(2010) 07 DEL CK 0242

Delhi High Court

Case No: Regular Second Appeal No. 74 of 2006

Ramesh Mohan Mittal		APPELLANT
	Vs	
Suresh Kumar Arora and Another		RESPONDENT

Date of Decision: July 29, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10, 100
- Evidence Act, 1872 - Section 114

Hon'ble Judges: Indermeet Kaur, J

Bench: Single Bench

Advocate: R.K. Shukla, for the Appellant; Girdhar Govind and Noorun Nahar Firdoshi for R-1, for the Respondent

Final Decision: Dismissed

Judgement

Indermeet Kaur, J.

This second appeal has been directed against the impugned judgment dated 29.9.2005 wherein the judgment and decree of the Trial court dated 7.7.2004 had been confirmed. Vide judgment dated 7.7.2004, the Trial Judge had dismissed the suit of the appellant/plaintiff namely Ramesh Mohan Mittal which was a suit for possession and mesne profits. The first Appellate Court had endorsed this finding.

2. Present suit has been filed by the plaintiff seeking possession of a plot of 1500 sq. yards land measuring 60'' x 225'' forming a part of Khasra No. 35/1 situated in the revenue estate of village Baprola. The Trial Judge on the pleadings of the parties had framed four issues. Two witnesses on behalf of the plaintiff and one witness on behalf of the defendant had been examined. While disposing of issue Nos. 2 and 3, the Court had held that the identity of the suit property on which possession had been claimed by the plaintiff has not been established by him. The layout plan Ex.PX had mentioned the name of the colony as Nitin Enclave but the site plan proved

through the version of PW-1 Ex.PW.1/A did not mention Nitin Enclave at all; it related to the revenue estate of village Baprola. Sale deed Ex.PW-2/1 relied upon by the plaintiff was also related to property situated in Village Baprola.

3. Further the version of PW-1, the draftsman, who had proved Ex.PW-1/A was not relied upon as even as per his own admission his knowledge of the case had been based upon instructions given to him by the plaintiff; no other independent verification has been done by him. Testimony of PW-2, the plaintiff himself was also found to be suspect. Identity of the suit property i.e. the correct description not having been established by the plaintiff suit was dismissed.

4. On 29.5.2005, the first Appellate Court dismissed the appeal. Relevant findings are as under:

The grudge of the appellant is that the defendant has tress-passed into his land which was purchased by plaintiff/appellant situated in the Revenue Estate of Village Baprola. The evidence on the other hand is shaky inasmuch as there is no reference or village Baprola in the lay out plan. The lay out plan was prepared and copy of the same was given to the appellant by the colonizer at the time of purchase of the suit land. Incidentally, the colony lay out of which has been shown as Nitin Enclave, whereas the appellant/plaintiff has no-where in the plaint uttered a word about Nitin Enclave. As it was the responsibility of the plaintiff/appellant to show that part piece of land which was purchased by him was encroachment by the defendant and he is entitled to have it back thus on this count the appellant/plaintiff has failed and could not identify and connect the defendant with the alleged tress-pass in his land. The counsel for the appellant has vehemently argued that plaintiff/appellant is able to pin point the position through the testimony of Bhoop Singh PW1. However, in the cross examination that said Bhoop Singh Sharma has not been able to say that he was aware of Khasra number, location etc. He had stated that it was plaintiff/appellant who informed him about the details and he had not confirmed it from any other source, nor checked it from the Revenue records etc. Therefore, his knowledge is based upon the information provided to him by the plaintiff/appellant. As such his testimony is of no consequence rather the testimony of the plaintiff/appellant Ramesh Mohan Mittal becomes vital. Here, the plaintiff/appellant has faulted on many occasions. His testimony has collapsed during the cross examination for he has stated that the land was purchased by him through Colonizer but did not verify the ownership of the land from the Revenue records. He has categorically stated that he is not aware of the fact as to whether the vendor is the owner of the suit property or not. He has admitted this fact that in the lay out plan there is not mention of village Baprola. Again, he has also fumbled on the point as to how he came to know about the encroachment by the defendant and he had no answer cogent enough as to why no one visited the suit land for such a long time when he has three sons and all are residing in Delhi. The land purchased was an agricultural piece of land. In these circumstances, the plaintiff/appellant is under

obligation to verify the status of the land through Revenue record or from other sources.

5. Before this Court, it has been urged that both the Courts below had dismissed the suit of the plaintiff summarily without considering the fact that it was admitted by the defendant himself that the part of the suit property i.e. 500 sq. yards is situated in Khasra No. 35/1 at village Baprola. Attention has been drawn to the application filed by the defendant seeking demarcation of the land through Tehsildar (page 68 of the paper book). In paras 2 and 5 of the said application, it has been averred as follows:

2. That the applicant/defendant filed a detailed written statement wherein he stated that he had never been in possession of any plot measuring 1500 sq. yards (one bigha and 10 biswas) forming part of Khasra No. 35/1 situated in the Revenue Estate of Baprola, Delhi-41 and also gave an undertaking before this Hon''ble Court that he undertakes not to part with possession of any land measuring 1500 sq. yds. forming part of Khasra No. 35/1 situated in the Revenue Estate of Baprola.

5. That the site plan as supplied by the plaintiff with the plaint stating his plot in Vill. Baprola out of Khasra No. 35/1 resembles with the plot of the applicant/defendant which was situated in the Vill. Tilangpur Kotla and which was out of Khasra No. 7/21/1 and 7/21/2.

Attention has been drawn to another application filed by the subsequent transferee of defendant No. 1 seeking a prayer for his transposition under Order 1 Rule 10 of the CPC (page 76 of the paper book). Para 6 of the application inter alia reads as follows:

That after the aforesaid sale, the applicant remains the owner of the land measuring 500 sq. yards comprising of Khasra No. 35/1, situated at Village Baprola (Bapdola), Delhi and his interest is involved in the present suit as per the information received by the applicant from the defendant No. 1 Shri Suresh Kumar Arora, on telephone yesterday. Hence the applicant wants to participate in the present proceedings to watch and safeguard his interest over the aforesaid land measuring 500 sq. yards, as stated above.

It is submitted that these contentions of the defendant show that the defendant through his transfree had admitted that 500 sq. yards of the suit property is situated in Khasra No. 35/1 and as such the finding of the Courts below that the suit property had not been properly identified is a perversity which has raised a substantial question of law in the present proceedings.

6. Learned Counsel for the appellant has placed reliance upon AIR 1970 Kerala 310 Thiruvanchan Sankaran v. Kunjipillai Amma Gouri Amma and Ors. to support his submission that in terms of Section 114 of the Indian Evidence Act there is a presumption that possession goes with the title. It is submitted that sale deed

Ex.PW-2/1 had been proved by the plaintiff evidencing his title; possession necessarily follows.

7. These arguments have been countered by the learned Counsel for the respondent. It is stated that no interference is called for in the judgment of the two Courts below; the appellant/plaintiff has to stand on his own legs; the deficiencies, if any, in the defence of the defendant cannot substitute the legal requirement of the onus of proof to be discharged by the plaintiff.

8. Perusal of the record shows that there is no fault in the findings of the Courts below. Suit had been filed qua 1 Bigha and 10 Biswas of land situated in part of Khasra No. 35/1, Village Baprola. In the written statement it had been stated by the defendant that he was never in possession of land measuring 1500 sq. yards in Khasra No. 35/1; his case was that he had a plot of land measuring 1 Bigha 10 Biswas out of Khasra No. 7/21/2 and 7/21/1 in the revenue estate of Village Tilangpur Kotla, Delhi and a part of it in Village Baprola. In view of the defence of the defendant issue No. 2 had been framed which inter alia reads as follows:

Whether the defendant No. 1 has trespassed into the suit land and raised super structure thereon? OPP

This issue had been decided along with issue No. 1. The Court had examined the layout plan Ex.PX-1 as also the corresponding documents i.e. sale deed Ex.PW-2/1 and the site plan Ex.PW-1/A. Layout plan did not mention the revenue estate of Village Baprola; the name of the colony mentioned was Nitin Enclave. The documents annexed along with the plaint i.e. the sale deed Ex. PW-2/A, site plan Ex. PW-1/A had mentioned the suit property as located in Village Baprola. Identity of the suit property was clearly in doubt. Both the Courts below had also gone into the oral as well as documentary evidence produced before them i.e. the testimony of PW-1, the draftsman, who had categorically admitted that he had prepared the site plan only on the information given to him by the plaintiff with no other independent input. Version of PW-2, the plaintiff, was also not relied upon; the documents spoke against him. Suit of the plaintiff could have been decreed only after the plaintiff had been able to show that the portion of the land owned by him had been encroached upon by the defendant. Onus of this had not been discharged by the plaintiff. He could not connect the defendant with the identity of the suit property which he claimed that the defendant had illegally usurped.

9. In these circumstances, the judgment relied upon by the learned Counsel for the appellant does not come to his aid.

10. These are fact findings given by the two Courts below on the basis of the oral and documentary evidence adduced before them. This is not a third fact finding court. Section 100 of the CPC is couched in mandatory terms. It casts a duty upon the court not to admit appeals which do not involve a substantial question of law; for such appeals are not provided for. The questions of law phrased in the memo of

appeal finds mention on page 11; they all relate to findings of facts i.e. whether the oral or documentary evidence adduced by the plaintiff was not sufficient, the non-consideration of the averments made by the applicant in the application under Order 1 Rule 10 CPC. At this stage, it is also relevant to point out that this application under Order 1 Rule 10 CPC had been filed by a proposed successor-in-interest of defendant No. 1 seeking to be impleaded in place of defendant No. 1. Application of this applicant had been dismissed. Even presuming that these admissions were made by such an applicant, they could not in any manner bind the defendant. The Courts below have rightly held that it was for the plaintiff to establish his case but he had failed to do so.

11. No question of law much less any substantial question has arisen in this appeal. It is dismissed. Records be returned. File be consigned to record room.