



\$~5

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

+ **RSA 160/2024 and CM APPL. 51102/2024**

RAJJO & ORS.

.....Appellants

Through: Mr. S. S. Nizami, Adv. s

versus

ALLAH RAKHI & ANR.

.....Respondents

Through: Mr. Ashish Tanwar, Adv.

CORAM:

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

ORDER

%

11.11.2024

1. Heard, learned counsel appearing for the parties on admission.
2. The facts of the case would indicate that the appellants-plaintiffs claim to be legal heirs of one late Mr. Mohd. Hasan. Late Mr. Mohd. Hasan was the husband of appellant-plaintiff No.1 and father of appellants-plaintiffs No.2 to 8. According to the plaint, late Mr. Mohd. Hasan was the absolute owner of the entire property bearing C-57, Khasra No.191, Johri Farm, Noor Nagar, Jamia Nagar, built over an area of approximately 100 square yards.
3. As per the case set up by the appellants-plaintiffs, it was submitted that during the lifetime of late Mr. Mohd. Hasan, he had allowed the defendant No.1 (the sister of Mr. Mohd. Hasan) to occupy one room, kitchen, latrine and bathroom on the ground floor of the subject property. The appellants-plaintiffs submit that the permission to occupy the said



premises have been granted solely out of love and affection for defendant No.1 by virtue of the brother and sister relation between late Mr. Mohd. Hasan and defendant No.1

4. The record would further indicate that the appellants-plaintiffs stated that, at the request of defendant No.1, late Mr. Mohd. Hasan also allowed defendant No.1 to use one room, toilet and balcony on the first floor of the above mentioned property. It was the case of the appellants-plaintiffs that the defendant No.2 was a close relative of defendant No.1, and therefore, late Mr. Mohd. Hasan also permitted defendant No.2 to live with defendant No.1 in one room set on the ground floor and one room, toilet and balcony on the first floor. It is, thus, seen that according to the plaint, the portion on ground floor and first floor, which was in occupation of defendants Nos.1 and 2, has been described to be the suit property.

5. As per the appellants-plaintiffs, the aforesaid arrangement came to be in place due to the amicable relations between late Mr. Mohd. Hasan and the defendants. However, on account of certain differences that arose between late Mr. Mohd. Hasan and the defendants, late Mr. Mohd. Hasan requested the defendants to vacate the suit property.

6. In the meantime, late Mr. Mohd. Hasan expired on 18.05.2016 and therefore, the appellants-plaintiffs, being the legal heirs of late Mr. Mohd. Hasan, had instituted the civil suit for mandatory injunction, directing the defendants to remove themselves from the suit property and further to restrain them from creating any third party interest. The claim for damages and occupation charges was also made.

7. The defendants contested the civil suit while filing the written statement and they stated that late Mr. Mohd. Hasan was the real brother of



defendant No.1. It was stated by the defendants that the suit property has been prescribed as 57-A, located in Khasra No.191, Johri Farms, Noor Nagar, Jamia Nagar, which according to them was a different property from property No.57.

8. The defendants further stated that the suit property along with the residence of the appellant-plaintiffs, i.e. 57 and 57-A, are two distinct properties adjacent to each other. As per the defendants, the said properties were purchased by one late Mr. Mangal Khan, father of late Mr. Mohd. Hasan and defendant No.1. According to the defendants, in accordance with the desire of late Mr. Mangal Khan, late Mr. Mohd. Hasan and defendant No.1 began living in the adjacent independent portions. It was further submitted that the said portions in property No.57 and 57A were constructed by late Mr. Mangal Khan himself.

9. The defendants further stated that initially the relations between late Mr. Mohd. Hasan and defendant No.1 were cordial. However, late Mr. Mohd. Hasan apprehended that after his death, his legal heirs would harass defendant No.1. Therefore, as a precaution, he executed a General Power of Attorney, Agreement to Sell, Will and Affidavit in favour of defendant No.1, on 28.03.2011, against a certain consideration.

10. The defendant No.1, thus, asserts her ownership over the suit property for past 22 years. The respondents-defendants denied the licensor-licensee theory as advanced by the appellants-plaintiffs and submitted that late Mr. Mohd. Hasan had never granted any license over the suit property to the defendant No.1.

11. After the issues were framed, the learned Trial Court, on the basis of evidence adduced by the respective parties, dismissed the civil suit.



12. The issue No.2, i.e. whether the appellants-plaintiffs are entitled to mandatory injunction, has been dealt with by the learned Trial Court in paragraph No.7 of its judgment and decree dated 30.04.2019. The learned Trial Court, in paragraph No.7.3, has recorded that the document, i.e. Ex.PW-1/1, are not proved by the appellant-plaintiffs. It may be noted that the claim led by the plaintiffs was solely rested on documents Ex.DW-1/4, which are unregistered General Power of Attorney, Agreement to Sell, Affidavit, Receipt etc. The discussion made by the learned Trial Court would further indicate that to establish authenticity of the document, the appellants-plaintiffs filed an affidavit of one of the witnesses, i.e. Mohd. Ayub, who allegedly executed those documents in favour of late Mr. Mohd. Hasan. However, said late Mr. Mohd. Hasan was never produced in the witness-box when he was alive. The learned Trial Court, therefore, came to the conclusion that the authenticity of the documents was not proved by way of adducing sufficient evidence. For the sake of clarity, paragraphs 7 to 7.3 of the decision of the learned Trial Court are reproduced as under:-

“7. The onus to prove this issue was upon the plaintiffs. The plaintiffs have approached this court on the basis that they are the legal heirs of the erstwhile owner of the suit property, i.e. Sh. Mohd. Hasan. However, no document to establish the ownership of their predecessor-in-interest Sh.Mohd. Hasan was proved in the court by the plaintiffs. Mohd. Hasan is stated to have purchased the suit property through documents Ex. PW-1/1 which are un-registered GPA, Agreement to Sell, Affidavit, Receipt, all dated 16.03.1993. Now, these documents Ex. PW1/1 (colly) should have been duly proved in accordance with the provisions of the Evidence Act, either by the maker of these documents or by someone who was a witness to the execution of these documents. While Mohd. Hasan has since expired, Mohd. Ayub who allegedly executed these documents in favour of Mohd. Hasan was very much alive (and in fact his evidence by way of affidavit was even filed on court record). However, for reasons best known to the plaintiff, later on this person was never produced in the witness box. Hence, the makers of these documents Ex. PW1/1 did not prove these documents.



7.1 Now there are two witnesses to these documents, one Hurmat Ali and one Zareena. Only, Hurmat Ali appeared in the witness box on behalf of the plaintiffs. However, in his cross-examination, he clearly deposed that he was not a witness to the agreement to sell and GPA relied upon by the plaintiffs. Thus, this witness obviously did not prove the document Ex. PW 1/1. If anything, he demolishes the case of the plaintiffs that the documents Ex. PW1/1 were prepared in his presence. The other attesting witness Zareena as never produced before the court. In such circumstances, the documents. Ex.PW-1/1 (colly) cannot be said to have been duly proved at all.

7.2 Thus, the documents which form the very basis of the ownership/licensor claim raised by the plaintiffs, have not been proved at all. The unregistered documents placed on record as title documents were never duly proved as discussed above. No chain of documents showing the previous owners of the suit property was filed even though the plaintiffs would certainly be in possession of the same, since they were in possession of document Ex. PW 1/1 and previous chain of title must have been handed over to Mohd. Hasan at the time of execution of documents Ex. PW1/1 only. The case of the plaintiff regarding ownership of Mohd. Hasan and his being the licensor thus stands on a very shaky ground.

7.3 During the course of arguments, Ld. Counsel for the plaintiff argued that even if these documents Ex. PW-1/1 (colly), are not proved by the plaintiffs, still in view of the admission of the ownership of Mohd. Hasan by defendants, which is revealed from the documents Ex. DW-1/4 (colly), Mohd. Hasan is established as owner of the suit property. In view of this argument, the documents Ex. DW1/4 would now be examined. These documents are the GPA, agreement to sell, affidavit, possession letter, receipt. Will, in favour of defendant no. 1 with respect to the suit property allegedly executed by Mohd. Hasan himself. Both the witnesses to these documents appeared in the witness box and stated in the chief examination that they had affixed their signatures on these documents. Despite, their cross-examination, they stood firm on the aspect of them having signed these documents, although there are minor discrepancies in their testimonies regarding the exact place where they signed these documents. These documents Ex. DW-1/4 (colly) were signed by the witnesses around 8 years prior to their cross-examination and therefore such minor discrepancies regarding the exact location where the signatures were obtained cannot be given much value especially considering that both the attesting witnesses are only semi-literate. Therefore, though in the testimony of these witnesses the documents Ex. DW1/4 were duly proved for the purposes of this judgment.”

13. On an appeal preferred by the appellant-plaintiffs, the first Appellate Court, in paragraph No.12 and 16, has rendered the following findings:-



“12. As mentioned herein above, the underlying suit was filed by the plaintiffs against the defendants for mandatory and permanent injunction by directing the defendants to remove themselves from the suit property as the plaintiffs were the successor in interest of the original owner of the suit property. Ld. Trial Court has examined the evidence in the present matter in great detail and has come to the conclusion that the suit was not maintainable and never dismissed the same, as neither the plaintiff could prove their title nor, once his cloud to the title was raised, the plaintiffs sought any declaration. As mentioned herein above, the plaintiff appellant has challenged the impugned judgment on the ground that the defendants had admitted that the predecessor in interest of the suit property was the owner of the suit property. He has relied upon Section 58 of the Indian Evidence Act, 1872 as the title of the predecessor in interest of the plaintiffs has been admitted by the defendants by producing documents. Ex DWI/4. However, the Ld. Trial Court has declined to look into the documents Ex DWI/4 being GPA, agreement to sell, etc, which are not the correct documents for transfer of title. It is the case of the plaintiff appellant themselves that exhibits Ex DWI/4 do not transfer any title to the defendants. Further, it is submitted that the said documents cannot be taken into evidence due to the bar of Section 49 of the Registration Act. Once, this is the proposition canvassed by the appellant, one thing is clear that it cannot be disputed that Ex DWI/4 being agreement to sell, GPA, will, etc, cannot be seen as title documents. Moreover, these document cannot be adduced into evidence. Therefore any admission made in these documents cannot be looked into by this Court.

16. Another aspect which needs to be mentioned is that along with the documents mentioned as DWI/4, one of the document is the Will of the deceased. The effect of this Will has not been discussed by the Ld. Trial Court. However, it is not in dispute that the testator of the said Will has expired. The witness to the said Will, DWI/1 were one Sh. Gulzar Ali and Sh. Farmood Khan, both have appeared in the witness box and they have stated that they have signed the documents DWI/4. Thus, the documents Ex DWI/4 have been admitted to have been executed by DW2 and DW3. Although, GPA, agreement to sell and purchase, possession letter, receipt Ex.DWI/4 do not transfer, but there is a part of the will of the predecessor in interest of the plaintiff as well. No questions have been asked in the cross examination regarding the genuinity or otherwise of the said Will. The said Will has been admitted by the witnesses. Thus, even if other arguments of the plaintiff are accepted, the plaintiff has not challenged the said will which has been proved by both the attesting witnesses. Thus, even if we do not take into consideration the other documents following part of Ex.DWI/4 and except all the arguments which have been raised by the plaintiff, this Will would have some bearing on the case. Since, the Will had been proved by both the witnesses of the Will, and nor challenge as to



the mental health or the capacity of the deceased to execute the said Will has been raised, the plaintiff would be non-suited in the present case, even if all his arguments are accepted. As mentioned herein above, neither the Will has been challenged nor its genuineness doubted, the claim of the plaintiff would fall on this aspect also.”

14. The exposition of law under Section 100 of CPC clearly elucidates that the second appeal can only be entertained if the instant appeal raises a substantial question of law. Furthermore, a bare perusal of the record would indicate that both the Courts below are at *ad-idem* with respect to the findings rendered with respect to the suit property.

15. A Court of the second appeal ordinarily would not interfere in the impugned judgment on the ground of erroneous findings of fact, however, gross or inexcusable the error may seem to be.¹ It is pertinent to point out that after the amendment in 1976, the scope of the second Appellate Court under Section 100 CPC was further curtailed and only in cases wherein the substantial questions of law arise, the second appeal is permissible. A second appeal under Section 100 CPC is now confined to cases where a question of law is involved and such question must be a substantial one.

16. Furthermore, the rigors of Section 100 CPC are more stringent when the second appeal is filed assailing the concurrent findings of the Courts below. In ***Bholaram v. Amirchand***², the second Appellate Court set aside the impugned judgment on the ground that the findings are perverse and disregard to the material available on record. However, the Supreme Court while setting aside the High Court judgment held that, even if we accept the rationale of the High Court, at best it could be termed as error in findings of fact but that itself would not entitle the High Court to interfere in the

¹ Ramratan Shukul v. Mussumat Nandu (1892) 19 Cal 249 (252) (PC).



absence of a clear error of law.

17. As seen from the decision in the case of ***Thiagarajan v. Sri Venugopalaswamy B. Koil***³, the Supreme Court has observed that where the findings of the fact by the lower Appellate Court are based on evidence, the second Appellate Court cannot ouster such finding and substitute it with its own finding on re-appreciation of evidence merely on the ground that another view was possible.

18. Interference in the concurrent findings of the fact is permitted but only in exceptional circumstances. As a second appeal is not the third trial on facts and the first Appellate Court is final arbiter of facts, this interference by the second Appellate Court is rarity rather than regularity. In ***Jai Singh v. Shakuntala***⁴, the Supreme Court held that it is permissible to interfere even on questions of fact but it has to be done only in exceptional circumstances. The Court observed as under:-

“6. ... While scrutiny of evidence does not stand out to be totally prohibited in the matter of exercise of jurisdiction in the second appeal and that would in our view be too broad a proposition and too rigid an interpretation of law not worthy of acceptance but that does not also clothe the superior courts within jurisdiction to intervene and interfere in any and every matter—it is only in very exceptional cases and on extreme perversity that the authority to examine the same in extenso stands permissible—it is a rarity rather than a regularity and thus in fine it can be safely concluded that while there is no prohibition as such, but the power to scrutiny can only be had in very exceptional circumstances and upon proper circumspection.”

19. In ***P. Chandrasekharan v. S. Kanakarajan***⁵, the Supreme Court laid down the exposition of law that the interference in the second appeal is permissible only when the findings are based on a misreading of evidence or

²(1981) 2 SCC 414.

³ (2004) 5 SCC 762.

⁴ AIR 2002 SC 1428.



are so perverse that no person of ordinary prudence could take the said view. More so, the Court must be conscious that intervention is permissible provided the case involves a substantial question of law which is altogether different from the question of law *simpliciter*.

20. Both the Courts below have concurred on the aspect that the document Ex.DW-1/4 has not been conclusively proved. The same, hence, is a finding of fact and thus, cannot be construed to be a substantial question of law.

21. Accordingly, the instant appeal is hereby dismissed along with pending application.

PURUSHAINDR KUMAR KAURAV, J

NOVEMBER 11, 2024/DPA

⁵(2007) 5 SCC 669.