
(2011) 03 DEL CK 0344

In the Delhi High Court

Case No : Regular First Appeal No. 422 of 1985

Sheikh Abdul Hai (Deceased) through his L.Rs.

APPELLANT

Vs

Sheikh Abdul Jabbar (Deceased) through his L.Rs.

RESPONDENT

Date of Decision : 07-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Evidence Act, 1872 — Section 115

Citation : (2011) 03 DEL CK 0344

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : S.H. Nizami, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—Before I dispose of the appeal, I may state that this appeal is one of the oldest appeals pending since the year 1985. This appeal was dismissed in default twice and thereafter restored on both the occasions, second restoration being vide the last order dated 27.1.2011 when it was made clear that no adjournment shall be granted and the appeal will be argued today. Counsel for the Appellant again however sought an adjournment which was declined by me, and thereafter the counsel has argued the appeal.

2. The challenge by means of this Regular First Appeal u/s 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment and decree dated 19.2.1985 whereby the Appellant/Plaintiff was granted 1/4th share in the property No. X/2398, Kutcha Mir Hashim, Chitli Qabar, Delhi. The Appellant/Plaintiff however claims that he should have got half ownership in the property and not 1/4th as decreed by the trial Court.

3. I may note that both the Appellant/Plaintiff and the Respondent/Defendant have died during the pendency of the appeal and now the appeal is being contested by their legal heirs. For the sake of convenience, however, I am

referring to the parties as they originally were at the time of filing of the suit and the appeal. The facts in this regard are a bit lengthy, and therefore I would refer to only such facts which are necessary for the disposal of the appeal. The facts of the case are that the property in question belonged to one Khuda Bux who died leaving behind four sons namely Nisar Ahmed, Abdul Gaffar, Abdul Sattar and Abdul Wahab. The Appellant/Plaintiff/Abdul Hai and the Respondent No. 1/Defendant/Abdul Jabbar were the sons of Abdul Sattar. Each of the four sons of Khuda Bux inherited 1/4th share in the subject property. Abdul Wahab had given up his right in the subject property in favor of the parties to the suit inasmuch as Abdul Wahab had received another property of the family. At the stage, when Abdul Wahab transferred his rights in the subject property to the parties to the suit being sons of Abdul Sattar, each son of Abdul Sattar would have 1/4th share each in the property. The Appellant/Plaintiff would accordingly have 1/4th share in the property. The Appellant/Plaintiff claimed that his 1/4th share became half share in the property by virtue of a Sale Deed dated 23.12.66(Ex.D1) when read with the Supplementary Deed dated 28.7.72 (Ex.P1).

The first year in the chain of events relevant is the year 1955. In 1955 Sh. Nisar Ahmad and Sh. Abdul Gaffar, the two sons of late Sh. Khuda Bux, transferred their 1/4th rights each in the suit property in favor of the Defendant to the suit, namely, Sh. Abdul Jabbar vide Sale Deed dated 21.11.1955, Ex.DW3/1. The trial Court has noted the admission, and which is also admitted by the learned Counsel for the Appellant appearing before me that this transaction of 1955 is not a disputed fact. As a result of the Sale Deed dated 21.11.1955 Ex.DW3/1, the 1/4th share each of Nisar Ahmad and Abdul Gaffar totaling to 50% rights in the subject property fell to the share of Sh. Abdul Jabbar. Sh. Abdul Jabbar thus became 3/4th owner of the subject property i.e. 1/4th plus 1/2. Before proceeding further, one aspect has to be noted that the parties to the suit had transferred the property by means of a Sale Deed along with an Agreement of Repurchase and which transaction was essentially a mortgage through the method of sale with an agreement to repurchase. Parties to the suit, namely, Sh. Abdul Hai and Sh. Abdul Jabbar mortgaged their rights by means of a sale deed with an agreement to repurchase in favor of one Shafiqun Nisa vide Ex. PA dated 2.9.1960 (wrongly mentioned in the impugned judgment as Ex.PW4/3 dated 1.9.1960). At this stage, it may be noted that the effect of transaction dated 2.9.1960 would be to transfer 1/4th share of Abdul Hai and 3/4th share of Abdul Jabbar to Shafiqun Nisa. Shafiqun Nisa further transferred rights obtained by her from the parties to the suit to one Sayed Zulfiqar Ali (name not to be confused with Zulfiqar Ali PW-3 the son of Abdul Gaffar) as the parties to the suit failed to repay the amount taken from her. The rights in the property were then further transferred by means of various further transactions, and ultimately, the rights which were first mortgaged by Abdul Hai and Abdul Jabbar to Shafiqun Nisa ultimately vested with Zulfiqar Ali son of Abdul Gaffar. Zulfiqar Ali vide document dated 23.12.1966 Ex.D1 transferred the rights which he had got in the subject property only to Abdul Jabbar, however Zulfiqar Ali subsequently executed a

Supplementary Deed Ex.P1 whereby he stated that he had wrongly executed the earlier document Ex.D1 dated 23.12.1966 only in favor of Abdul Jabbar although the said document should also have been in favor of Abdul Hai. The sum total of all these transactions is that what was first transferred by the parties to the suit namely Abdul Hai/Appellant/Plaintiff and Abdul Jabbar/Respondent/Defendant to Shafiqun Nisa came back to them. Obviously, therefore, what would come to the parties to the suit would be in the same ratio and proportion as what would have been first transferred. What was first transferred by means of the document Ex. PA was 1/4th share of Abdul Hai and 3/4th share of Abdul Jabbar and thus it is only in this proportion that the property came back to the parties. In view of the aforesaid finding, the trial Court has held and arrived at a finding on issue Nos. 1,3,6 and 7 that Abdul Hai would have only 1/4th share in the subject property and not the half share as claimed by him. The relevant findings in the impugned judgment and decree are contained in paras 10 to 14 and which read as under:

10. All these issues are inter-connected and therefore, they are taken up together. There is no dispute in between the parties about the share of Abdul Wahab in favor of the Plaintiff and the Defendant in respect of the property in suit as the Plaintiff and the Defendant surrendered their share in the property No. 24/00 in favor of Abdul Wahab. The share of Abdul Wahab had thus to be shared by the two brothers Abdul Hai and Abdul Jabbar, the Plaintiff and the Defendant. As the Ld. counsel for the Plaintiff has not disputed before me that Abdul Jabbar had purchased the shops of Nisar Ahamad and Abdul Gaffar in the property, the Defendant would become owner of 3/4th share and not half share as claimed by the Plaintiff.

11. From the side of the Defendant it was alleged that the Plaintiff had lost even that 1/4th share on account of the fact that the Plaintiff had relinquished, transferred and surrendered his right, if any, in the disputed property through mortgage deed dated 5th September, 1960 executed by the parties to the suit in favor of Smt. Safiqal Nisha. This plea as it is, is absurd and illogical as by mortgage all the rights of the owner are not transferred and relinquished and therefore, the question of stopple u/s 115 of the Evidence Act would not arise at all. The transactions mentioned above have not been disputed. The Defendant Abdul Jabbar made a very curious statement on 1/12/78 that he never mortgaged the property with Zulfiqar Ali but he purchased the property from him. This does not explain as to how the property happened to pass to Zulfiar Ali in case the sale was not a conditional sale with the right to repurchase as stated by PW3 Zulfiqar Ali who executed a supplementary sale deed Ext.P1. It may also be noted that it was suggested to the Plaintiff Abdul Hai on 16/5/1980 in cross-examination that he mortgaged the property with conditional sale to Mohd. Yamin, Safiqal Nisha and thereafter to Sayed Zulfiqar Ali. It appears from the evidence of Shri Akil Mirza, witness, the deed writer, who scribed Ext.DW4/C on 1st September, 1960, also scribed along with it a deed of agreement executed from the side of Safiqal Nisha at the same point of time and he proved the photostat copies of the entries in regard to the agreement of re-conveyance. This

proves that Safiqal Nisha had purchased the property subject to the agreement of re-conveyance. It may further be mentioned that the Defendants attorney Mohd. Jabbar stated on 24th September, 1982 that the Defendant did not possess the original agreement of property No. 2393 at Kutcha Mir Hasam, Bazar Chitli Qabar, Delhi executed by Safiqal Nisha dated 2nd September, 1960 in favor of Abdul Hai and Abdul Jabbar Defendant.

11. It would be interesting that though PW3 Zulafqar Ali stated that he purchased the property as conditional sale with the right to repurchase, it was not suggested to him that there was no such condition and the repurchase was not subject to the condition of re-sale and re-conveyance.

12. It was alleged that the entire money was paid by Abdul Jabbar and for that reason he had become the sole owner of the property including the share of the Plaintiff by virtue of the deed executed by Zulfiqar Ali in his favor dated 23/12/1966. Firstly it may be mentioned that Abdul Jabbar had not stated that he himself paid entire price. Abdul Jabbar also did not state anything that the entire price was paid by his father from his own pocket. Even if for the argument sake, it is supposed that the sale price was paid by Abdul Jabbar, he would not become the owner of the entire property unless it is further proved that Abdul Hai had agreed to such a sale. As there is nothing of the kind, Abdul Hai would not lose his rights in the property. As there is no doubt about the execution of Ext.P1 by Abdul Jabbar, it would become very much evident that the Plaintiff had 1/4th share in the property in question. In such circumstances the question of stoppage would not arise.

13. As regards the question of the Plaintiff being the licensee, the above facts belie the plea of licensee. In any case they are inconsistent with the stand taken by the Defendant. Had the Defendant purchased the property without any condition then he would have immediately taken steps against the Plaintiff and might have obtained a license deed or lease deed, to establish his rights. It appears to me that this was not a disputed between the two brothers but between the family members who it appears have forced the parties to come to the Court. In any case, I reject the plea of license taken by the Defendant.

14. In view of the above, I hold that the Plaintiff and the Defendant both are joint owners but the share of the Plaintiff is only 1/4th in the property. All these issues are decided accordingly in favor of the Plaintiff and against the Defendant." (Note: In the first para trial court had referred to Abdul Wahab as Abdul Bahav and I have therefore corrected the same to Abdul Wahab.)

4. In view of the admitted position which has emerged on record, I fail to understand as to how Abdul Hai/Appellant/Plaintiff would have half ownership of the property. In my opinion, the Appellant/Plaintiff is lucky to get even the 1/4th share because if the original mortgage in favor of Shafiqun Nisa was a mortgage by conditional sale and which conditional sale was breached because admittedly parties to the suit failed to pay back the loan to Shafiqun Nisa then only

Defendant/Respondent/Abdul Jabbar was the sole owner because it was only Sh. Abdul Jabbar/Defendant who purchased back the property by means of the document Ex.D1 dated 23.12.1966. Once the Defendant had become the exclusive and complete owner of the property by virtue of the execution of the document Ex.D1, Zulfiqar son of Abdul Gaffar who executed Ex.D1 had thereafter no right to execute another Supplementary Deed dated 28.7.72, Ex.P1, to which Abdul Jabbar was not a party. In any case, since however no cross objections are filed on behalf of Abdul Jabbar to the impugned judgment and decree, therefore, the ratio of 1/4th share in favor of the Plaintiff and 3/4th share in favor of the Defendant as arrived at by the impugned judgment and decree will have to stand.

5. I may note that in the memo of appeal a totally new case than as set up in the trial Court was set up that the brothers Nisar Ahmad and Abdul Gaffar had no right to transfer the property in favor of Abdul Jabbar vide document Ex.DW3/1 dated 21.11.1955 inasmuch as the Appellant/Plaintiff claimed that earlier there was a dastabardari nama of the year 1951 executed by Nisar Ahmad and Abdul Gaffar and these persons therefore could not have executed DW3/1 on 21.11.1955. However, learned Counsel for the Appellant has very fairly not argued on this basis, and in fact this position could not have been so argued, because, the trial Court has noted the admission made on behalf of the Appellant/Plaintiff in the trial Court that the 50% rights of Nisar Ahmad and Abdul Gaffar were in fact transferred vide Ex.DW3/1 dated 21.11.1955 to Sh. Abdul Jabbar.

6. There is therefore no illegality or perversity in the impugned judgment and decree which calls for interference in the appeal. In view of the above, the appeal being devoid of merit is dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.