

**(2011) 01 DEL CK 0229**

**In the Delhi High Court**

**Case No :** Regular Second Appeal No. 183 of 2006

Shri Sham Lal

APPELLANT

Vs

Shri Hukam Chand Gupta (Deceased) through his L.Rs

RESPONDENT

**Date of Decision :** 12-01-2011

**Acts Referred:**

**Citation :** (2011) 01 DEL CK 0229

**Hon'ble Judges :** Indermeet Kaur, J

**Bench :** Single Bench

**Advocate :** J.K. Singhal and Kapil Singhal, for the Appellant; Mohit Gupta and Dheeraj Trikha, for the Respondent

**Final Decision :** Dismissed

## Judgement

Indermeet Kaur, J.—This appeal has been directed against the impugned judgment and decree dated 1.5.2006 which had endorsed the finding of the Trial Judge dated 6.8.2004 whereby the suit for recovery of possession of the suit property bearing No. 13A/7, Brahmpuri, Karol Bagh, New Delhi, had been decreed in favour of the plaintiff.

2. This is an unfortunate dispute between two real brothers. The plaintiff Hukam Chand and Sham Lal are two sons borne out of their father Shri Beg Raj. plaintiff had filed the present suit for possession of the afore-noted suit property. His contention was that he was earlier the resident of House No. 2805, Ward No. 8, Kali Masjid, Ajmeri Gate, Delhi. The suit property, i.e., Quarter No. 13A/7, Brahmpuri, Karol Bagh, New Delhi, had been allotted to him in lieu of the property held by him at Kali Masjid. This was under the Delhi Ajmeri Gate Slum Scheme. The plaintiff had been in lawful possession of the suit property since 1952. Defendant, who was his brother was living in Rajasthan. Out of love and affection, the plaintiff permitted his brother to occupy a portion of the suit property. Thereafter in spite of repeated demands by the plaintiff seeking eviction of the Defendant from the suit property, he had failed to vacate it. The Defendant is also liable to pay damages. The suit was accordingly filed.

3. In the written statement, it was contended that the suit property had been allotted in the name of the plaintiff but on behalf of the brothers; they were all jointly occupying the property at Kali Masjid; all family members have since 1952 been living in the suit property. The application for allotment of the alternative accommodation, i.e., the suit property in lieu of the property held at Kali Masjid was sanctioned in the name of the plaintiff only in his capacity as the head of the family. The brothers had arrived at a settlement in lieu of which the Defendant is occupying the suit property in his own right.

4. The Trial Judge had framed eight issues. On the basis of the oral and documentary evidence led by the parties, the suit of the plaintiff had been decreed in his favour. The contention of the Defendant that the premises in dispute had been allotted to the joint family on the basis of the strength of the family and not in the name of the plaintiff individually was repelled.

5. The impugned judgment had endorsed this finding of the Trial Judge.

6. On behalf of the Appellant, it has been urged that the impugned judgment suffers from a perversity for the reason that the Circular issued by the Government of India, Ministry of Works and Housing dated 11th June, 1984, had not been considered whereby all allottees/occupants of tenements constructed in Delhi under the Slum Clearance Scheme would be granted perpetual lease hold rights in lieu of the properties held by them. It is pointed out that the testimony of DW-3 has also not been appreciated in the correct perspective. Attention has also been drawn to the cross-examination of the Appellant who had been examined as DW-1 before the Trial Judge.

7. Arguments have been countered.

8. A perusal of the record shows that the allotment letter Exhibit PW-2/1 had been issued in the name of the plaintiff. This document had been proved in the testimony of PW-2. Admittedly this allotment letter is in the individual name of the plaintiff. The contention of the Defendant that this was an allotment in the joint family name is not borne out. The testimony of DW-3 had also been appreciated by the Courts below. DW-3, Naresh Kumar Jain, had proved the records from the Slum Wing of the MCD wherein he had stated that Sham Lal (Appellant) had filed an application for grant of perpetual lease hold in respect of the present suit property, i.e., 13A/7, Brahmpuri, Karol Bagh, Delhi, in September, 1984. Admittedly before September, 1984, no such application had been made by the Appellant. DW-3 in his cross-examination has further stated that as per the record, the plaintiff, Hukam Chand, had applied for allotment of the said flat and the allotment letter has been issued in his name. In the further part of the cross-examination of DW-3, it has been stated that the Appellant, Sham Lal, has been allotted a flat bearing No. E-5C at Dilshad Garden vide allotment letter dated 10.12.1984. The Circular dated 11.6.1984 issued by the Government of India, referred to above and relied upon by the learned Counsel for the Appellant had admittedly not been proved before the Trial Judge.

9. In these circumstances, the suit of the plaintiff on the basis of oral and documentary evidence produced by him had rightly been decreed in his favour. The judgment of the Trial Court had been upheld by the Appellate Court.

10. The contention raised before this Court has been answered in the impugned judgment, the relevant extract of which reads as under:

11. I have carefully considered the rival submission made at bar in the form of written arguments and also the evidence on record. The fact that "the suit property" has been allotted in the name of the Respondent Hukam Chand is not in dispute. What is required to be analysed and adjudicated upon by this Court is the question whether "the suit property" was allotted on the basis of family strength as alleged by the Appellant. Secondly, whether the Appellant had any right in "the previous property" from where the Respondent was evicted and alternative site in the form of "the suit property" was allotted. Thirdly, whether there is any evidence on record to ascertain if the name of the Defendant and other family members were mentioned in the application by the Respondent for allotment of alternative site. Fourthly, whether any family settlement took place under which "the disputed property" has been given to the Appellant by the Respondent.

12. With regard to these questions, the Ld. Trial Court has framed issue No. 4, 5 and 6. With regard to issue No. 4, the Ld. Trial Court has held that the allotment letter Ex. PW 2/1 shows that there is no dispute about the fact that the quarter No. 13-A/7 (suit property) was allotted in the name of the plaintiff. The Ld. Trial Court further held that the Defendant did not summon any other witness apart from DW-3 to explain the scheme under which the allotment was made to the plaintiff allegedly on the basis of family strength but again the DW-3 stated that he cannot tell the basis of the scheme upon which the allotment was made. In the appeal, it was argued by the Appellant that the Ld. Trial Court has erred in not summoning the DDA as court witness to prove the scheme on the basis of which alternative accommodation was allotted to the plaintiff/Respondent. It is not stated in the appeal or in the written arguments if the Appellant has made any request to the Ld. Trial Court to summon the DDA as court witness. It is also not explained as to what prevented the Defendant/Appellant to summon the DDA officials to prove the relevant scheme because the onus to prove this fact was upon the Defendant. The Defendants were required to prove that there was a scheme of the DDA under which "the suit property" was allotted on the basis of family strength in the name of Respondent/plaintiff being Karta of HUF. The DW-3 has clearly stated that he has not brought any such record to prove said schemes as the relevant record including the application of the plaintiff might be available with the property cell. On perusal of the evidence of the DW-3, it is found that his testimony has nowhere proved that "the suit property" was allotted in the name of the plaintiff on the basis of family strength so that the Defendant may get right of ownership and possession in "the suit property". I do not find any infirmity in the finding recorded by the Ld. Trial Court on the issue

No. 4.

13. With regard to issue No. 5, onus of which was upon the Defendant, the PW-5 Sh. Data Ram who was landlord of "the previous property" deposed that the plaintiff was his tenant in the premises No. 2805, Kali Masjid, Ajmeri Gate, Delhi. It is further deposed that the plaintiff and only his family was in occupation of the tenanted premises. It is further deposed by PW-5 that the Defendant present in the court was neither his tenant nor he occupied the portion under the tenancy of the plaintiff. The PW-4, Sh. Onkar Nath, testified that Sh. Sham Lal (Defendant) was not residing alongwith Sh. Hukam Chand in Kali Masjid premises as he must to come and meet his brother (plaintiff) sometimes. The PW-4 further deposed that the plaintiff was allotted accommodation in WEA, Karol Bagh, quarters also known as Brahmpuri.

14. The DW-1, Sh. Sohan Lal, deposed that since their family members were more in number, they got additional accommodation and another flat No. 13-A/60, Brahmpuri as earlier, the flat No. 13-A/7 was allotted. He further deposed that they never objected to the plaintiff making application on behalf of family as he was the Karta and they had faith in him and never doubted his bona fides. He further deposed that since the day of the allotment by the DDA, he alongwith his family have been living in the disputed house in portion shown red in the site plan Ex. PW 1/1. The DW-1 has proved mark A and mark B, the electricity bill alleging that he has paid the said bills alongwith plaintiff on the ration of 50-50. He has also proved mark C, the photocopy of the application filed by the plaintiff for 3rd quarter stating that the said application was rejected by the DDA. Admittedly, mark A to mark C are not proved as per Indian Evidence Act as the relevant competent witness to prove these documents have not been examined and no circumstances have been proved for leading secondary evidence of these documents. It is further deposed by the DW-1 that all his children were born in the disputed house and he was also married in the disputed house in 1956. Birth of children and marriage of the Defendant in "the suit property" does not itself prove that he was residing there as owner in his own legal rights. It is the case of the plaintiff/Respondent that he has allowed the Defendant as a family member being his brother out of love and affection and because of such residential facilities given by the plaintiff, the birth of his children and marriage of the Defendant might have taken place in "the suit property". In his cross examination, DW-1 deposed that he did not have any documentary proof to show that he was living with the plaintiff in the house in Kali Masjid. He further admitted in the cross examination that he had been allotted a house in Dilshad Garden, Delhi by the DDA. Thus, the oral as well as documentary evidence led by the Defendant has not proved the fact that he was residing in "the suit property" since 1952 in his own rights. The Ld. Trial Court has rightly recorded the findings on this issue in the favour of the plaintiff.

15. With regard to issue No. 6 which has been decided against the Defendant/Appellant, it was incumbent upon the Appellant to examine any such witness to

the said settlement not taking place because of the force and coercion as alleged by the plaintiff/Respondent. The Defendant has failed to examine any other family members including his other brothers in support of his case. Moreover, what were the terms and conditions of the settlement arrived between the parties in police station is neither explained by the plaintiff nor by the Defendant. The fact that the said settlement took place in police station is not disputed and denied by the Appellant. In the absence of contrary evidence, it can be safely presumed that the alleged settlement taking place in the police station was arrived under force and coercion upon the plaintiff/Respondent. Once the plaintiff has proved that the agreement was signed in the police station under compelling circumstances, the onus has shifted to the Defendant/Appellant to prove that the settlement was arrived out of free will of the parties. The Ld. Trial Court has recorded a detailed finding on this issue and I do not find any infirmity in the same. Similarly, the finding recorded by the Ld. Trial Court on other issues is found to be apt and accurate as the Appellant has failed to point out any such infirmity in the said findings which may require interference by this Court. For these reasons, I do not find any merit in the appeal and the same is accordingly, dismissed.

11. There is no perversity in this finding. The substantial questions of law referred to in the Memo of Appeal are all fact based. No substantial question of law having arisen, the appeal is dismissed.

CM Appl No. 8544/2006 & 7314/2010

The aforesaid applications have become infructuous and are dismissed accordingly.