
(2007) 05 DEL CK 0103

In the Delhi High Court

Case No : Regular Second Appeal No. 446 of 2006 and CM No. 17477 of 2006

Piara Singh and Sons

APPELLANT

Vs

Gurudwara Baba Jorawar Singh and Baba Fateh Singh Ji

RESPONDENT

Date of Decision : 16-05-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 7

Evidence Act, 1872 — Section 90, 91

Limitation Act, 1963 — Article 65

Citation : (2007) 05 DEL CK 0103

Hon'ble Judges : J.M. Malik, J

Bench : Single Bench

Advocate : V.K. Srivastava, for the Appellant; Deepika Marwaha, for the Respondent

Final Decision : Dismissed

Judgement

J.M. Malik, J.—This second appeal is filed against the order whereby the respondents were granted relief of possession in respect of the suit property measuring 184 square yards. The property in question was purchased by Smt. Prem Kaur wife of Sardar Darshan Singh for a consideration of Rs. 4,500/- vide Sale Deed dated 6.6.1958. After her death, the mutation was effected in favor of the respondents herein in the year 1977. The appellant is stated to be in unauthorised occupation of plot measuring 184 square yards out of the total land measuring 383.13 square yards. It is alleged that the appellant has unauthorisedly constructed a temporary tin shed, raised a wall and has placed asbestos sheet on the portion of the plot in his occupation in the year 1986. Thereafter, a legal notice dated 8.4.86 was sent to the appellant. Responding to the legal notice, the appellant contended that he is in possession of the suit property at his own rights without disclosing under what capacity and in what manner.

2. The following defenses were enumerated by the appellant in his written

statement. He is in possession of the suit property since 1968 and has become the owner of the property in dispute by adverse possession. The ownership of Smt. Prem Kaur in respect of the suit property has been called into question. The mutation, if any, in the name of Smt. Prem Kaur is not a proof of ownership. The respondents have not obtained any letter of administration of the property.

3. The trial court decreed the suit of the respondents vide order dated 21st April, 2005. The said order was confirmed by the First Appellate Court vide order dated 26th October, 2006. The appellant has formulated the following substantial questions of law in the instant appeal:

1. Whether the conclusion arrived at by the Lower Appellate Court and the Trial Court has been so arrived at by ignoring important evidence and by misreading of evidence.
2. Whether the finding of the Lower Appellate Court is based on inadmissible evidence and is not binding.
3. Whether the Lower Appellate Court made wrong assumptions and wrongly approached the case by wrongly placing the onus on the appellant.
4. Whether the Court below could go beyond the pleadings particularly when the plaintiffs'/respondents case was of the appellant being a trespasser since the very beginning.
5. Whether the court below could decide the question of Fateh Nagar Extention and Shiv Nagar Extention being the same colonies without any issue or evidence or even without any plea in the plaint.
6. Whether the Courts below/learned Lower Appellate Court could legally and in law take into consideration any other documents in the presence of the certified copy of the registered Sale deed available on record as Ex.PW-1/1.
7. Whether Ex.PW-1/1 the certified copies of the Sale deed proved the ownership of the suit property which is located at Shiv Nagar Extention, Delhi and not in Fateh Nagar Extention as mentioned in the plaint.
8. Whether Courts below could arrive at a conclusion that Fateh Nagar Extention did not exist when there was neither any plea nor any issue nor any evidence in this regard.
9. Whether the Courts below could raise any presumption against Ex.PW-1/1 in view of Section 91 of the Evidence Act and Section 21 of the Registration Act.
10. Whether the Courts below erred in Law in not coming to a finding as to the date/year of unauthorised occupation of the appellant/defendant in particular when the respondents'/plaintiffs' case was for possession on the basis of his unauthorised occupation.
11. Whether the Courts below correctly interpreted Article 65 of the Limitation Act when the suit is by the owner not by the unauthorised occupant.

12. Whether the Courts below were not competent/empowered to grant relief to the Appellant/defendant under Order 7 Rule 7 CPC on the facts as placed by the respondents/plaintiffs themselves.

4. A three fold argument was advanced by learned Counsel for the appellant to assail the judgments of both the courts below. Firstly, counsel for the appellant argued that the original Sale Deed pertaining to Smt. Prem Kaur did not see the light of the day. Although, the respondents pleaded that the original Sale Deed has been lost, yet, they failed to prove the loss of the same. plaintiff/PW-5, Trilochan Singh, deposed that he had never seen the original Sale Deed and he was not a witness to the execution of the Sale Deed in question. He was unable to say as to where the Sale Deed was lying after the death of her mother in the year 1968. It is pointed out that under these circumstances certified copy of the Sale Deed proved on record as Ex.PW-1/1 is not admissible in evidence. Presumption u/s 90 of the Indian Evidence Act regarding a thirty year old document is available to the original document and not to the copy, unless foundation was laid for the loss of original document.

5. For the following reasons, I am unable to locate substance in this argument. This is an indisputable fact that no objection was raised when the certified copy of the registered Sale deed was exhibited before the trial court as Ex.PW-1/1. It is well-settled that once the certified copy of the original document is produced as secondary evidence without any objection and marked as exhibit, no objection regarding admissibility of such evidence can be entertained afterwards. The crucial test about the admissibility of document is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for twin reasons: firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court. These views find support from a celebrated authority by the Supreme Court reported in Smt. Dayamathi Bai Vs. Sri K.M. Shaffi, , wherein it is held,

14. To the same effect is the judgment of the Privy Council in the case of Gopal Das and Anr. v. Sri Thakurji and Ors. reported in AIR 1943 PC 830, in which it has been held that when the objection to the mode of proof is not taken, the party cannot lie by until the case comes before a Court of appeal and then complain for the first time of the mode of proof. That when the objection to be taken is not that the document is in itself inadmissible but that the mode of proof was irregular it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. Similarly, in Sarkar on Evidence, 15th Edition, page 1084, it has been stated that where copies of the documents are admitted without objection in the trial Court, no objection to their admissibility can be taken afterwards in the Court of appeal. When a party gives in evidence a certified copy, without proving the circumstances entitling him to give secondary evidence, no objection must be taken at the time of admission and such objection will not be allowed at a later stage.

15. In the present case, when the plaintiff submitted a certified copy of the sale deed (Ex.P1) in evidence and when the sale deed was taken on record and marked as an exhibit, the appellant did not raise any objection. Even execution of Ex.P2 was not challenged. In the circumstances, it was not open to the appellant to object to the mode of proof before the lower appellate Court. If the objection had been taken at the trial stage, the plaintiff could have met it by calling for the original sale deed which was on record in collateral proceedings. But as there was no objection from the appellant, the sale deed dated 14-11-1944 was marked as Ex.P1 and it was admitted to the record without objection.

Similar view was taken in authorities relied upon by the trial court in its impugned order, which are reported in Collector, Cuttack Vs. Rajib Bhol, , Karuppanna Gounder and Others Vs. Kolandaswami Gounder and Others, , The Land Acquisition Officer, The Land Acquisition Officer, Vijayawade Thermal Station Vs. Nutalapati Venkata Rao, and Harihar Pal and Ors. v. Sudhir Kumar Pal AIR 1998 Cal 68. In the light of the discussion above, the arguments urged by counsel for the appellant must be eschewed out of consideration.

6. Similar view was taken in an authority reported in R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another, .

7. The second argument urged by learned Counsel for the appellant is that the appellant is in occupation of the property in dispute since 1968. The plaintiffs/respondents admitted that the appellant was in possession of the premises in dispute. It was pointed out that the findings given by the courts below that the appellant was not in permissive possession of premises in dispute is altogether wrong. It was submitted that the appellant was never a tenant under the respondents. The appellant has proved the copy of the accounts book Ex.DW1/A, A.1, A.2, A.3 and A.4 and DW1/D.2 to D.5. The appellant also proved Registration certificate as Ex.DW1/1 and also the bills in the name of the

appellant. He also proved Ex.DW1/16 and Ex.DW1/17 which are the receipts of the challan money paid by the appellant. The appellant also proved a letter dated 30.8.68 from the MCD as Ex.DW1/19 besides counter foils of two cheque books as Ex.DW1/20 and Ex.DW1/21.

8. A bare perusal of the evidence on record clearly goes to show that the appellant has failed to prove that he is in adverse possession of the property in dispute. It is well said that truth has annoying habit of not being suppressed for too long. Again, it is rudimentary principle of jurisprudence that the documentary evidence will always get preponderance over the oral evidence because it is well known axiom of law that men may tell lies but the documents cannot. It goes beyond the pale of my comprehension as to why the appellant is trying to kick against the pricks. The appellant had filed an affidavit before the DESU, the photocopy of which was proved on record as Ex.PW2/3. In this affidavit the appellant himself clearly, specifically and unequivocally stated that he was a tenant of a portion of the suit property and the landlord was not issuing rent receipt to him. The affidavit was filed in the month of July 1979 before DESU. The appellant, although, denied his signatures but admitted that he is getting the electricity since 1979. Nobody is supposed to keep the forged document in the records of the DESU. The respondent also placed on record survey report conducted by the MCD in the years 1975 and 1982, which are proved on record as Ex.PW3/1 and Ex.PW3/2 respectively. In both the survey reports, the appellant has been shown as a tenant. Again, the record clerk, PW-4, Jagdish Sharma has proved on record the original inspection report EX.PW4/1, which is purported to have been signed by the respondent.

9. The Privy Council in AIR 1935 53 (Privy Council) held that the person claiming adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed.

10. I also came across few latest authorities of Apex Court. In a recent authority reported in Krishnamurthy S. Setlur Dead by LRs. Vs. O.V. Narasimha Setty and Others, it is held,

In the plaint, the plaintiff who claims to be owner by adverse possession has to plead actual possession. He has to plead the period and the date from which he claims to be in possession. The plaintiff has to plead and prove that his possession was continuous, exclusive and undisturbed to the knowledge of the real owner of the land. He has to show a hostile title. He has to communicate his hostility to the real owner.

11. In another recent authority reported in P.T. Munichikkanna Reddy and Ors. v. Revamma and Ors. Civil Appeal No. 7062/2000 decided on 24.04.2007 the Apex Court was pleased to hold that adverse possession lie in it being open, continuous and hostile. It was further held:

7. Therefore, to assess a claim of adverse possession, two-pronged enquiry is

required:

1. Application of limitation provision thereby jurisprudentially "willful neglect" element on part of the owner established. Successful application in this regard distances the title of the land from the paper-owner.

2. Specific Positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper owner, to the adverse possessor. Right thereby accrues in favor of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property.

12. In Thakur Kishan Singh (dead) Vs. Arvind Kumar, and in Vishal Builders Pvt. Ltd. Vs. DDA and Others, , it was held that non-payment of rent as tenant does not convert the permissive possession into adverse possession.

13. It is crystal clear that the appellant has been changing his stance according to his convenience. If he is to obtain electricity he becomes the tenant. If sword of Damocles starts hanging over his head, he pleads that he has become the owner by virtue of adverse possession. In the light of this discussion this argument, too, does not ensure in favor of the appellant.

14. The next submission made by counsel for the appellant was that there is a confusion whether the suit property is situated in Fateh Nagar or Shiv Nagar. The sale deed refers to the property situated in Fateh Nagar Extention whereas the suit property is situated at Shiv Nagar Extention. It was argued that both the locations are different areas.

15. This argument is straw man intended to divert the court from the main topic. The site plan filed by the respondents stands proved. No objection was raised in this context. Further, the sale deed mentions that the suit property is bounded as follows:

North : Kacha Rasta 30"

South : Kacha Rasta 15"

East : Jail Road

West : Plot No. 48

Situated in the area of Village Tihar, Delhi Province, in the Abadi of Fateh Nagar Extention in the area of Municipal Corporation of Delhi. It is also mentioned that the premises mentioned in the Sale Deed is an open vacant plot of land bearing No. 49, measuring 383.13 square yards out of Khasra No. 535. The survey report Ex.PW3/1 clearly shows that this place is known as Shiv Nagar, House No. WZ 678C (plot No. 49) owned by Smt. Prem Kaur widow of Shri Darshan Singh residing at WZ 678C (plot No. 49), Shiv Nagar. In this document, Smt. Prem Kaur has been shown as the owner of the said plot. Again, Khasra number is also mentioned in the Sale Deed Ex.PW1/1. The survey report Ex.PW3/1 clearly

mentions the name of fresh occupants, including the name of appellant, Pyare Singh, which is duly signed by him and in this survey report it is clearly, specifically and unequivocally mentioned that the name of the owner and house tax payer of house bearing No. WZ 678C (plot No. 49) is Smt Prem Kaur.

16. On the other hand, counsel for the appellant has failed to show that he is living in a different plot than the plot mentioned in the Sale Deed. This argument has no force and Therefore, the same must be left out of consideration. No other point has been argued before me. The appeal has no merit. No substantial question of law arises in the present case.

RSA 446/2006 is accordingly dismissed at the admission stage. CM No. 17477/2006 also stands dismissed.