* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 09.5.2011*

\+ **R.S.A.No. 149/2008**

SHRI NANAK CHAND & ORS. .....Appellant
Through: Mr.Sunil Chauhan, Advocate.

Versus

SHRI JAI LAL (SINCE DECEASED) THROUGH LRS. .....Respondent
Through: Mr.N.S.Dalal and Mr.D.P.Singh, Advocates.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J. (Oral)

CM No.9586/2008 (Exemption)

Allowed subject to just exceptions.

R.S.A.No. 149/2008

1. This appeal has impugned the judgment and decree dated 08.4.2008 which had endorsed the finding of the trial judge dated 15.5.2003 whereby the suit filed by the plaintiff Nanak Chand

seeking possession of the suit property measuring 9 bighas 12 biswas bearing Killa No.46/3 (4-16),8(4-16) in village Jatkhore, Delhi had been dismissed.

2. The case of the plaintiff is that his predecessor had agreed to sell the aforenoted land to the defendant vide agreement to sell executed in 1966. He had requested the defendant to get the sale deed executed and registered by making the payment of the balance agreement amount but the defendant failed to do so. Licence granted by the plaintiff to the defendant for cultivating has since been expired. Legal notice dated 19.1.1990 was sent to the defendant calling upon him to vacate the suit land but he failed to do so. Present suit was accordingly filed.

3. In defence it is stated the defendants had become the owner by virtue of the agreement to sell which was executed by the predecessor of the plaintiff in their favour; their possession cannot be disturbed; they are entitled to be protected under Section 53 A of the Transfer of Property Act (hereinafter referred to as the TPA); further this court does not have pecuniary jurisdiction to entertain the suit.

4. From the pleadings of the parties the following 10 issues were been framed:

"1. Whether the suit has not been properly valued for the purposes

of court fee and jurisdiction? OPD

2. Whether this Court has got no pecuniary jurisdiction to try this case? OPD

3. Whether the suit is barred by provisions of Section 41(h) of the Specific Relief Act? OPD

4. Whether the suit is barred by time? OPD

5. Whether the plaintiffs have got no locus-standi to file the present suit? OPD

6.Whether the plaintiffs are the owner of suit land measuring 9 bighas 12 biswas of Killa No.46/3 (4-16), 8(4-16) situated in the revenue estate of Village Jathkhore, Delhi? OPP

7.Whether the defendant is merely a licencee under the plaintiff? OPP

8.Whether the plaintiffs have got any cause of action in their favour against the defendants?

9.Whether the plaintiffs are entitled to the relief claimed? OPP

10.Relief."

5. Oral and documentary evidence was led. The trial judge was of the view that the court does not have the pecuniary jurisdiction to entertain the suit. This was disposed of while dealing with issue no.2. Trial judge, however, proceeded to deal with the merits of the case; on merits the court was of the view that the plaintiff has failed to establish his case; suit of the plaintiff was dismissed.

6. In first appeal it was contended that the trial judge had noted that it had no pecuniary jurisdiction to deal with the case; yet Trial Judge had proceeded to decide it on merits; this was an

illegality. This point was noted by the first appellate court. The first appellate court was of the view that this was an illegality. It had held that Court had re-appreciated the evidence, oral and documentary and the trial judge had the pecuniary jurisdiction to deal with the matter. On merits also it had endorsed the finding of the trial judge. Suit of the plaintiff was dismissed.

7. This is a second appeal. It is yet at the stage of admission. On behalf of the appellant, it is pointed out that the trial Judge had returned a positive finding that it has no pecuniary jurisdiction. In this view of the matter it should not have dealt with the case on merits. No cross appeal had been filed by the defendant before the first Appellate Court. The first appellate court could not have upset the finding on pecuniary jurisdiction.

8. Even on merits, the finding returned is perverse.

9. Reliance has been placed upon AIR 2008 SC 493 *A Lewis & Anr. Vs. M.T.Ramamurthy & Anr.* to substantiate his submission that the protection of Section 53A of the TPA which had been granted to the defendant is an illegality as the defendant was himself not willing to perform his part of the contract and in these circumstances this protection could not hae been afforded to him.

10. Arguments have been countered.

11. It is pointed out that the powers of the first appellate court

under Order 41 Rule 33 of the Code of Civil Procedure are wide and nothing prevents the first appellate court from dealing any objection of the respondent; even though he has not filed a cross appeal.

12. Order *XLI* Rule 33 of the Code reads as follows:

> *"33. Power of Court of Appeal – the Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:*
>
> *Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."*

13. In this context the Supreme Court in AIR 1988 SC 54 *Mahant Dhangir & Anr. Vs. Madan Mohan & Ors.* while dealing with this aspect has noted as follows:

> *"The appellate court could exercise that power in favour of all or any of the respondents although such respondent may not have filed any appeal or objection. The sweep of the power under Rule 33 is wide enough to determine any question not only between*

the appellant and respondent, but also between respondent and co-respondents. The appellate court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words "as the case may require" used in Rule 33 of Order 41 have been put in wide terms to enable the appellate court to pass any order or decree to meet the ends of justice. What then should be the constraint? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraint that we could see, may be these: That the parties before the lower court should be there before the appellate court. The question raised must properly arise out of the judgment of the lower court. If these two requirements are there, the appellate Court could consider any objection against any part of the judgment or decree of the lower court."

14. The first appellate court had ample power to deal with the objections about the issue of the pecuniary jurisdiction of the court; after adverting to the evidence it had rightly concluded that the Civil Court has the necessary jurisdiction to deal with the matter. This answers the first objection of the learned counsel for the appellant. On merits also the two fact finding courts have returned a positive finding holding that the plaintiff has not been able to substantiate his case. In fact, it is the case of the plaintiff himself that his predecessor had executed documents of transfer i.e. an agreement to sell in favour of the defendant under which he had a possession. Doctrine of part performance as contained

in Section 53A of the Transfer of Property Act was rightly adverted to. The judgment of *Lewis* (supra) relied upon by the learned counsel for the appellant has no application. In this case the court had held that the protective umbrella of Section 53A of the TPA will not be available if the transferee has been passive and not taken any effective steps; i.e. where there is no evidence to show that he was willing to perform his part of the contract. Present suit was not a suit for specific performance. This contention had not arisen.

15. Substantial questions of law have been embodied on pages 13 and 14 of the appeal. No such substantial question of law has arisen. Appeal is dismissed in limine.

INDERMEET KAUR, J.

MAY 09, 2011
ss/nandan