

(2011) 03 DEL CK 0534

In the Delhi High Court

Case No : Regular Second Appeal No. 129 of 2006 and CM No. 5324 of 2006

Sh. Suresh Kumar Sharma

APPELLANT

Vs

Sh. Fateh Bahadur Singh and Others

RESPONDENT

Date of Decision : 28-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Evidence Act, 1872 — Section 114, 115
Specific Relief Act, 1963 — Section 41
Transfer of Property Act, 1882 — Section 41

Citation : (2011) 03 DEL CK 0534

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : K.K. Rohtagi, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Indermeet Kaur, J.—This appeal has impugned the judgment and decree dated 07.2.2006 which had endorsed the finding of the trial judge dated 21.8.2004 whereby the suit filed by the Plaintiffs Fateh Bahadur Singh and Ors. seeking possession and permanent injunction qua the suit property i.e. the property bearing No. E-7/149, Sultanpuri, Delhi had been decreed in his favour.

2. Case of the Plaintiffs as is evident from the plaint is that their father Balak Singh was allotted plot measuring 25 sq. yards by the Delhi Development Authority (DDA) vide a possession slip in Sultanpuri, in the year 1977. Their father had constructed a room and boundary wall on the said plot and started living there. Gokal Prasad (subsequently arrayed as Defendant No. 2) was granted permissive user of the said plot by Balak Singh. He was living there jointly with Balak Singh. Balak Singh fell sick; he went back to his native village for treatment where he remained confined to bed for a long time. Balak Singh died in 1985. In July 1985, Plaintiff found that the Defendant Suresh Kumar Sharma was negotiating regarding this property; Plaintiffs approached the

Defendant and told him that this property belonged to their father Balak Singh who is the exclusive owner of the said property. On 02.8.1985 notice was sent to Gokal Singh to deliver the possession of the suit property back to the Plaintiff; no person was found living at the said address. Defendant came in occupation on this property. On repeated requests by the Plaintiff to the Defendant calling upon him to vacate the suit property; he paid no heed. Suit was accordingly filed.

3. Defence of the Defendant was that he had purchased this property from Gokal Prasad for a valuable consideration and transfer documents have been executed by Gokal Prasad in his favour. Suit is also barred by Section 41(i) of the Specific Relief Act. It is also bad for non-joinder of the parties.

4. Thereafter in the course of the proceedings Gokal Prasad was also arrayed as a party and impleaded as Defendant No. 2.

5. Trial judge framed the following seven issues; they read as follows:

1. Whether the Plaintiffs have no locus standi to file the present suit as alleged by the Defendant? OPD

2. Whether the suit is bad for non-joinder of necessary parties as alleged by the Defendant ?OPD

3. Whether the suit is barred u/s 451(i) of the Specific Relief Act as alleged by the Defendant? OPD

4. Whether the suit is properly valued for the purpose of court fee and jurisdiction? OPD

5. Whether the suit is liable to be rejected Under Order 7 Rule 11 CPC as alleged by the Defendant? OPD

6. Whether the Defendant is an unauthorized occupant in the suit property as alleged by the Plaintiff? OPP

7. Whether the Plaintiffs are entitled to a decree of possession and consequential relief of perpetual injunction as prayed for? OPP

6. Issues No. 6 and 7 are relevant for the present controversy. On the basis of the oral and documentary evidence it was held that Balak Singh was admittedly the original allottee of this suit land; the documents purported to have been executed by the Gokal Singh in favour of Defendant No. 1 (Suresh Kumar Sharma) had been proved as Ex. DW-1/2 to Ex. PW-1/6 which were a GPA, agreement to sell, affidavit, receipt and will; electricity and water bills in the name of Gokal Prasad has also been proved as Ex. DW-1/7 to Ex. DW-1/9. Gokal Singh had been impleaded as a party but he had not filed a separate written statement. He has come into the witness box as DW-2; he had supported the stand of the Defendant No. 1 and on oath he deposed that he had purchased this property from Balak Singh and thereafter he had sold it to the present Defendant i.e. Suresh Kumar Sharma. In his cross-examination he could not give the detail

of the date of purchase of this property from Balak Singh. He admitted that for the sale-purchase of a immovable property execution of transfer documents is a must; he had no documentary proof to show that he had purchased this property from Balak Singh except the allotment slip Ex.DW-1/1. This allotment slip dated 07.11.1997 issued by the DDA was admittedly in the name of Balak Singh. He denied the suggestion that he was not the owner of the suit property and was not in a position to execute the documents of transfer in favour of Suresh Kumar Sharma i.e. Defendant No. 1. On the basis of this oral and documentary which was adduced before the trial judge, the trial judge had held that the Defendant No. 1 had failed to prove that he has purchased this property from Defendant No. 2. Defendant No. 2 was not the owner of the suit property; he could not have transferred title in favour of Defendant No. 1. The Plaintiffs who were admittedly legal heirs of Balak Singh were entitled to a decree.

7. In appeal the impugned judgment had endorsed this finding. The finding returned reads as follows:

In order to decide the above issue, a primary question arose whether the seller of Appellant had the right to transfer the property in his favour. In the entire evidence led on behalf of Appellant before Id. trial court, the Appellant had not been able to show any document by which the ownership of the property was transferred by Balak Singh to Gokul Prasad. This fact has been admitted by Appellant during his cross examination when he examined himself as DW1. He stated that he did not have any proof to show that signature on the documents from DW-1/2 to DW/16 are of Gokul Prasad. He has also stated that except the possession slip in the name of Balak Singh, there is no other document of transfer in favour of Gokul Prasad. The Appellant did not examine Gokul Prasad to support his case. Therefore I am unable to agree with the contention raised and grounds taken in this appeal that the impugned judgment has been passed on conjunctures, surmises, presumption. On the other hand I come to the conclusion that Id. Trial Court has rightly considered the evidence led by the Appellant. The document Ex.DW-1/2 - Ex.DW-1/6 not proved that same were executed by Gopal Dass as Gopal Dass or attesting witness not examined. Further no document placed on the record to prove that Balak Singh ever transferred the property to Gopal Dass. When Gopal Dass had no title how could he transferred any title to Appellant. Therefore only document Ex.DW-1/2 to DW1/6 not sufficient to establish ownership of Appellant in the suit property.

These are two concurrent finding of fact by the two courts below.

8. This is a second appeal. It has been admitted; on 13.8.2007 the following substantial questions of law were formulated; they read as follows:

1. Whether Respondent No. 1 to 6 are barred by the principle of Estoppel from claiming injunction and the possession of the suit property?
2. Whether Respondent No. 1 to 6 have by acquiescence and by delay of 16 years (1980-1996) lost their right of possession of the suit property?

9. On behalf of the Appellant, it has been urged that the fact findings of the two courts below are perverse. Attention has been drawn to Section 114(i) of the Evidence Act; it is submitted that there is a presumption that when a document which creates an obligation is in the hands of the obligor, the obligation is discharged. The Court below had wrongly held that the onus to discharge title in favour of the Defendant was upon the Defendants; the Defendants had proved on record Ex.DW-1/2 to Ex. Dw-1/6; establishing title of Defendant No. 1 in the suit land; thereafter it was for the Plaintiff to rebut this presumption but he has failed to do so. To support this submission learned Counsel for the Appellant has placed reliance upon Citi Bank N.A. Vs. Standard Chartered Bank and Others, . It is pointed out that u/s 41 of the Transfer of property Act an ostensible owner of the property transfers the same for a consideration, the transfer cannot be voidable on the ground that the transferor was not authorized to make it. In this context, it is submitted that Gokal Prasad was well within his right to have transferred rights in favour of Suresh Kumar Sharma and this transfer cannot be challenged on the ground that Gokal Prasad was not authorized to make it. For this proposition learned Counsel for the Appellant has placed reliance upon (1996) 7 SCC 55 Sankra Hali and Sankara Institute v. Kishori Lal Goenka . Attention has also been drawn to Section 115 of the Indian Evidence Act. It is submitted that the rule of estoppel is also attracted and Defendant No. 1 who had on a representation made to him by Gokal Prasad that he could validly execute the title documents in his favour, had acted upon this representation and equity now prohibits a challenge on this score. To support this submission learned Counsel for the Appellant has placed reliance upon Indira Bai Vs. Nand Kishore, . Reliance has also been placed upon another judgment of Apex Court reported in B.L. Sreedhar and Others Vs. K.M. Munireddy (Dead) and Others, . It is pointed out that for all the aforementioned reasons the impugned judgment of the Court below is liable to be set aside.

10. Record has been perused.

11. Admittedly Balak Singh was the original allottee of the suit land. Ex.DW-1/1 evidence to this effect was also not disputed. The defence of the Defendant Suresh Kumar Sharma that he had purchased this property from Gokal Prasad vide the aforementioned documents Ex.DW-1/2 to Ex.DW-2/6 had been examined and re-appreciated in the courts below. The question that had arisen for decision was as to whether Gokal Prasad was himself in a position to execute such title documents; Gokal Prasad had come into witness box as DW-2 and he had admitted that there is no documentary prove to show that he had purchased this property from Balak Singh; except this bald submission there was no other documentary evidence with Gokal Prasad to substantiate this fact; in these circumstances the courts below had rightly held that Gokal Prasad himself having no title in the suit premises could not have executed any document of transfer in favour Suresh Kumar Sharma. These are legal findings based on the oral and documentary evidence as also the prevailing law. No person can transfer a better title than that he himself possesses. Findings in the impugned judgment on this

score call for no interference.

12. Section 114(i) of the Evidence Act has no application. This is a presumption which arises in favour of the obligor which may be rebutted; this presumption would operate inter se only between Defendant No. 1 and Defendant No. 2 and has no effect on the status of the Plaintiff. Section 115 of the said Act has also no application. This doctrine which is based on a principle of equity speaks of a representation of fact made by one party which the other party has believed it to be true and acted upon it; the first party then cannot retreat from such a representation. This doctrine if applicable would apply only qua Defendants No. 1 and 2.

13. Section 41 of the Transfer of Property Act reads as follows:

41. Transfer by ostensible owner- Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it; provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

14. It postulates that the consent either expressed or implied, of the persons interested in immovable property has to be taken before this section is made applicable. The proviso further states that that the transferee must after taking reasonable care to ascertain that the transferor had the power to make the transfer and thereafter acted in good faith. In this case Gokal Prasad had admitted in his deposition that he knew that transfer of title can only be effected only by execution of title documents; he further admitted that he had no documentary proof to show that Balak Singh had sold this property to him. Applicability of this section fails.

15. Substantial question No. 2 was never a defence raised by the Defendants in the courts below. It was never contended in the written statement that the Plaintiffs have by acquiescence and delay lost their right of possession to the suit property. No issue had also been framed qua this proposition as this was never the defence of the Defendants; no evidence was also led. This submission cannot now be examined as it is a question of fact.

16. A plea whether of fact or law which could have been waived or abandoned and is so abandoned cannot be raised in a second appeal. This has been held by the Apex court in Banarsi Das Vs. Seth Kanshi Ram and Others, .

17. Factual submissions not raised in the two courts below cannot be examined by this second appellate Court.

18. There is no merit in the appeal. Appeal as also the pending application is dismissed.