

(2009) 01 DEL CK 0130

In the Delhi High Court

Case No : Regular Second Appeal No. 41 of 1987

Shri Om Prakash Sharma

APPELLANT

Vs

Shri Kishan (Deceased) thr. Lrs.

RESPONDENT

Date of Decision : 30-01-2009

Acts Referred:

Citation : (2009) 5 ILR Delhi 134 : (2010) 8 RCR(Civil) 1246

Hon'ble Judges : Rekha Sharma, J

Bench : Single Bench

Advocate : J.K. Seth and Shalini Kapoor, for the Appellant; Sunil Agrawal and Sarfaraz Ahmed, for the Respondent

Final Decision : Allowed

Judgement

Rekha Sharma, J.—Om Prakash Sharma is the appellant before me. He had filed a suit for possession with regard to plot bearing No. 25/59, Shakti Nagar, New Delhi against Shri Kishan predecessor-in-interest of the present respondents. The suit was filed on the basis of title. It was specifically alleged in the plaint that the appellant had become owner of the plot by virtue of a registered sale deed dated September 28, 1978 duly executed in his favour by the then owner Mohd. Yusuf and that the respondent had occupied a portion of the same on or about January 25, 1978. The suit was instituted on September 11, 1979.

2. The respondent contested the suit principally on the grounds that the appellant was not the owner, that he had himself become owner by adverse possession and that in any case the suit was barred by limitation. The parties went to trial on the following issues:

- 1) Whether the plaintiff is the owner of property in dispute? OPP
- 2) Whether the defendant is in adverse possession of property in dispute for more than 25 years as alleged in the written statement? OPD
- 3) Whether the suit of the plaintiff is properly valued for the purpose of court fee

and jurisdiction? OPP

4) Whether the suit is barred by time? OPD

3. The learned Subordinate Judge by his judgment dated October 01, 1981 passed a decree for possession in favour of the present appellant holding that he was owner of the suit property, that the respondent had not acquired title by adverse possession and the suit was not barred by limitation. It was also held that the suit was properly valued for the purpose of court fee and jurisdiction.

4. Aggrieved by the judgment and decree of learned Subordinate Judge, the respondent preferred an appeal. The learned Additional District Judge agreed with the learned Subordinate Judge that adverse possession was not proved and the suit was not barred by limitation. However, she accepted the appeal and set aside the impugned judgment and decree on the ground that the appellant had failed to prove his title. It was then the turn of the appellant to file the appeal.

5. Before I proceed to deal with the contentions raised before me, I may mention that both the courts below having held that adverse possession was not proved and the suit was not barred by limitation, I am not inclined to interfere with those findings, the same being based on appreciation of evidence. Even otherwise keeping in view the fact that the suit was instituted on September 11, 1979 the respondent was required to prove that he was in adverse possession since before September 10, 1967. Of-course, the respondent did produce letters Ext.DW8/1, DW9/1 and DW10/1 but they do not prove his possession on or before September 10, 1967 much less that the possession was adverse. As far as oral evidence is concerned DW1 admitted having never entered the suit property and could not even give the block number of the property in question. DW3 lived streets away from the suit property and his testimony was disbelieved on valid grounds. DW7 had deposed that he had put certain cement sheets on the suit property in the year 1957. Both the courts below have rightly rejected his testimony too and on valid grounds. Coming to the statement of the respondent he neither placed on the record ration card nor he led evidence to show that he had given the address of the property in question in the schools of his children. Rather that record bears some other address. Even the voters list was not produced. It cannot thus be said that the evidence has been wrongly rejected.

6. During arguments it was contended by learned Counsel for the respondents that the first appellate court had rightly held that the title of the appellant was not proved. I do not agree. The suit was on the basis of title and in the very first paragraph of the plaint the appellant had categorically stated that he had become owner by virtue of a Sale Deed executed in his favour on September 28, 1978 by one Mohd. Yusuf. That Sale Deed is Ext.PW1/1 and its execution has been duly proved by its attesting witness PW4 Shri R.P. Sharma. Besides that attesting witness, its execution was also proved by the appellant himself. The First Appellate Court admits that on account of that evidence the execution of the Sale Deed stands proved. However, she has despite that held ownership as not

proved principally on two grounds. Firstly that proof of execution of the Sale Deed Ext.PW1/1 did not prove its contents and secondly the vendor Mohd. Yusuf was not proved to be the owner. With respect I feel that the First Appellate Court went wrong on both the counts.

7. Primary evidence means the document itself produced for the inspection of the court. Section 61 of the Evidence Act, 1872 embodies the general rule that the contents of a document may be proved either by primary or secondary evidence. If the original document exists and is available it must be proved because it is the best evidence. The contents of a document can be proved by the document itself. After all, when a given matter has been expressed in writing the primary evidence is the writing itself. The sale-deed Ex.PW1/1 having been proved and the mode of proof having in any case not been objected to, it is the best evidence of its contents. Therefore, the finding of the learned First Appellate court that the contents of the sale-deed were not proved cannot be sustained.

8. Coming to the question that Mohd. Yusuf was not proved to be the sole heir of his predecessor-in-interest, it is significant to note that the respondent himself in his own statement had deposed that he did not know who was the owner of the suit property. He further stated and I quote" I cannot say whether the property in dispute belongs to the plaintiff." The title of the appellant was thus not specifically denied in evidence. In any case he had not stated in the witness box that Mohd.Yusuf was not the sole heir of his predecessor-in-interest or that he had no right, title or interest in the suit property to transfer. Of-course, reliance was placed on Agreement Ext.DW1 executed between Aziz Begum as owner and Delhi Improvement Trust. It shows that Aziz Begum had agreed to transfer the land to Delhi Improvement Trust only for the purpose of development by it and the Delhi Improvement Trust had agreed to transfer the land after development. However, there is no evidence on record that consequent upon that agreement the land was actually transferred to Delhi Improvement Trust. In any case, it is not the case of the respondent that consequent upon that agreement the land was actually transferred to Delhi Improvement Trust. Thus Aziz Begum has to be taken as the owner even after execution of the agreement. In Ext.D1 she is stated to be the wife of Niaz Ahmed. Mohd. Yusuf is also the son of Niaz Ahmed as borne out from PW1. There is no evidence nor any allegation that the father of Mohd. Yusuf was some Niaz Ahmed other than the husband of Aziz Begum. Faced with this situation reliance was placed on Exhibit DC which is the voters-list and wherein Mohd. Yusuf is shown to be the son of Mohd. Yakub and consequently, it was sought to be contended that Mohd. Yusuf was not the son of Niaz Ahmed. What needs to be noticed is that the voters-list Exhibit DC was not got filed by any officer from the Electoral Department or by any other person. It was just tendered and exhibited without examining any person. The person who prepared the list was also not produced. It cannot thus be taken to be substantive piece of evidence and is no proof of the fact that Mohd. Yusuf is not the son of Niaz Ahmed, specially, in view of Ex.PW1/1 which as noticed above was duly proved by the appellant. It was also sought to be contended that Aziz Begum had left

behind other heirs besides Mohd. Yusuf and that consequently being not the sole heir he could not sell the property as sole owner to the appellant. This is not specifically pleaded. In any case it is not proved that at the time of execution of Sale Deed Ext.PW1/1 other heirs of Aziz Begum were alive. What I do find is that the learned Trial Court has dealt with it in a detailed manner and in view of what has been noticed by me above, passing of the title to the appellant stands proved moreso, when the respondent himself had specifically denied his ownership in the witness box.

9. I may mention that since the appellant has proved his title and as adverse possession has not been proved and as it is further not proved that the respondent was in possession since before January 27, 1978 the suit has rightly been held by the learned Trial Judge to be not barred by limitation.

10. Before I conclude, it may be noticed that the custodian of evacuee property had filed an application under Order 1 Rule 10 of the CPC which was directed to be heard along with the appeal but none appeared for the custodian to press the application. The same is, therefore, dismissed in default.

11. For the reasons recorded above, the appeal is accepted. The judgment and the decree passed by the learned Trial Court is affirmed. Parties are left to bear their own cost.