
(2011) 02 DEL CK 0350

In the Delhi High Court

Case No : Regular First Appeal No. 420 of 1999

H. Dohil Construction Company Pvt. Ltd.

APPELLANT

Vs

Mr. Rajesh Ahuja and Others

RESPONDENT

Date of Decision : 07-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96

Citation : (2011) 02 DEL CK 0350

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Rajesh Manchanda, for the Appellant; Prosenjeet Banerjee and Princy, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—The challenge by means of this Regular First Appeal u/s 96 of the Code of Civil Procedure, 1908 is to the impugned judgment and decree dated 28.11.98 whereby the suit for possession filed by the Appellant for 180 square feet area (160 sq. feet plus 20 sq. feet of passage) in the basement of the building situated on plot No. 46, Nehru Place, New Delhi or in the alternative for a decree of Rs. 64,600/- was dismissed.

2. The facts of the case are that the Respondent No. 1/Defendant No. 1 was working as the Manager of the Appellant company. The Managing Director of the Appellant company was one Mr. H. Dohil who was known to the Respondents/Defendants. Defendant Nos. 2 and 3/Respondent Nos. 2 and 3 are the father and mother of the Respondent No. 1 respectively. The Respondent No. 1 was acting as a manager on behalf of the Appellant company and selling various spaces situated in the building to third parties.

3. The genesis of the dispute is an agreement titled as a Conditional Sale Agreement dated 23.11.79 executed between the parties with respect to a portion of the basement of the subject building. Whereas the case of the

Appellant is that only an area of 80 square feet was agreed to be sold in terms of the agreement dated 23.11.79, the case of the Respondent/Defendant was that an area of 160 square feet was agreed to be sold. On account of the disputes arising between the parties, the Appellant filed a suit for recovery of possession of the alleged excess portion of 100 sq. feet in occupation of the Respondent No. 1/Defendant No. 1 including 20 sq. feet of passage or in the alternative for the value of 100 square feet on the basis that only an area of 80 sq. feet was agreed to be sold by the agreement dated 23.11.79.

4. The Respondents on service appeared and contested the suit. The stand of the Respondents was that the agreement dated 23.11.79 was for an area of 160 square feet and not for only 80 square feet. It was alleged that the agreement relied upon by the Appellant contained erasure and overwriting whereby the original area of 160 square feet was changed to 80 square feet. The Respondents filed the 2nd original agreement dated 23.11.1979 in their possession, and this document was exhibited as Ex.PW4/D3 in the cross examination of the managing director of the Appellant. This document specifically contained the area of 160 square feet and was signed on behalf of the Appellant by the managing director of the Appellant company. I at this stage note that this document seems to have been illegally removed from the Trial Court record and today this document is missing. I am in this regard passing a separate order for inquiry and taking of appropriate action including if so required of filing of a criminal complaint against the guilty persons after conduct of a due inquiry.

5. Everything in the facts of the present case turns around the agreement dated 23.11.79. There were two originals of the agreement dated 23.11.79. One was with the Respondent No. 1 and which contained only the signatures of the managing director of the Appellant and the other was with the managing director of the Appellant and which contained the signatures of both the parties. It would have indeed been difficult to decide this case in view of the original document exhibited as Ex.PW4/D3 missing from the Trial Court record; however, there is a photocopy of the said document which appears in the Trial Court Record as Mark A (so marked on 10.3.97 and appearing at page No. 621 of the Trial Court Record, and reference to Mark A in this judgment will mean this document). I have therefore in view of the evidence on record, taken this Mark A as Ex.PW4/D3 to decide and determine the matter in controversy in the present appeal.

6. The Trial Court has considered the most important issue in the case, which is issue No. 2 in Paras 8 to 10 of the judgment, and with which conclusions I agree, and the same are therefore reproduced as under:

8. Issue No. 2

The onus to prove the issue is on the plaintiff to the effect that the Defendant is an unauthorised occupant of 180 sq.ft. as alleged. To prove the issue the plaintiff enter in the witness box as PW4 and deposed that space is required for the company installing stand by generator and Defendant is unauthorised occupying

the same. He further proved the site plan as Ex.PW1/10 and the space in possession of the Defendant is green. I have gone through the statement led by him in its cross examination he has admitted that in the line 3 of Ex.P1 80 sq.ft. has been overtyped. He voluntarily disclose that he told Mr. Ahuja that he cannot sell the whole of area of 160 sq.ft. because there is a main hole in it the area. He further stated that the area originally mentioned in the conditional sale was 160 sq.ft. but he objected to the same. In the further cross examination he voluntarily deposed that he has objected to the Defendant for taking the forcible possession of the area of 1 sq.ft. and in the next to the question he has categorically deposed that 80 sq.ft. extra were occupied against the conditional sale. In answer of the next question he has deposed that area of 180 sq.ft. includes the passage of 20 sq.ft. leading to the disputed room. I have further gone through the document available on the record and the evidence led by the Defendant. DW2 has categorically stated that he purchased 1 sq.ft. area and even the original plaint and the plaint has stated that the Defendant are unauthorized occupant.

9. On the other hand the case of the Defendant is that entire area of 160 sq.ft. was sold in October, 1979 and a sum of Rs. 20,000/- was paid vide cheque and Mr. Dohil issued receipt for Rs. 20,000/- for full and final payment. The receipt is Ex.PW4/5. He further relied upon the document Ex.PW4/3.

10. The admitted case of the parties are that the Defendant is in possession of the suit property. As per the plaintiff he has sold the 80 sq.ft. area vide the conditional sale agreement dated 23.11.1979 Ex.P1 for lump sum price of Rs. 20,000/-. The Defendant produced a notrise copy of the same which shows that the area of 160 sq.ft. was sold for Rs. 20,000/-. In addition to the agreement to sell there is one receipt executed by plaintiff in which it has mentioned that sum of Rs. 20,000/- has been received towards the sale of payment spac3e next to L.T room in the building jno.46, Dohil construction, Nehru Place, in full and final settlement of account. It is the case of the plaintiff that he executed a conditional agreement to sell which is not binding on him and the agreement is for 80 sq.ft. The facts evidence on the record that there is dispute with regard to the area claimed by both the parties but fact remains that the plaintiff received sum of Rs. 20,000/- towards the sale of the payment space next to electric L.T room in the building can not said to have been unauthorised possession of the area covered under the agreement. The sale agreement and the receipt of the payment is admitted by the plaintiff. As discuss above, the plaintiff have stated during his evidence that initially it was 160 sq.ft. typed on the sale letter, i.e. Ex.P1 but as he not agree so the area was reduced 80 sq.ft. The perusal of the document shows that the consolidation price had remain the same if the plea of the plaintiff is accepted then consideration price i.e. Rs. 20,000/- had also to be change accordingly. Thus in the present of sale agreement and the receipt Ex.PW4/5 for the possession it cannot not be said the Defendant is an unauthorised occupant. Moreover, the plaintiff has filed the suit for 180 sq. fit out of which he admits that 80 sq.ft. was sold through conditional agreement, i.e. Ex.P1 to the Defendant

and he is in occupation of the 80 sq. ft. etc. and 20 sq. ft rastha only. The plea is not even consistent with the other evidence as in the receipt Ex.PW4/5. The sale consideration towards the sale of basement space next to electric L.T room in the building and it is for the full and final settlement thus plaintiff has miserably failed to prove that the Defendant are unauthorised occupant on the area of 180 sq.ft. as alleged. Accordingly issue is decided against the plaintiff.

(Emphasis added).

7. It is quite clear that the Trial Court has for the purpose of deciding this issue, relied upon the most important fact that the figure of 160 square feet which was originally typed in the original agreement with the Appellant was changed by the Managing Director of the Appellant to 80 square feet. I may note that this figure of 80 square feet, is not counter signed by either of the parties in token of the correction of the area in the document. In fact, this is really the crucial aspect, on which the present appeal will have to be decided because the basic issue between the parties is as to whether only 80 square feet of space had to be sold or whether 160 square feet of space was actually sold.

8. I have gone through the document which is Mark A, and which is a photocopy of Ex.PW4/D3. The original of Mark A i.e. Ex.PW4/D3 was confronted to the managing director of the Appellant who appeared as PW4 in his cross-examination on 20th March, 1997 and the witness Mr. H. Dohil/Managing Director of the Appellant admitted that the document Ex.PW4/D3, photocopy of Mark A was the incorrect copy of Ex.P1. Ex.P1 is the original agreement dated 23.11.79 in possession of the Appellant, which was signed by both the parties and on which there is an erasure, overwriting and replacing of the figure of 160 sq.ft to the figure of 80 square feet. It is the admitted case of the Managing Director of the Appellant that he himself modified the earlier figure of 160 square feet appearing in Ex.P1 to the figure of 80 square feet. The trial court has therefore rightly recorded the conclusion that the agreement between the parties was for 160 sq.ft and not only 80 sq.ft.

I therefore do not find any illegality or perversity in the findings and conclusions of the Trial Court which have been reproduced in the entirety above.

9. Learned Counsel for the Appellant very strongly pressed three contentions before this Court. The first contention was that the Respondent No. 1 has taken illegal possession of the disputed area and if the Respondent No. 1 had a right under the agreement dated 23.11.79, the Respondent No. 1 should have filed a suit for possession for the same. The second argument which has been raised is that the agreement was in fact only for an area of 80 square feet and not for 160 square feet, inasmuch as Ex.P1 mentions the area as 80 square feet. Thirdly, it was urged that the agreement was a Conditional Sale Agreement and unless a proper flat buyers agreement was entered into no rights could have accrued in favour of the Respondent No. 1 and against the Appellant. 10. I am unable to agree with any of the contentions as raised by learned Counsel for the Appellant.

(i) Firstly, a reference to the document being an agreement dated 23.11.79, shows that the said agreement clearly mentions that the Respondent No. 1 was entitled to use the subject area. This is mentioned in Para 4 of this agreement dated 23.11.79. This is an undisputed para which is found in both the original agreements whether the original was Ex.P1 as per the case of the Appellant or Ex.PW4/D3 as per the case of the Respondent. Clearly therefore the contention of the Appellant is misconceived that the Respondent No. 1 has come into illegal possession. In any case, the suit which was filed was not a suit by the Respondent No. 1, but the suit which was filed was a suit on behalf of the Appellant for possession and once it is held that there did exist a valid agreement dated 23.11.79, it is difficult to hold that the possession of the Respondent No. 1 is an illegal possession, inasmuch as the Respondent No. 1 has paid valuable consideration for the subject property and so stated in the agreement dated 23.11.79. May be in law Respondent No. 1 has not derived 100 percent ownership rights in the subject property as contended by learned Counsel for the Appellant because a proper flat buyers agreement has not been entered into, however, that would not mean that the possession of the Respondent No. 1 of the disputed area would become illegal.

ii) So far as the issue as to whether the agreement was for 80 square feet and not for 160 square feet, I have already held that the agreement was for 160 square feet by virtue of Ex.PW4/D3, photocopy of which is Mark A in the Trial Court record at running page 621 thereof. Of course, the original of this document, has been illegally removed from the Court file, however, the document Mark A which was signed on behalf of the Appellant can be looked into to decide the present appeal. I may note that I must place great emphasis on the impugned judgment and decree of the Trial Court before whom the original of Ex.PW4/D3 was there and which has been in fact been crucially relied upon by the Trial Court to determine the issue that the area which was transferred to the Respondent No. 1 was an area of 160 square feet and not an area of only 80 square feet. The Trial Court had the benefit of the original document on the basis of which this conclusion was reached that the area which was transferred was 160 square feet. I, therefore, do not find any reason, much less a persuasive reason, to interfere with the findings of the Trial Court as far as this aspect is concerned.

iii) The third argument of the learned Counsel for the Appellant that the document in question was a Conditional Sale Agreement and hence no ownership rights under the same stood transferred unless a proper flat buyers agreement was entered into does not in any manner assist the Appellant because the Trial Court was not deciding a suit for declaration of ownership of the Respondent No. 1 where the issue would have cropped up as to what was the nature of right, title or interest of the Respondent No. 1 on the basis of the agreement dated 23.11.79 although the flat buyers agreement was not entered into. However, the Respondent No. 1 is not seeking any relief and it is the suit of the Appellant/plaintiff for possession or recovery of money which was decided by the impugned

judgment and decree. The Respondent No. 1 therefore remains in possession of the disputed area under the rights which flow from the agreement dated 23.11.79 and nothing more, and nothing more is admittedly being claimed by the Respondent No. 1.

11. In view of the above, I do not find any merit in the appeal, which is therefore dismissed leaving the parties to bear their own costs. The Trial Court Record be sent back. A separate order with respect to inquiry is being passed for the missing document Ex.PW4/D3 from the Trial Court Record and which the Staff of the Trial Court itself has reported as being missing page 431 when the Trial Court Record was sent to this Court.