

(2010) 07 DEL CK 0294

In the Delhi High Court

Case No : Regular Second Appeal No. 67 of 2009 and C.M. No. 7544 of 2009

Shri Kedar Nath and Smt. Chita

APPELLANT

Vs

Vijay Kumar Kapani

RESPONDENT

Date of Decision : 19-07-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 6, 100
Criminal Procedure Code, 1973 (CrPC) — Section 340

Citation : (2010) 07 DEL CK 0294

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : D.K. Aggarwal and Suryakant Singh, for the Appellant; Dhananjai Rana, for the Respondent

Final Decision : Dismissed

Judgement

Indermeet Kaur, J.—The question of law formulated in the memorandum of appeal reads on internal page 17. The contention of the learned Counsel for the appellant is that the memorandum of understating dated 1.7.1985 entered between the plaintiff and the defendant was an understanding between the parties that the property will be passed on to the defendant after five years if the money paid by the defendant to the plaintiff is not refunded back by him; further the finding of the trial court that this document required registration has raised substantial questions of law. The evidence adduced before the trial court has been ignored; the trial court could not have concluded that the defendant had paid only small amount of Rs. 3,000/- in the purchase of the disputed property; the unimpeachable evidence before the Courts below that the children of defendant were studying in Ashok Vihar evidencing the residency of the defendant in the suit premises since 1975 was again mis-appreciated; in these circumstances the Courts below in decreeing the suit of the plaintiff on these scores has committed a perversity which is liable to be set aside.

2. Before advertng to an attempt to answer these queries raised by the learned

Counsel for the appellant, the factual matrix of the case would necessarily have to be gone into.

3. The plaintiff Vijay Kumar Kapani had filed a suit for recovery of possession of house No. B-13-B, Pocket-B, Ashok Vihar, Phase-II, Delhi as also damages of Rs. 7500/-. Defendant No. 1 was the brother of the plaintiff and the defendant No. 2 was his wife. Parties were having amicable relations. Case of the plaintiff is that earlier his brother was living in house No. D-186, Lajpat Nagar, New Delhi which he had to vacate on 13.1.1987; in these circumstances, the plaintiff had permitted the defendant to live in the suit property till the time he could make alternate arrangement; defendants had assured him that they would vacate the suit property on or before 26.3.1988; in spite of requests defendants did not vacate the suit property.

4. In the written statement it was stated that the defendant No. 1 had paid the entire proceeds of the suit property from his own hard earned money i.e. a sum of Rs. 23000/- for the purchase of this DDA flat for which plaintiff's contribution was only Rs. 3000/-; further the plaintiff had given an undertaking to the defendant No. 1 that if the plaintiff is unable to return this amount to the defendant, the defendant would become the owner of the suit property.

5. On the pleadings of the parties, after the issues were framed, the trial court decreed the suit of the plaintiff in his favour. Testimony of the plaintiff examined as PW-1 was appreciated. The allotment and possession letter of the suit property has been proved as Ex.PW-1/2 and Ex.PW-1/3, his passbook entries have been proved as Ex.PW-1/7. PW-1 in his cross-examination has categorically denied the suggestion that the defendant was permitted to live in the suit property till any payment has been returned by the plaintiff. PW-3 and PW-4 known to both the parties had also supported the stand of the plaintiff. Another brother of the parties was examined as PW-5; yet another brother was examined as PW-6. In all eight witnesses were examined on behalf of the plaintiff. In defence five witnesses were examined. The court had held that the plea of adverse possession as set up by the defendants has not been proved. Title of the suit property was admittedly in the name of the plaintiff and it was also not the defence of the defendant that he was the owner of the suit property. Suit of the plaintiff was decreed by the trial court.

6. In appeal, the Appellate Court had endorsed the findings of the trial judge. It had held that the title of the suit property was admittedly with the plaintiff; the allotment and possession letter had proved that the flat had been allotted and thereafter physical possession of the same had been handed over by the DDA to the plaintiff who was also the assessee for the purposes of house tax. The oral and documentary evidence of the plaintiff had been appreciated; Appellate Court had concluded that the plaintiff had deposited a sum of Rs. 19,612/- and another sum of Rs. 8,000/- for the purchase of this property; the contention of the defendant that he had paid a major part of the price of the suit flat had been rejected. Versions of DW-4 and DW-5 i.e. the defendant and his wife had been

examined. Appellate Court had further held that the evidence adduced before the court had established that the defendant also knew that the disputed property could be transferred in his name only by way of a registered document; testimony of DW-5 in this context is relevant and reads as under:

The plaintiff had agreed to transfer the suit property by a registered document in my favour.

It was held that this admission of DW-5 in his version on oath clearly evidenced that the defendant himself was aware of the fact that the suit property could be transferred only by way of a registered document. The Appellate Court had further endorsed the view of the trial Court that the alleged memorandum of understanding/settlement had not been proved by the defendant in accordance with law; perusal of the same showing that it is a document which is type written in hindi and purported to have been signed by the plaintiff Vijay Kumar Kapani, this document had been given mark B. It had not been proved as per the rules of evidence. The Court had further held that this document is also not registered and even on this count it could not be looked into.

7. The contention of the learned Counsel for the appellant is that this finding of the first appellate court is contrary to law as the memorandum of understanding entered between the parties does not require any registration and on this count a substantial question of law has arisen which requires adjudication. Learned Counsel for the appellant has placed reliance upon *Damadilal and Others Vs. Parashram and Others*, to support his submission that even on findings of facts the second Appellate Court can interfere. This judgment is dated 7.5.1976. Section 100 of the Code was amended w.e.f. 1.2.1977; the effect of the amendment being to restrict the scope of a second appeal; the right of second appeal being restricted only where a question of law involved is a substantial question of law.

8. Submissions have been countered by the learned Counsel for the respondent. It is submitted that this Court is sitting in second appeal; the strict parameters as contained in Section 100 of the CPC have to be adhered to; unless a substantial question of laws has arisen no interference is called for in a second appeal. For this proposition reliance has been placed upon *Mst. Sugani Vs. Rameshwar Das and Another*, . Reliance has also been placed upon a judgment *Ram Briksha Singh and Others Vs. Rudra Narain Singh (deceased by L. R's.) and Another*, . to support his submission that the question as to the execution of a document is a pure question of fact which cannot be interfered with in second appeal.

9. This Court is of the view that no substantial question of law has arisen. First and foremost, the Courts below had held that this document had not been proved as per rules of evidence and rightly so the maker of the document had not come into witness box to prove it and neither was there any testimony to the effect that the person testifying it could identify the signatures of the person who

had signed it. The first Appellate Court had also examined the document itself and drawn the conclusion that the face of the instrument shows that it is forged and fabricated as the manner in which it has been typed being illegible, writing in blue ink in the document showing that this piece of paper is a doubtful document. This has been recorded in para 13 of the judgment of the appellate court clearly showing that the court itself had examined the document. Suspicion had centered around this document; this was another reason for the rejection of the said document by the two Courts below. The first Appellate Court had further re-endorsed its finding by holding that this document is not registered and for that reason also it cannot be looked into. Even presuming that this submission raises a disputable proposition, yet this was not the only reason for the rejection of the so called memorandum of understanding mark B. In these circumstances by no stretch of imagination can it be said that any question of law much less any substantial question of law has arisen. Finding of the two Courts below was on the basis of fact finding evidence available on record which this Court sitting in second appeal cannot re-appreciate. The question of law as formulated in the memo of appeal seeks direction from this Court to go into all findings of fact i.e. about the school record of the children, about payments if any made by the defendant all of which this Court sitting as a second Appellate Court cannot go into. The fetters imposed upon this Court while hearing a second appeal does not permit this Court to make a fact finding or a roving inquiry. No substantial question of law has arisen. Appeal and the CM No. 7544/2009 are dismissed.

CM No. 7545/2009 (under Order 20 Rule 6 CPC)

This application has become infructuous. It is dismissed.

CrI.M.A. No. 319/2010 (under Section 340 Cr.P.C.)

Counsel for the respondent states that he would not be pressing this application. This application is dismissed as withdrawn.