

(2021) 05 DEL CK 0094

Delhi High Court

Case No: Regular Second Appeal No. 27 Of 2021

Raj Kaur

APPELLANT

Vs

Mitlesh & Ors.

RESPONDENT

Date of Decision: May 5, 2021**Acts Referred:**

- Code Of Civil Procedure, 1908 - Section 151, Order 41 Rule 27
- Delhi Municipal Corporation Act, 1957 - Section 477, 478
- Limitation Act, 1963 - Section 5
- Transfer of Property Act 1882 - Section 53A, 54, 55
- Powers of Attorney Act, 1882 - Section 1A, 2
- Indian Succession Act, 1925 - Section 69, 70

Hon'ble Judges: Jyoti Singh, J**Bench:** Single Bench**Advocate:** S.K. Balain, Harshit Chopra, Divya Prakash Pande**Final Decision:** Dismissed

Judgement

Issue No. 5:- Whether the defendants have raised unauthorised construction in the suit property in violation of Building Bye-Laws and without sanctioned plan? OPP

11. Applying the principles of law enunciated in the aforesaid judgements, the evidence led before the Trial Court reflects that Respondent No.1

proved the execution of GPA, Agreement to Sell, Receipt, Will and Affidavit dated 21.02.1994 by Smt. Bimla Devi in her favour. Respondent No.

deposed in support of the stand taken in the Plaint and also proved the Police complaints made from time to time and the son of Respondent No.

corroborated her testimony. PW-7/Shri Shiv Shankar Dubey was a summoned witness and he testified that he had signed as attesting witness on a documents such as GPA etc. (Exh. PW-1/1 to Exh.PW-1/4). He also testified that the sale and purchase took place in his presence and consideration of Rs. 40,000/- was paid by Respondent No.1 to Smt. Bimla Devi in his presence. In cross-examination, he denied the suggestion that the documents were forged. Significantly, Smt. Bimla Devi stepped into the witness box as PW-9 and proved the Sale Deed executed by Shri Zile Singh in her favour and the execution of the GPA etc. in favour of Respondent No.1. PW-10 was a summoned witness from the office of Sub Registrar, Delhi, who proved registration of Sale Deed executed by Shri Zile Singh in favour of Smt. Bimla Devi.

38. Under Order 41 Rule 27 CPC, the appellate court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. (Vide Lala Pancham [AIR 1965 SC 1008] .)

39. It is not the business of the appellate court to supplement the evidence adduced by one party or the other in the lower court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this Rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide State of U.P. v. Manbodhan Lal Srivastava [AIR 1957 SC 912] and S. Rajagopal v. C.M. Armugam [AIR 1969 SC 101] .)

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence

of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning

of this Rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of the sentence, so that it

is only where, for any other substantial cause, the appellate court requires additional evidence, that this Rule will apply e.g. when evidence

has been taken by the lower court so imperfectly that the appellate court cannot pass a satisfactory judgment."

17. Applying the above principles from the verdict of the Supreme Court, the First Appellate Court cannot be said to have committed any error in

dismissing the applications. Appellant had sufficient opportunities to produce witnesses in defence but chose to produce only Respondent No. 2

herein/Defendant No. 1, who could only be partially cross-examined. No opportunity was sought to produce any other witness. Insofar as the alleged

Sale Deed is concerned, the First Appellate Court rightly held that no plea of loss of original Sale Deed, allegedly executed by Shri Zile Singh in favour

of Shri Daljeet Singh, was taken in the written statement. In Union of India (supra), the Supreme Court has clearly held that no relief can be granted if

it is not founded on pleadings and no evidence is permissible to be taken on record in the absence of pleadings in that respect. Relevant paras are as

under:

"77. This Court while dealing with an issue in Kalyan Singh Chouhan v. C.P. Joshi [(2011) 11 SCC 786 : (2011) 4 SCC (Civ) 656 : AIR

2011 SC 1127], after placing reliance on a very large number of its earlier judgments including Trojan & Co. v. Nagappa Chettiar [AIR

1953 SC 235], Om Prakash Gupta v. Ranbir B. Goyal [(2002) 2 SCC 256 : AIR 2002 SC 665], Ishwar Dutt v. Collector (LA) [(2005) 7

SCC 190 : AIR 2005 SC 3165] and State of Maharashtra v. Hindustan Construction Co. Ltd. [(2010) 4 SCC 518 : (2010) 2 SCC (Civ) 207 :

AIR 2010 SC 1299] , held that relief not founded on the pleadings cannot be granted. A decision of a case cannot be based on grounds

outside the pleadings of the parties. No evidence is permissible to be taken on record in the absence of the pleadings in that respect. No

party can be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of

the case set up by it. It was further held that where the evidence was not in the line of the pleadings, the said evidence cannot be looked into

or relied upon.

78. In Bachhaj Nahar v. Nilima Mandal [(2008) 17 SCC 491 : (2009) 5 SCC (Civ) 927 : AIR 2009 SC 1103] this Court held that a case not

specifically pleaded can be considered by the court unless the pleadings in substance contain the necessary averments to make out a

particular case and issue has been framed on the point. In the absence of pleadings, the court cannot make out a case not pleaded, suo

motu.â€

18. Appellant has filed an application under Order XLI Rule 27 CPC before this Court also, as referred in the earlier part of the judgement, being CM

APPL. 9349/2021, seeking permission to lead additional evidence. The cause for filing the application according to the Appellant arose when the son

of the Appellant procured documents on 25.02.2021 relating to the plot of 400 sq. yards, initially owned by Smt. Bimla Devi, which reveal that the said

plot had been sold by her on 01.01.1987 to one Shri Ishwar Singh vide Agreement to Sell, GPA, Affidavit and Receipt, as detailed in the earlier part of

the judgement. It is further averred that the Appellant was not in a position to present the sale documents of the said Plot as she was unable to contact

Shri Deepak and had no knowledge of the said transactions. Plea of the decree being a nullity, obtained by fraud is set up by the Appellant. A perusal

of the averments in the application reveals that an entirely new plea has been set up by way of the said application. Realising that the Courts below

have decreed the suit against the Appellant on the basis of better title in favour of Respondent No. 1, Appellant now seeks to produce documents

allegedly showing sale of 400 sq. yards of plot, portion of which is the suit property, by Smt. Bimla Devi on 01.01.1987 to one Shri Ishwar Singh.

There are no pleadings to this effect either before the Trial Court or First Appellate Court or even in the appeal before this Court. It is not mentioned

as to how on 25.02.2021, the date mentioned in the application, Appellant came in possession of the said documents or why despite diligence, the

documents could not be procured earlier. Applying the parameters laid down by the Supreme Court on the scope of the power of Appellate Court to

decide an application under Order XLI Rule 27 CPC, this Court finds no merit in the application.

19. Learned counsel for the Appellant relied on the judgement of the Supreme Court in North Eastern Railway Administration, Gorakhpur vs.

Bhagwan Das (2008) 8 SCC 511 for the proposition that if the stand of the Appellant that the judgement or decree by the First Court is obtained by

fraud, is borne out from the documents seeking to be filed before the Appellate Court as additional evidence, then such additional evidence ought to be

taken on record. There cannot be a dispute on the proposition laid by the Supreme Court which is a binding dictum. However, the said judgement

cannot be of any avail to the Appellant.

20. As noticed above, while examining an application under Order XLI Rule 27 CPC, the parameters that have to be kept in mind are that

(a) the evidence sought to be led before the Appellate Court must relate to the pleadings by the party; (b) First Court has refused to admit evidence

which ought to have been admitted; (c) party establishes that notwithstanding exercise of due diligence, the evidence was not within its knowledge or

could not be produced when the decree was passed and the Appellate Court requires the documents to enable it to pronounce judgement.

21. In North Eastern Railway Administration, Gorakhpur (supra), the Appellant had specifically pleaded before the High Court in the Second Appeal

that the decree was obtained by concealing material facts and the details were mentioned in the appeal. In support of the plea, an application was filed

under Order XLI Rule 27 CPC to bring on record copies of the official documents. A bare reading of the judgement would also throw light on the fact

that even before the Trial Court, the Appellant had contested the suit on the ground that the suit land had been transferred to him by the Government.

Hence no new plea was set up in the Second Appeal. In this background, the Supreme Court remanded the matter back to the High Court to decide

the application afresh on the merits of the Second Appeal. It also needs to be highlighted that in the said case, the High Court did not deal with the

application at all, as reflected from para 18 of the judgement of the Supreme Court. At the cost of repetition, this Court notes that the plea now

introduced by way of an application under Order XLI Rule 27 CPC is totally extraneous to the case of the Appellant in the Courts below. The

application therefore deserves to be rejected and the Appellant cannot be permitted to lead additional evidence as prayed for in the said application.

22. For the aforesaid reasons, the appeal is dismissed along with the pending applications with no order as to costs. Liberty is reserved with the

Appellant to resort to remedies, if any, qua the plea of fraud in the appropriate forum.