
(2011) 04 DEL CK 0217

In the Delhi High Court

Case No : Regular Second Appeal No. 48 of 2009 and CM No. 5299 of 2009

Kenneth Loyal @ Manmohan Singh Loyal

APPELLANT

Vs

Shri Vipin Vinod Diwan and Others

RESPONDENT

Date of Decision : 18-04-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9
Evidence Act, 1872 — Section 74

Citation : (2011) 123 DRJ 368

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Geeta Luthra and Harish Malik, for the Appellant; S.C. Singhal, for the Respondent

Final Decision : Dismissed

Judgement

Indermeet Kaur, J.—This appeal has impugned the judgment and decree dated 16.07.2007 which had endorsed the findings of the trial Judge dated 22.10.2005 whereby the suit filed by the Plaintiff Kenneth Loyal @ Manmohan Singh Loyal seeking mandatory injunction qua dispossession from the suit property (No. 254, ground floor, double story, new Rajinder Nagar, New Delhi) had been dismissed.

2. The Plaintiff is the nephew of Defendant No. 1. He was holder of British Passport and a resident of Dubai. His contention was that his maternal great grandmother Radha Rani had gifted a sum of Rs. 12,000/- to the mother of the Plaintiff who being the sister of Defendant No. 1 had given a loan of Rs. 12,000/- to him for the purchase of the aforementioned property. There was an understanding between the brother and the sister that the house would be purchased in the name of the mother of the Plaintiff. Defendant No. 1 however did not abide by this understanding. He purchased the suit property in his own name. A skirmish took place between the parties. In October, 1994, it was agreed between the Plaintiff's mother and Defendant No. 1 that Defendant No. 1 would occupy the first floor of property No. 259 whereas the Plaintiff would occupy the ground floor

portion of property No. 254 i.e. the suit property; respective possession of the properties had also been taken. In mid January, 1997, Defendant No. 1 telephoned the Plaintiff that he is no longer interested in permitting the Plaintiff to retain the suit property without any rent; advance rent was demanded; it was agreed that the rent deed would be executed; Rs. 50,000/- was paid as advance rent by the Plaintiff to Defendant No. 1 which comprised of Rs. 15,000/- and Rs. 25,000/- by way of account payee cheques dated 05.01.1997 & 20.05.1997; balance sum of Rs. 10,000/- was paid in cash. On 09.08.1997 Defendant No. 1 picked up a quarrel with the Plaintiff and his mother. Again a quarrel was picked up. The Plaintiff faced threats of dispossession from the Defendants. Criminal complaint was also lodged. Present suit was accordingly filed.

3. On 26.09.1997, a Local Commissioner was appointed in the presence of the parties. He was an Advocate namely Sanjay Sethi who had been directed by the court to visit the suit property to verify the factum of possession; time and date was fixed by the Court. The Local Commissioner had reported that the suit property was in possession of Defendant No. 1. Allegation of the Plaintiff is that this report of the Local Commissioner is false.

4. The Defendants filed written statement. It was stated that the Plaintiff has no locus-standi to file the present suit; a sum of Rs. 40,000/- received by Defendant No. 1 was by way of gift to Defendant No. 3 (son of Defendant No. 1); it was paid on the occasion of Lohri festival and on the first marriage anniversary of Defendant No. 3. It was denied that Rs. 10,000/- had been paid by cash.

5. On the pleadings of the parties, seven issues were framed. Oral and documentary evidence was led. All the issues were decided against the Plaintiff. The Court was of the view that the Plaintiff has failed to show his legal status in the suit property; Defendant No. 1 was admittedly the owner of the suit property. PW-4 was the Plaintiff. The contradictions in his testimony had been noted; different addresses had been given by him; he was not clear as to whether he has given Rs. 10,000/- in cash directly or through Mr. Ashwani Kumar Ahluwalia. In his cross-examination, he had admitted that the relations between himself and Defendant No. 1 were cordial. The report of the Local Commissioner had been proved as Ex.DW-1/2. On the preponderance of probabilities, suit of the Plaintiff stood dismissed.

6. The order of the trial Judge was affirmed in first appeal.

7. This is a second appeal. On behalf of the Appellant, vehement arguments had been urged. It is urged that the report of the Local Commissioner cannot be read in evidence in view of provisions of Order 26, Rule 9 of the CPC (hereinafter referred to as the "Code") as a mandatory notice is required to be given before the Local Commissioner visits the spot. For this proposition reliance has been placed upon the judgment reported in 1995 111 AD Delhi 414 Rani Aloka Dudhoria and Others Vs. Goutam Dudhoria and Others, Rani Aloka Dudhoria and Ors. v. Gautam Dudhoria. For the same proposition reliance has also been placed

upon AIR 1980 Ori 52 Chaitan Das v. Purnbasi Pattnayak. It is submitted that the Local Commissioner has also to be necessarily examined as a witness which was not done so in this case. No reliance could have been placed on the report of the Local Commissioner.

8. This argument is bereft of any force. Reliance placed as aforementioned also does not advance the submission made by learned Counsel for the Appellant. Admittedly the Local Commissioner had been appointed by the Court in the presence of the parties and with the consent of the counsel for both the parties. The Local Commissioner who was an Advocate namely Sanjay Sethi was present in Court; he had been directed to visit the suit property on 27.09.1997 i.e. on the following day at 01:00 PM; he had been directed to verify the factum of possession of the suit property; the date & time and notice of the purpose of the visit was well-known to both the parties; in this scenario, the question of a second notice by the local commissioner does not arise. The submission of learned Counsel for the Appellant that the local commissioner had to be examined as a witness before his report could be read in evidence is also a meritless objection. If the Plaintiff was aggrieved by the report of the local commissioner, she should have filed objections to the said report; no such objection had been filed. No application had also been filed before the Court to summon the local commissioner in order to examine him. This argument holds no water.

9. The second argument urged by learned Counsel for the Appellant is that the court below had committed a patent illegality in not allowing certified copy of a probate petition to be filed before it when a certified copy of the same had been placed before the trial Judge; u/s 74 of the Indian Evidence Act, there was a presumption about the correctness of a certified copy of a document and same should have been read in evidence. There is no doubt about the proposition that a certified copy of a judgment can be taken on record and presumption can be drawn in favour of such a document. However, in this case both the courts below had correctly noted that this probate petition did not concern the Plaintiff; the Plaintiff was not a party to it. Defendant No. 1 had sought probate of Will of his mother in which objections had been filed by the mother of the Plaintiff; the Plaintiff was not a party; this position is admitted. In these circumstances, the trial Judge had rightly held that the Plaintiff seeking permission to place on record the certified copy of the probate petition is not going to advance his case; his prayer was rightly rejected. This was endorsed in first appeal. This argument is also meritless.

10. Substantial questions of law have been embodied on page 3 of the body of the appeal. No such substantial question of law has arisen. There is no merit in this appeal. Appeal as also pending application are dismissed in limine.