 SCC (Civ) 239] .)”

d. ***Mohinder Kaur vs. Sant Paul Singh, (2019) 9 SCC 358***

“6. We have considered the submissions on behalf of the parties. It is an undisputed fact that the suit property stood redeemed from mortgage on 4-7-1989. The appellant sent due intimation by registered post to the respondent on 27-7-1989 and also provided him with a photocopy of the release deed, requiring the respondent to take steps for execution of the sale deed. The respondent by reply dated 2-8-1989 insisted on the no-dues certificate, denying receipt of the release deed. The respondent then gave a power of attorney on 2-11-1989 to PW 1. The witness was naturally unaware of the preceding events and denied receipt of the notice dated 27-7-1989 itself. The witness was therefore also incompetent to deny receipt of photocopy of the release documents by the respondent. It was for the respondent to establish his readiness and willingness for execution of the agreement by entering the witness box and proving his capacity to pay the balance consideration amount. Except for the solitary statement in the plaint no evidence whatsoever was led on behalf of the respondent with regard to the same, if PW 1 was competent to depose with regard to the same because these were facts which had to be personal to the knowledge of the respondent alone. Had the witness even led any documentary evidence on behalf of the respondent, in support of the plea for readiness and willingness on part of the respondent, different considerations may have arisen. The witness also sought to deny any knowledge regarding the cancellation of the agreement on 1-9-1989.

7. In Janki Vashdeo [Janki Vashdeo Bhojwani v. Indusind Bank Ltd., (2005) 2 SCC 217] , it was held that a power-of-attorney holder, who has acted in pursuance of the said

power, may depose on behalf of the principal in respect of such acts but cannot depose for the principal for the acts done by the principal and not by the power-of-attorney holder. Likewise, the power-of-attorney holder cannot depose for the principal in respect of matters of which the principal alone can have personal knowledge and in respect of which the principal is entitled to be cross-examined. In our opinion, the failure of the respondent to appear in the witness box can well be considered to raise an adverse presumption against him as further observed therein as follows : (SCC p. 223, para 15)

“15. Apart from what has been stated, this Court in Vidhyadhar v. Manikrao [Vidhyadhar v. Manikrao, (1999) 3 SCC 573] observed at SCC pp. 583-84, para 17 that:

‘17. Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct....’ ”

e. ***Shri Durga Dass Banka vs. Shri Ajit Singh & Ors. ILR (2012) I Delhi 607***

“8. The case of Janki Vashdeo (Supra) on which reliance was placed by both the courts below reaffirms the well settled law that the power of attorney holder cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge of. However the said legal position is not attracted to the facts of the case at hand. The question that arises for consideration is that whether what was deposed by the attorney holder, the son of the plaintiff appellant herein, was something that the principal had a personal knowledge of or was relating to some act done by the plaintiff which only he was privy to. The answer to this question is an emphatic no. As is evident

from the facts of the case at hand, the suit was instituted to get the order of the Hon'ble Division Bench of this Court enforced where the undertaking was given by the father of the appellant not to raise any unauthorized construction and to remove the existing construction which was unauthorized in the said order. Can it be said that the order of the court is something that the principal alone would have personal knowledge of? The order was of the court and the attorney deposing regarding the same is not something to be in his personal knowledge but a fact which has been proved on record. Here it would be relevant to refer to the judgment of this court in the case of Capt. Praveen Davar (Retd) v. Harvansh Kumari 2010 (119) DRJ 560 wherein the court while distinguishing the judgment in the case of Janki Vashdeo Bhijwani held as under:

“16. An attempt was made by Mr. Singla, the learned senior counsel for the appellants to contend that none of the plaintiffs having entered into the witness box to assert their title, the evidence of PW-1 Shri Bihari Lal Walia, the Attorney of the respondents, could be of no assistance to the respondents. Relying upon the judgment of the Hon'ble Supreme Court in Janki Vashdeo Bhoiwani v. Indusind Bank Ltd., (2005) 2 SCC 217 : AIR 2005 SC 439, the learned senior counsel for the appellants contended that the word “acts”, employed in Order 3 Rules 1 & 2 CPC, was confined to acts done by the power of attorney holder in exercise of powers granted by the instrument and was not inclusive of deposing in place and instead of the principal in respect of the matters in which the acts were done by the principal and not by him, and in which only the principal could have a personal knowledge. Apart from the fact that this point was not urged before the learned trial court and has been taken up for the first time in this appeal, there is, even otherwise, in my view, no merit in the same. The provisions of Order 3 Rules 1 and 2 CPC, as is clear from a reading thereof, contain no impediment to the

Attorney deposing in place of and instead of the landlord. In Smt. Ramkubai (since deceased) by Lrs v. Hajarimal Dhokalchand Chandak, (1999) 6 SCC 540 : AIR 1999 SC 3089, the Supreme Court while dealing with a case where the landlady did not appear in the witness box herself, but instead produced her son, who was also her G.P.A. holder, held that it was not important or essential for the landlord/landlady to enter the witness box to support the case. [See also: Om Prakash v. Inder Kaur 2009 107 DRJ 263 and Satnam Channan v. Darshan Singh 2006 (2) RCR (Civil) 615 P and H].

17. The judgment in Janki Vashdeo Bhojwani's case (supra) relied upon by the learned senior counsel for the appellants also does not come to the aid of the appellants and is clearly distinguishable. It has been held in the said case that if the power of attorney renders some acts in pursuance of the power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Further, it has been held that he cannot depose for the principal in respect of the matters, in which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined. It nowhere states that even though the facts deposed are not facts within the personal knowledge of the principal alone, the power of attorney holder cannot depose on behalf of the principal.

(emphasis supplied)”

Hence in my considered view the learned courts below have misinterpreted the import of the judgment of the Apex Court and applied it to the facts of the case at hand. It would also be pertinent to mention here the judgment of this court in the case of Mr. Vinav Jude Dias v. Ms. Renaiet Kaur AIR 2009 Delhi 70 wherein the court while dealing with the deposition

of the attorney holder with regard to the fact that whether the parties before the court were married or not held as under:

“Facts which are within the special knowledge of principal and are not in the knowledge of attorney can only be deposed by the principal. Whether the parties were married on a particular day, is not a private act of the parties. Marriage is normally a public act in this country and evidence can be given by anyone who has knowledge of the fact. Whether the parties are living separate or not is also known to other people associated with the parties and is not something secret. Similarly, for how long parties were living separate can be deposed in the Court by any person who is aware of the facts. If an attorney aware of these facts and can answer the questions of the Court, the attorney cannot be told that he is not a competent witness or his statement would not be recorded. Similarly an attorney, on the basis of instructions/directions given to him, can answer the queries, if there was any possibility of parties patching up and living together or the marriage has broken down irretrievably. An attorney has to be allowed to appear in the witness box and make statement. The Court may reject that part of his statement which is based on hearsay or which he has no personal knowledge. But he cannot be prevented from appearing in the witness box and deposing and answering the queries. Same is the import of judgment of Supreme Court in Janaki Vasudeo Bhojwani (supra) wherein Supreme Court had not debarred an attorney from appearing in the witness box but the Supreme Court has stated the facts which are only in the knowledge of the principal, about those facts attorney cannot testify in the Court.”

9. Hence, any act which is not a private act or which is not something the principal alone can have

personal knowledge of can be deposed by the attorney holder and taken in evidence while deciding the issues. There is no bar hence under the Code or otherwise where the attorney holder is deposing regarding a fact which is proved on record. The learned trial court was required to consider the documentary evidence instead of giving any weightage to the oral evidence led by the son of the appellant. The copy of the said order was placed and proved on record by the son of the appellant. Perusal of the said order would clearly show that a clear undertaking was given by the father of the defendant that he would not raise any unauthorized construction and that was the only relevant factor of consideration.

27. It is submitted that the Sale Deed produced by the plaintiffs before the Trial Court showed that the physical possession of the Suit Property was with the plaintiffs no. 1 and 3 in the capacity of a tenant. It is submitted that a perusal of the documents exhibited by the plaintiffs before the Trial Court shows that there was a *mala fide* on their part to grab public land.

28. Learned counsel also submitted that the appellants cannot rely upon the deficiencies in the case of the respondent to succeed in their claim. Reliance has been placed upon the following judgments to give force to this argument:-

- a. ***Sayed Muhammed Mashur Kunhi oya Thangal vs. Badagara Jumayath Paili Dharas Committee & Ors. (2004) 7 SCC 708***

“8. As is evident from the impugned judgment, the High Court took into consideration the written statement filed by

the Secretary, Wakf Board wherein it has been stated that the plaintiff Committee was very regular in submitting annual statement of accounts to the Wakf Board and in payment of annual contribution to the Board as per the provisions of the Act in support of the view that the plaintiff was actually acting as a mutawalli. This approach, in our view, is not correct. The written statement filed by the Wakf Board could not bind Defendant 2. Further, any statement made in the said written statement could not be accepted against Defendant 2 unless it was established on the basis of evidence. The decision of Moideen Bibi Ammal [AIR 1927 Mad 69 : 51 MLJ 598] in our view, does not help the plaintiff. To apply the said decision, necessary facts ought to have been pleaded and established. In the case on hand, as already noticed above, neither was there pleading specifically in that plaint as to the plaintiff actually acting as a mutawalli to come within the scope of Section 3(f) of the 1954 Wakf Act nor was acceptable and sufficient evidence placed on record to prove it as a fact. In the situation, the aforementioned decision has no application to the case of the plaintiff. When the plaintiff came forward specifically pleading that he was entitled to declaration of title and for recovery of possession of the plaint schedule property based on the agreement, Ext. A-2 dated 13-2-1973, it could succeed only on the basis of validity of Ext. A-2 and the validity of transfer of mutawalliship in its favour. Since all the courts have concurrently found that mutawalliship could not be validly transferred in favour of the plaintiff Committee under Ext. A-2, the suit filed by the plaintiff ought to have been dismissed. The plaintiff could only succeed on the strength of its case and not on the weakness found in the case of the defendant, if any. The first appellate court having elaborately considered the evidence placed on record in the light of the pleadings of the parties had come to the right conclusion in dismissing the suit of the plaintiff. The High Court in second appeal, in our view, was not right in upsetting the findings of fact recorded by the first appellate court, that too without putting the parties on notice on the substantial question of law. Even otherwise, the finding of

the High Court on Question 3 cannot be sustained when such a case did not arise for consideration in the absence of necessary pleading in the plaint in that regard. More so when the case of the plaintiff was based clearly on title said to have been derived under Ext. A-2.”

b. ***State of M.P. v. Nomi Singh, (2015) 14 SCC 450***

“11. It is settled principle of law that in respect of relief claimed by a plaintiff, he has to stand on his own legs by proving his case. On perusal of the impugned order passed by the High Court, this Court finds that the High Court has wrongly shifted burden of proof on the defendants. In the middle of para 12, while giving its reasons to disagree with the decree passed by the courts below, the High Court has observed as under:

“It was the respondent-defendant who has challenged the possession of the plaintiff and his father on the ground of khasra entries, therefore, burden of proving the fact that allegations made by the defendant are correct, is on the defendant, in which the defendant has failed. Further, it has been admitted before the Court that entry of the plaintiffs in the khasra record is as encroacher, but no such khasra entries have been produced by them....”

In the middle of para 15 of the impugned decree, again the High Court observes:

“Further, the defendant has failed to prove the possession of the plaintiff and his father was that of an encroacher. The defendant has further failed to prove Khasra Nos. 1950 to 1952 to be wrong or that patta given to the plaintiffs, was only for one year....”

The above observations made by the High Court, show that it has erroneously placed onus of proof of title and possession of the plaintiffs, on the defendant. The High Court has completely ignored the fact that the plaintiff after losing case

in the first round from the trial court, got amended the plaint and took plea of adverse possession, on which matter was remanded to the trial court, and after hearing parties suit was again dismissed, which was upheld by the first appellate court. The above approach of the High Court is against the law laid down by this Court, and in our opinion, it erred in law in reversing the decree passed by the trial court and that of the first appellate court by shifting burden of proof on the defendant.

29. It is submitted that all the four Defence Witnesses reiterated that Suit Property was in possession of the respondent/MCD, which was given for dispensary in the year 1986. It was further deposed by DW-2, Dharam Chander Batra, a resident of Majlis Park and also the Head Master of the MCD School, that no education was being provided at the Suit Property and its possession was with the dispensary since 1986. However, the documents pertaining to the Suit Property were destroyed in the floods in the year 1976. It is submitted that the inability to produce the documents was *bona fide*.

30. It is, therefore, submitted that the instant appeal is liable to be dismissed keeping in view the above made arguments, since there is no merit in the challenge against the impugned order.

31. Heard the learned counsel for parties and perused the record, including the impugned judgment.

ANALYSIS AND FINDINGS

32. In the instant appeal, the private appellants and the respondent Department both are claiming the title in and the possession of the Suit Property/Plots. The Trial Court while passing the impugned judgment

framed two primary issues, as stated above, discussing the possession of the land by the parties, and other adjudicating the validity of the documents produced by the plaintiffs. However, this Court requires to investigate into the question whether the entire issue for suit for recovery could be based on the question of possession and who held it, when in fact neither of the party had argued upon the title of the property or claimed adverse possession. The question, first, comes of title, and then of the possession, whether legal or not. Accordingly, this Court delves into the following discussion, referring to the issues framed by the Trial Court.

ISSUE I

33. The first issue being ‘*Whether the possession of the suit land was handed over to defendant*’, was decided in the favour of the respondent and against the plaintiffs based upon the statement of the Defence Witnesses, including the Chief Medical Officer, Head Master and Assistant Teacher of the MCD School, and Deputy Health Officer. While deciding the issue, the statements of the Defence Witnesses were appreciated as under:-

“8 From the testimony of Dr. Parbodh Kumar Sharma, CMO DW. 1, Shri Dharam Chander Batra DW. 2 and Shri Puran Chand, DW. 3 and Dr. Ved Parkash Kannoji, Deputy Health Officer DW.4 it is evident that MCD had been running school in the suit property since 7.11.1958 which was donated to MCD by Shri Sharma and Mr. Khosla proprietor of M/s Chief Housing Corporation. The name of the donor is Mr. Vilayti Ram Khosla. From the evidence on records, it is evident that land in question was handed

over to Deputy Health Officer, ISM, MCD in the year 1986 by Education Department for opening a dispensary. Since then the land has been in possession of the dispensary. Nothing material has come in cross examination of these two witnesses to controvert these findings. The running of dispensary since 1986 has further been strengthened by testimony of Shri Ved Parkash DW.4 who has taken over the possession from the Education Department vide letter Ex.DW4/1. This letter Ex.DW4/1 shows that in the year 1986, two rooms were given for running Ayurvedic and Homeopathic dispensary. Letter Ex.DW4/2 also shows that site was earmarked for MCD primary school in the year 1997.

9 Testimony of Dr. Parbodh Kumar Sharma, CMO DW.1 shows that Ayurvedic dispensary has been running since 1998. Since he joined in February 1998, he did not disclose who was in possession of the suit property in 1986. Though the possession of the suit property has been with Health Department since 1986, but the dispensary is stated to have been started in the year 1998 as is evident from the testimony of Shri Ved Parkash DW4 and Dr. Parbodh Kumar Sharma, CMO DW.1.

10 Thus, from the testimony of these four witnesses, it becomes clear that the possession of the suit property was with Education Department since 1958 and in the year 1986, it was given to Health Department, in which Ayurvedic Dispensary was running since 1986/1998. Though there has been no document on record to show the property has come in the possession of MCD, except the oral testimony of Dr. Parbodh Kumar Sharma, CMO DW.1 who stated that the same was donated by one Shri Vilayti Ram Khosla, partner in Chief Housing Construction to MCD for opening the school, it is held that suit land was handed over to Defendant. Therefore, Issue No. 1 is decided in favour

of defendant and against plaintiffs.”

34. The Trial Court, relied upon the testimonies of the Defence Witnesses and made the abovementioned findings, however, for this Court as well, it is pertinent to look into the relevant part of the examination and cross-examination of DW-1 alongwith the interpretation of the same made by the Trial Court.

35. The evidence of DW-1, was recorded as under:-

“I have been working in this dispensary since Feb. 1998, which is situated in the suit property. There is no problem after Feb. 1998 and nobody has claimed for that property since then. The dispensary is running till today. The dispensary had started in Feb. 1998. I took the possession from Deputy Health Officer (ISM) MCD.

I do not know who was in possession of this property in 1996, I cannot admit or deny the suggestion that the Majlis Park Welfare Association had written the letter d. 28.12.2996 to the MCD for starting a dispensary in the suit property, since I joined in Feb 1998. I cannot who was in possession in 1996 since I joined I Feb. 1998. It is wrong to suggest that I am deposing falsely.”

36. The statement made by DW-1, suggests that the CMO of the respondent had limited information regarding the plot and the dispensary operating thereupon. The CMO joined the dispensary in the year 1998 and could not depose as to the position of the same prior to that year. Even though he was working at the post of CMO, he could not make any statement regarding the legitimacy of the letter dated 28th December 1996

written by the Majlis Park Welfare Association to the SHO, PS Adarsh Nagar wherein it was stated that the Association had passed a resolution that a charitable dispensary would be built at the Suit Plot. The statement made by DW-1 indicated only the fact that he was working at the dispensary and that the same was operating on the property, which was in no manner a testament to the construction or operation on the property or even its possession being legal. Yet the Trial Court relied upon the fact that DW-1 was working at the premises to hold that the possession was in favour of the respondent, not giving heed to the fact that there was nothing in his statement to suggest that the possession with the respondent was legal.

37. The statement of DW-2 during his evidence was as under:-

“I am residing at Majlis Park since 1.1.1995/ This school was opened on 7.11.1958 by MCD. This school was near my house. I became Head Master In this school in July 1973, and I retired on 31.10.1993 from school. This school was running by MCD, and the salary to the staff including me paid by MCD. The land was donated by Mr. Sharma and Mr. Khosla, Coloniser partner of Chief Housing Construction Co. to MCD for opening the school. The name of one donor was Vilaity Ram Khosla and I am not clear of the title of the firm.

There were about 300 children were studying during 1973. At the time of election, this school was also used as polling booth/station. This school was shifted to another place in 1981. However, Nursery School was running in the suit property after shifting of the school. This land/building was handed over to DHO ISM in the year 1986 by the order of Education

Deptt. For opening a dispensary. In the year 1978 due to flood all the whole record of the school has been destroyed.

MCD have been running a Nursery School in a New Building. I do not know what record was lying in the school which was destroyed due to flood. I had written to the AMCD that whole of the record had been destroyed. I will have to search the copy of the same with me. But I have not brought today. I do not know if Valiaty Ram Khosla was the owner, Vol He was colonizer. We do not see what authority owners of the land had given to him.

I had not seen what writing Vailaity Ram Khosla or any other person had given while giving possession of the property. The school had now been run in other building of the MCD in street no. 10/11, opposite to this property of the property. My ration card is in the above address given by me. I had gone to the MCD office yesterday when I was told to appear in evidence for today. I had not received any summon or letter from court or from MCD. The possession of the property was given without any payment; I do not know who is in possession of the writing given by the colonizer. The colonizer had given the possession of the property for teaching purposes. Vo. For running school. Now the possession is with the dispensary since 1986. I had given possession and had taken in writing. Since 1986 no education in provided in the property in the suit. The Coloniser had not given the number of the plots/property allowed to be used for education purposes. He had also not given the Khasra No. while given possession of the property in dispute. I do not know if any document was regd. in favour of the MCD. It is wrong to suggest that I am deposing falsely, due to I am living in the same gali."

38. It is extremely crucial to see that statement of the above Defence Witness, who was the Head Master at the classes running out of the Suit Property, makes averments regarding the possession being handed over to the respondent by one Vilaity Ram Khosla of M/s Cheap Housing Construction, the School running from the premises since 1958 and the transfer to the Deputy Health Officer (ISM) (hereinafter “DHO”). However, during cross-examination, he was unable to produce any evidence or any document on record to substantiate either of the statements made by him. Neither was he able to show the transfer of the property to the respondent Department, let alone the same being a transfer in accordance with the law, nor was he able to testify as to when and how the same took place. Moreover, admittedly, DW-2 was not a part or even a witness to the transfer to the MCD from Mr. Tyagi and Mr. Khosla that was alleged. Hence, the plea that the records were destroyed in the floods should not have come to the rescue of the witness.

39. In *Arguendo*, even if the statement of DW-2 was to be taken to be completely true and without errors, it is clear that the purpose of donation of the Suit Property was to run a School and setting up or running a dispensary on the Suit Property found no mention in the said Defence Witness’s statement.

40. The DW-3 made the following statements during recording of his evidence:-

“I am living in the above property since 1962. The school was running in this property then. MCD was running this school. I was working as Asstt. Teacher in this schools since 1973. In 1978 there was flood, then

our school was shifted to gali no. 11 Majlish Park. Due to flood all the record of the school has been destroyed. Nobody made any claim on this property since 1962. this property was sold by Tyagi Family to Mr. Sharma and Mr. Khosla who were the colonizer. It was donated by them for running a school to MCD. The school was continuously running since 195 to 1983. I am presently residing near the suit property. Now a dispensary (Ayurvedic) ahs been running by MCD, since 1996. I am not sure about the year of opening of dispensary.

I do not know if the colonizer Mr. Khosla or Mr. Sharma had given in writing or not. The record used to be kept in the school. I do not know If any document was registered or not. No payment was made by the MCD. Vol. as it was donated. There has been no litigation about this property since 1962, Since I know all the facts personally. Since the property in dispute was donated, there, I have not seen any sale deed executed by Tyagi Family in respect of property in dispute. The property in dispute was given to McD for provided education facilities/ running the school. Padam Sen Jain was the general Secretary of the Majlis Park Welfare Association. I was member of that Association at that time when he was General Secretary. I do not know whether the property was in possession of Association in the year 1996. In the year 1996 the possession was with Corporation. The correspondence was going on between the Deptt. Of Education and Health of MCD, for opening a dispensary in the disputed premises. The Majlis Park Association was also corresponding with the MCD, for opening dispensary. I do not know when for the first time somebody has claimed ownership or possession of the premises in dispute. I was not present at the time of handing over possession of the property, by the owner to the school of MCD. Hence I do not know whether any writing was made or not. I do not know the sig. of

Sh. Padam Sen Jain. Letter dated 28.12.1996 is mark A. It is wrong to suggest that I am deposing falsely. The Majlis Park Welfare association has never been in possession of the property in dispute.”

41. Repeating similar averments, although DW-3 stated that the Suit Property was sold by Tyagi Family to Mr. Sharma and Mr. Khosla who further donated the same to MCD for running a school, he was unable to substantiate the same and deposed that he was not present at the time of handing over of the possession by owner to the MCD. The admission of DW-3 regarding not being present at the time of the alleged handing over of possession is also significant to be noted, since, neither he was able to present any documentary evidence to substantiate and corroborate his statement nor he was actually present at the time of the transfer in favour of the respondent he claims to have taken place.

42. Further, the evidence of DW-4 recorded the following statements:-

“I am working as Deputy Health officer since 1997. A Dispensary was running in the property in disputed under my supervision. The possession was given to the dispensary in 1986, by the MCD, Education Deptt. Vide letter Ex. DW4/o (Objected to mode of proof). We had asked for ownership of the property/status of the property I dispute and we had received letter, copy of the same is Ex. DW4/2 and Ex. DW4/A and DW4/2-A and DW4/2-=B. from Addl. Deputy Commissioner land and state. (Objected to) I cannot tell when the dispensary started. However, I can tell the date after checking the record. We had written letter to the Addl. Commissioner land and State Deptt. MCD, copy of the same is Ex. DW/4 and DW4/4 is the letter written by the Architect of the MCD to DHO ISM, MCD. Today dispensary is running in the property in dispute but I

do not know when it was stated. Again said it was started in 1998. The possession of the property in dispute is with the Health Deptt. MCD since 1986. Nobody was claimed about the possession or ownership of the property in dispute, as per official record. The dispensary is a free dispensary and the doctors and other staff are getting salary from MCD.

Copy of letter dated 10.12.97 was written by me is Ex. DW4/5. I do not know if the dispensary was being run from 1986 to 1992. I do not know since when the property in dispute was lying abundant as mentioned in letter Ex. DW4/4. Regarding the ownership of the property we received letter from the land and state office Ex. DW4/2. We did not receive any other proof or state office ex. DW4/2. We did not receive any other proof or ownership. I do not identify the sig. of Sh. K J Chaudhary in Ex. DW/2, however, letter Ex. DW4/2 was received by me I official capacity, I do not remember the name of the person who has signed Ex.DW4/4. I do not remember who has signed Ex, DW4/2-A and /DW4/B. I do not remember if there has been any school has been run in the property in dispute since 1986. I have not seen any school being run in the premises in dispute since 1986 till today, nor any Nursery school, it is wrong to suggest that I am deposing falsely."

43. The aforesaid Defence Witness referred to Ex. DW4/2, which was addressed to the DHO (ISM), Health Department by the Additional Deputy Commissioner, Land & Estate Department, MCD, contained therein the communication that as per layout of the Majlis Park, the site in question was earmarked for Municipal Corporation Primary School, however, it has also been stated repeatedly by those involved on both sides of the current dispute that the classes that were running from the

Suit Property/Plot were shifted to the School constructed by the respondent in the same locality and the classes stopped running on the Suit Property much prior to the issuance of the instant communication, i.e., in the year 1981. Therefore, relying upon a communication, which on the face of it lacks credibility for the reason of stating contrary facts, was erroneous on the part of the Trial Court. Moreover, even if the site was in fact earmarked for Municipal Corporation Primary School, there is no mention of a dispensary being authorized to run and operate from the Suit Property. Hence, the disputed and contrary facts do not support the case of the respondent and the position upheld by the Trial Court.

44. DW-4 also relied upon Ex. DW4/4, containing the communication from the Architect, MCD to the Deputy Medical Officer (ISM) that the land in question was lying abandoned and it was also intimated that the title of the land may be confirmed before any plans were to be taken up for setting up the dispensary. For this, reference is made to Ex. DW 4/5 which states that the possession was taken by the respondent Department in the year 1992. However, there is nothing on record to show that the possession was legally taken by the respondent and being operated upon with title. It is also apparent from the record that the title or right was not confirmed in favour of the respondent before any operations were initiated or construction was raised.

45. A reading of decision of the Trial Court on Issue No. I and a perusal of the record show that for deciding the question of handing over of possession to the respondent reliance was placed solely on the statements of the witnesses. These witnesses were not independent and

were teachers or medical officers attached with the respondent, thus, having an interest in the property. As discussed earlier, there was not even an iota of evidence that the witnesses were able to produce to show that the respondent had obtained legal possession of the Suit Property from the original owners. The entire evidence of the defence was based on assumptions, surmises and conjectures.

46. On one hand, the Trial Court relied upon the statements of the witnesses to come to the conclusion that the property was donated to the respondent and had been in its possession since, despite clear depositions by the witnesses that they did not have any material to show that such a transfer had taken place and neither were they a witness to same, on the other hand Trial Court completely and in blatant error ignored the evidence of PW-2, the concerned Halqa Patwari, who was a public servant/government official, had produced the relevant records and had categorically stated that there was no record of any transfer of the Suit Property to the respondent, as per their records. The Halqa Patwari also stated that as per the record, the owners were Thakur Dass, Shiv Nath Singh and Jai Prakash, appellant no. 1 herein, but the same was also not considered while deciding the issue. The documents produced by the Halqa Patwari which are before this Court and were also before the Trial Court, had been disregarded and not appreciated properly. Although, it is a settled position of law that entry in revenue records in itself does not tantamount to ownership and title, it is undisputed that it carries evidentiary value and has to be corroborated with other relevant factors, testimonies, proof of title. However, the testimony of the Halqa Patwari ought to have been given due consideration.

47. It is also pertinent to note, that the Trial Court while deciding the Issues No. II and III had observed that the evidence of GPA holder/appellant no. 2 could not be accepted since the law laid down restricts the GPA holder to depose only to the extent that he has witnessed, however, in the instant case, the witness examined by the defence were neither a party to the transfer alleged by them, nor a witness and were not even the GPA or agent of those who were a part of the transfer. They had no foundation for testifying that a transfer had taken place in favour of the respondent. The Trial Court very categorically observed as under, despite which the aforesaid decision in favour of the respondent was made:-

“10 Though there has been no document on record to show the property has come in the possession of MCD, except the oral testimony of Dr. Parbodh Kumar Sharma, CMO DW.1 who stated that the same was donated by one Shri Vilayti Ram Khosla, partner in Chief Housing Construction to MCD for opening the school, it is held that suit land was handed over to Defendant. Therefore, Issue No. 1 is decided in favour of defendant and against plaintiffs”

48. In ***Marri Venkata Lakshmi vs. Kalvakollu Harinadha Rao***, **Second Appeal No. 456/2014** decided on 26th May 2020, the Andhra Pradesh High Court expressed its view on possession on the evidence required to prove title and held as follows:-

“49. With reference to possession of the suit site claimed by the respondent, his oral testimony is not sufficient by itself in the absence of any other documentary proof. Ex. A1 and Ex. A2 cannot be proper substitutes for the proof to be adduced in this

context. Evidence of P.W. 2, who claimed to be tenant of the vendor of the respondent, was rightly rejected by the learned trial Judge offering valid reasons. Except his assertion orally, no documentary proof was laid at the trial to make out that P.W. 2 was a tenant of the site in question at any stage nor nature of his possession and enjoyment of this property was established. He claimed that he was retrading tyres. If it was his activity, there should have been certain documents to show that he conducted this activity from the property in dispute. Cross-examination of P.W. 2 itself makes out that there is no documentary proof establishing that he resided in the property in dispute in between the years 2004 and 2007. These circumstances are sufficient to reject the version of P.W. 2.”

49. In the instant case as well the only declarations in favour of the stand of the respondent were the oral assertions of the Defence Witness which were not backed by any documentary proof. Moreover, there were no documents to show that the respondent was carrying out the activity alleged to be conducted from the Suit Property, in this case running a School and thereafter, a dispensary,

50. In ***Sh. Pratap Singh & Ors. vs. Shiv Ram***, Civil Appeal No. **1511/2020** decided 20th February 2020, the Hon’ble Supreme Court while deciding a second appeal in the suit for permanent injunction and the question of proof of title through tenancy noted as under:-

“18. The present is a case where no relationship of landlord and tenant is mentioned in the revenue record though required in terms of Section 32(2)(a) of 1954 Act. In the absence of entry in the revenue record, which is also expected to contain the entry of rent and

possession, the tenancy cannot be treated to be in existence only on the basis of oral evidence of the witnesses examined by the defendant. The burden of proving the relationship was on the defendant. Such burden cannot be said to be rebutted only by oral evidence. The witnesses may lie but the documents do not, is a golden rule. The presumption of truth attached to the revenue record can be rebutted only on the basis of evidence of impeccable integrity and reliability. The oral evidence can always be adduced contrary to the revenue record but such oral testimony will not be sufficient to hold that the statutory presumption stands rebutted.”

51. Hence, a blind reliance on the statements made by the Defence Witnesses in the absence of any substantiating document to show that even if the respondent was in possession of the suit property and operating, the same was a legitimate, *bona fide* and legal possession. The onus of proof of title in the property and the legal possession thereof was upon the respondent, however, it miserably failed to corroborate and validate the oral testimonies made by the Defence Witness.

52. Moreover, before this Court, the respondent and the learned counsel for the respondent on several dates sought time to produce documents to show that the Suit Property/Plot belonged to the respondent, as has been noted in the orders dated 27th November 2009, 9th December 2009, 10th December 2009 and 3rd May 2010, however, despite seeking such time, the respondent miserably failed to produce and documents whatsoever showing the title and ownership of the Suit Property.

53. The letters relied upon by the respondent were those which talked about taking an action on the Suit Property, however, a perusal of the same showed that nowhere was the legality of possession or ownership discussed in the said letters. A mere reproduction of facts did not amount to a conclusive proof of ownership or title. This Court also finds merit in the argument advanced on behalf of the appellants that the alleged transfer was not also in accordance with the provisions of the Transfer of Property Act, 1882.

54. Therefore, this Court does not agree with the finding of the Trial Court regarding Issue No. I.

ISSUES II AND III

55. The next issues decided by the Trial Court were '*whether the plaintiff is entitled to possession of the suit land*' and '*whether the plaintiff is entitled to damages*'. The issues were decided in favour of the respondent and against the plaintiff, while observing the following:-

"11. The onus to prove this issue lies upon the plaintiff in support of this, they have examined Shri Desh Deepak Tyagi as PW1. This witness has stated that he is the attorney of plaintiff No. 1 to 6 and got exhibited the copies of the same as ex. PW1/1 to PW1/3. He has stated that land of Khasra No. 262, 258, 217 and 204 of Village Bharolla, Delhi was his ancestral property. They had sold plots No. C-408, C-409 Majlis Park to M/s Chief Housing Corporation and for other plots, they had given the authority to enter into agreement for sale on their behalf. He has further stated that they used to execute the sale deed on getting payment from the buyers. The said company took advances from

plaintiff No. 3 to 6 for sale of plots No. 342 and C-343. He has got exhibited the certified copies of sale deed as Ex. PW1/4, Ex PW1/5 in favour of plaintiff No. 1 & 3 respectively. Ex PW 1/7 is the copy of khasra Girdawari issued by Patwari in favour of the owners. He has further deposed that his father was the co-owner of the suit property and had temporarily allowed MCD School to run since the children of village used to sit in tents. Later on, school was shifted to newly constructed building of MCD school and the premises were lying vacant under their locks. After about 7 years some persons of locality moved for opening dispensary for which they had lodged a report. They also filed a suit, which was however, withdrawn with permission to file the fresh as they had not issued notice to MCD. The fresh suit was filed after serving MCD, copy of the same has been got exhibited as Ex. PW.1/6 to Ex. PW1/11. Ad receipt is Ex. PW21/12 to Ex. PW.1/14. MCD did not reply the said notices. The rental value of the property is more than 20,000/- per month. Ex.PW.1/15 is the receipt issued in favour of plaintiff No 2.

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13. The law is well settled that an attorney can depose only to the facts which he has witnessed. In the present case, he is not the witness to sale deed etc nor he has given any plausible reason as to why plaintiffs could not appear and depose in the case.

14. Though the testimony of Shri Desh Deepak Tyagi who has appeared on behalf of plaintiffs as an attorney cannot be relied upon, ever otherwise also, the documents which he has got exhibited cannot be read in evidence as the same have not been proved as per law. If the Sale Deed Ex. PW1/4 is stated to have been in favour of plaintiff no.1 and Sale deed Ex. PW 1/5 which is in favour of plaintiff no.3 are examined, the

Sale Deed Ex. DW 1/a has been executed for Shri G.R. Sharma, Director Chief Housing Construction in favour of Shri Sardari Lai, plaintiff No. 1 for property bearing No. C-408. Neither the vendor nor the vendee has been examined to prove this Sale Deed. Not only this, the Sale Deed does not bear the name of any witness who has witnessed the same. Thus, the Sale Deed got exhibited in the testimony of Shri Des Raj Tyagi PW.1 as Ex. PW1/4 cannot be said to have been proved as per law. Similar is the fate with regard to Ex. PW1/5 which is also a Sale Deed in respect of property No. C-409. The fact that sale deed Ex. PW.1/4 and 5 have not been proved as per law and not site plan has, been put on record to identify the suit property and the testimony of Shri Desh Deep Tyagi PW.1 not to be relied upon being an attorney, plaintiff is not entitled to the possession of the suit property as well as damages. Therefore, these issues are decided against the plaintiff and in favour of defendant.”

56. To adjudge the issue whether the plaintiffs were entitled to the possession of the Suit Property it was necessary to investigate the title of the plaintiffs while considering the facts and more importantly the documents reproduced.

57. The plaintiffs produced the Sale Deed executed between the M/s Cheap Housing Company and the plaintiff no. 1 and 3, however, the main plea taken on behalf of the defendants and also reiterated by the Trial Court is that the GPA holder does not have the power and authority to testify in favour of a document which was not executed in his presence. The position of law is clear on this aspect and this position has been upheld. A testimony of a GPA holder shall not be considered as a valid proof of a document or event which has not been witnessed by him/her.

In the instant case, the appellant no. 2/PW-1, was holding the GPA in his favour, which had been exhibited before the Court of the Trial Court and were examined as Ex. PW 1/1, PW 1/2 and PW 1/3. However, this was not the sole title he possessed with reference to the Suit Property.

58. It is an admitted and undisputed position that appellant no. 1 was a co-owner of the Suit Property, as has been reiterated in the impugned judgment as well as the written submissions placed before the Court by the respondent. Appellant no. 2, being the son of the co-owner has vested interest in the property and was also the GPA holder on behalf of the plaintiff no. 1 to 3 and 6, therefore, was made a party to the suit. Being a plaintiff himself, it is erroneous to say that only his status as a GPA holder was relevant to consider or not to consider the statement made and evidence adduced by him.

59. Furthermore, the statement of the other primary and crucial independent witness, PW-2 did not find even a slightest mention in the impugned judgment. The relevant portion of the statement of PW-2, the Halqa Patwari, Village Bharolla, is as follows:-

“I have brought the summon record. As per register (Khatauni) PW1/6 is the true copy of the Khatauni for the year 1988-89. I have also brought the Khasra Girdawari register for the year 1997-98. PW1/7 is the true copy of te Khasra Girdawari for the year 1997-98.

In our record there is no mentioned that the land was given to MCD or to any school. In our record the area is shown as abadi. In our record the land in dispute is shown in possession of Sh.Thakur Dass, Jai Prakash, Shiv Nath Singh, PW1/7. As per our record of

Khatauni of the year 1988-89 Khata NO. 25 shows that 1/4th of the Kh. No. 262/258, 217/4, 263//258, 217/4, 263/258, 217/4 min, 262/258, 217/4 min total land 115 bighas, 10biswas belongs to Capital Housing as mentioned in IInd column beside name of the other owner inside the carbon. In the record for the year 1997-98 Khasra Girdawari names are mentioned in column no. 4 in Ex. PW1/7."

60. The statement made by PW-2 evinced that the ownership of the Suit Property vested with the original owners, i.e., Thakur Dass, Shiv Nath Singh and the appellant no. 1. It is a settled position of law that revenue records on their own are not to be considered a conclusive proof of ownership/title, however, in the instant case the records that showed that the land vested with the original owners was corroborated with the statement that no document or other material existed anywhere in the record with the concerned department to show that any transfer of the Suit Property took place in favour of the respondent. Further, the fact of ownership was also corroborated with the registered Sale Deed, produced by the plaintiffs no. 1 and 3 executed between the M/s Cheap Housing Construction Company. The said Sale Deed, though disputed could not be disproved by the defendants.

61. Another pertinent point to be considered is that merely because the land in question was lying vacant, did not give the unbridled entitlement to the respondent to start to operate its functions on the same without any right or title.

62. In *Jones vs. Chopman*, (1849) 2 Ex. 803: 18 LJ Ex. 456, the doctrine ‘possession follows title’ was propounded and it was stated as under:-

“If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of these two is in actual possession, I answer, the person who has the title is in actual possession and the other person is a trespasser. In such a case who is in possession is to be determined by the fact of the title and having the same apparent actual possession; The question as to which of the two really is in possession is determined by the fact of the possession; following the title, that is by the law, which makes it follow the title.”

63. The Gujarat High Court in this respect in its judgment passed in *Navalram Laxmidas Devmurari vs. Vijayaben Jayvantbhai Chavda*, 1997 SCC OnLine Guj 83, and held as under:-

“11. The concept of possession is an abstract one. The ordinary presumption is that possession follows title. Presumption of possession over an open land always is deemed to be that of the owner and not of a trespasser. An open place of land shall be presumed to be in possession of the owner unless it is proved by the trespasser that he had done some substantial acts, of possession over the land which may excite the attention of the owner that he has been, dispossessed. As indicated above, an owner of an open land is ordinarily presumed to be in possession of it and this presumption becomes strong in his favour when the defendant fails to establish the ground on which he claims to have come in possession.”

64. A Coordinate bench of this Court in *Institute of Human Behaviour & Allied Sciences vs. Govt. of NCT of Delhi & Ors, 2012 SCC OnLine Del 1373*, held as under:-

“103. From the above judicial precedents, it is evident that so far as open land is concerned, such open plot would always be in the possession of the owner as a title holder. Mere unnoticed user of such land by a neighbor or a trespasser which is not in the nature of a substantial act of possession and would not tantamount to dispossession of the owner.”

65. In the landmark judgment of *Indore Development Authority vs. Manoharlal, (2020) 8 SCC 129*, the Hon’ble Supreme Court observed as under:-

“249. The concept of possession is complex one. It comprises the right to possess and to exclude others, essential is animus possidendi. Possession depends upon the character of the thing which is possessed. If the land is not capable of any use, mere non-user of it does not lead to the inference that the owner is not in possession. The established principle is that the possession follows title. Possession comprises of the control over the property. The element of possession is the physical control or the power over the object and intention or will to exercise the power. Corpus and animus are both necessary and have to co-exist.

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253. A person with title is considered to be in actual possession. The other person is a trespasser. The possession in law follows the right to possess as held in Kynoch Limited v. Rowlands, (1912) 1Ch 527.

Ordinarily, the owner of the property is presumed to be in possession and presumption as to possession is in his favour.”

66. It is also apparent that the statements made by the Defence Witnesses and the letters relied upon by the respondent in no manner establish or even discuss as to the capacity in which the respondent running its operation in the School or the dispensary without any title or entitlement in the same. There is no statement made by the respondent or anyone on their behalf to conclusively prove that the possession with the respondent was legal.

67. Therefore, the position of law is also definite to this extent that possession follows title and hence, the person with title would have a better cause and claim than the one who has mere possession. Moreover, where the land is lying abandoned/open or vacant, the presumption would be in the favour of the owner and not the trespasser. In the case at hand, as discussed earlier, the respondent was not able to produce any document to show its title in the Suit Property and legality of its possession, whereas, the plaintiff had produced the revenue records as well as the deed of sale for establishing their title, which was anyways not rebutted by the respondent that the appellant no. 1 herein was the co-owner.

68. Therefore, this Court also distinguishes the findings of the Trial Court in the instant Issues No. II and III as well.

ISSUE IIIA

69. The final issue considered by the Trial Court was '*whether the documents of the title purported to be executed by M/s Chief Housing Corporation in favour of plaintiff No 1 are fabricated as stated in para 1 of the written statement?*'.

70. The defendant/respondent before the Trial Court, filed an application for framing an additional issue which resulted in framing of the present Issue No. III A. However, despite having made a formal application and having the same decided in their favour, the defendants before the Trial Court did not make any effort to present its case for establishing that the documents filed by the plaintiff were fabricated.

71. Therefore, in the absence of any document or material to challenge the documents, the issue was rightly decided in the favour of the plaintiffs and against the defendants, which this Court also upholds.

72. It is also found, that Issue No. IIIA was framed upon application, however, at the time of filing of the said application and framing of the additional issue, there was no new discovery of fact or change in circumstances which justified the action on the part of the Trial Court. All the facts, material, documents and objections against the title and ownership of the plaintiff, including the appellant no. 1, were on record even prior to the application. There was no reason for framing the additional issue to this effect and it seemed like a prejudiced decision by the Trial Court.

CONCLUSION

73. The discussion in the aforesaid paragraphs has inclined this Court to hold that the Trial Court while passing the impugned judgment ignored several important facts, material and law laid down and made erroneous observations regarding the right, title and entitlement of the respondent in the Suit Property.

74. Therefore, this Court while distinguishing with the findings of the Trial Court with respect to Issue Nos. I, II, III deems it fit to allow the instant appeal and set aside the impugned judgment for the reasons that;

- a. *Firstly*, the reliance solely on the statements of the Defence Witnesses to decide issue of entitlement in favour of the respondent was misplaced, since, none of the witnesses were able to substantiate their averments by way of any documentary evidence whatsoever;
- b. *Secondly*, while deciding the title of plaintiffs, ignoring the statements and documents produced by the Halqa Patwari was gravely erroneous; and
- c. *Thirdly*, the respondent in the absence of any right and title was not entitled to any relief against the plaintiffs.

75. In view of the aforesaid, the instant appeal is allowed and the impugned judgment passed by the Additional District Judge, Delhi dated 3rd May 2007 in suit bearing no. 300/2004 titled '*Sardari Lal Tandon & Ors. vs. Municipal Corporation of Delhi*' is set aside.

76. With the aforesaid observations, the instant appeal is accordingly allowed and pending applications, if any, are disposed of.

77. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

JANUARY 18, 2023
gs/ms

